PERMANENT COUNCIL

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

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

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

ORGANIZATION OF AMERICAN STATES
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Rio de Janeiro, January 13, 2010

CJI/O/01/2010

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/IX.40 CJI/doc. 338/09), regarding the activities of the Committee in 2009.

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

Guillermo Fernández de Soto
Chairman
Inter-American Juridical Committee

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

ORGANIZATION OF AMERICAN STATES

INTER-AMERICAN JURIDICAL COMMITTEE

CJI

75th REGULAR SESSION
August 3 to 14, 2009
Rio de Janeiro, Brazil

OEA/Ser.Q/XIX.40
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ANNUAL REPORT

OF THE INTER-AMERICAN JURIDICAL COMMITTEE

TO THE GENERAL ASSEMBLY

2009

General Secretariat
Organization of the American States
www.oas.org/cji
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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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RESOLUTIONS ADOPTED BY THE INTER-AMERICAN JURIDICAL COMMITTEE

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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 International Criminal Court; follow-up on the application of the Inter-American Democratic Charter; the fight 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; migratory topics; follow-up of the Opinions of the Inter-American Juridical Committee (evaluation and follow-up on the Opinion of the Inter-American Juridical Committee on the Directive on Return approved by the Parliament of the European Union); innovating forms of access to justice in the Americas; considerations on an inter-American jurisdiction of justice; cultural diversity in the development of international law; strengthening the consultative competence of the Inter-American Juridical Committee; asylum; freedom of thought and expression; access to public information and legal and institutional cooperation with the Republic of Haiti.

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 2009 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. Guillermo Fernández de Soto, 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-fourth Regular Session

The 74th regular session of the Inter-American Juridical Committee took place on March 12 to 20, 2009, at its seat in the city of Bogota, Colombia.

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:

Guillermo Fernández de Soto
Hyacinth Evadne Lindsay
Mauricio Herdocia Sacasa
João Clemente Baena Soares
Jorge Palacios Treviño
Jean-Paul Hubert
Fabián Novak Talavera
Ana Elizabeth Villalta Vizcarra
David P. Stewart
Freddy Castillo Castellanos
Jaime Aparicio

Representing the General Secretariat, technical and administrative support was provided by Drs. Jean-Michel Arrighi, Secretary for Legal Affairs, Dante M. Negro, Director of the Department of International Law; Manoel Tolomei Moletta, Secretary of the Inter-American Juridical Committee and Maria Helena Lopes served as the rapporteur for the proceedings.

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

He welcomed the members of the Committee and in particular its new members, Drs. Fabián Novak Talavera (Peru) and David Stewart (United States of America), who were elected at the 39th regular session of the 2008 OAS General Assembly, as well as Ambassador João Clemente Baena Soares (Brazil), who was elected by the Permanent Council on March 4, 2009, and he expressed his hope that their contributions, based on the individual experiences of each, would provide the Committee with new ideas for addressing the topics on its agenda, a sentiment that was shared by the other members.

Drs. Novak, Stewart, and Baena Soares thanked him for this warm welcome and expressed their utmost commitment to the activities of the Juridical Committee.

The Chairman spoke of the resignation of the IAJC's Vice Chairman, Dr. Ricardo Antônio Silva Seitenfus, on account of his appointment to serve as the representative of the OAS in the Republic of Haiti, by means of a note dated December 18, 2008, that was duly distributed among all the members. For that reason, this session would proceed to elect a new Vice Chairman to conclude the remainder of his mandate, ending in August 2010.

In due course, the Inter-American Juridical Committee adopted resolution CJI/RES. 153 (LXXIV-O/09), "Tribute to Dr. Ricardo Antônio Silva Seitenfus," recognizing his work as a member and Vice Chairman of the Committee.

CJI/RES. 153 (LXXIV-O/09)

TRIBUTE TO DR. RICARDO ANTÔNIO SILVA SEITENFUS

THE INTER-AMERICAN JURIDICAL COMMITTEE,

CONSIDERING the resignation of Dr. Ricardo Antonio Silva Seitenfus on 18 December 2008 as a member of this organ, owing to his appointment by the Secretary General of the Organization of American States to serve as the Representative of the OAS Office in the Republic of Haiti;

RECALLING, as well, that Dr. Seitenfus was elected as the Vice Chairman of this organ on 8 August 2008;

BEARING IN MIND the studies presented by Dr. Seitenfus and his outstanding participation in the meetings of the Inter-American Juridical Committee,

RESOLVES:

1. To express its appreciation to Dr. Ricardo Antonio Silva Seitenfus for his work as a member and Vice Chairman of the Inter-American Juridical Committee.

2. To take into account the studies he has done for the Inter-American Juridical Committee, such as: Keeping the Peace and Juridical-Institutional Cooperation with the Republic of Haiti; The Principles on the Right of Access to Information; The Directive on Return Approved by the European Parliament and the Implementation of International Humanitarian Law in the OAS Member States.

3. To wish Dr. Ricardo Seitenfus every success in his new endeavors.

This resolution was adopted unanimously at the regular session held on 19 March 2009, with the following members being present: Drs. Guillermo Fernández de Soto, Hyacinth Evadne Lindsay, Mauricio Herdocia Sacasa, João Clemente Baena Soares, Jorge Palacios Treviño, Jean-Paul Hubert, Fabián Novak Talavera, Ana Elizabeth Villalta Vizcarra, David P. Stewart, Freddy Castillo Castellanos and Jaime Aparicio.

During the session, the Inter-American Juridical Committee resolved to adopt resolution CJI/RES. 154 (LXXIV-O/09), "Date and venue of the seventy-fifth regular session of the Inter-American Juridical Committee", whereby it decided to open its 75th regular session at its headquarters in the city of Rio de Janeiro, Brazil, on August 3rd , 2009.

CJI/RES. 154 (LXXIV-O/09)

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

THE INTER-AMERICAN JURIDICAL COMMITTEE,

CONSIDERING that Article 15 of its Statute provides for two regular sessions to be held annually;

BEARING IN MIND that Article 14 of its Statute stipulates the headquarters of the Inter-American Juridical Committee are to be located in the city of Rio de Janeiro,

RESOLVES to hold its 75th regular session at its headquarters in the city of Rio de Janeiro, Brazil, as of the 3rd of August 2009, authorizing its Chairman to set the date on which the session will conclude, pursuant to the circumstances.

This resolution was adopted unanimously at the session held on March 19, 2009, by the following members: Drs. Guillermo Fernández de Soto, Hyacinth Evadne Lindsay, Mauricio Herdocia Sacasa, João Clemente Baena Soares, Jorge Palacios Treviño, Jean-Paul Hubert, Fabián Novak Talavera, Ana Elizabeth Villalta Vizcarra, David P. Stewart, 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. 152 (LXXIII-O/08), "Agenda for the 74th Regular Session of the Inter-American Juridical Committee":

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. Legal-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 law in OAS Member States
   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.

Finally, the Inter-American Juridical Committee adopted resolution CJI/RES. 156 (LXXIV-O/09), "Expression of Appreciation to the Government and the People of the Republic of Colombia," for their warm and generous welcome and for the efforts made by the Government of Colombia that had contributed to the success of the 74th regular session.

CJI/RES. 156 (LXXIV-O/09)

EXPRESSION OF APPRECIATION TO THE GOVERNMENT AND THE PEOPLE OF THE REPUBLIC OF COLOMBIA

THE INTER-AMERICAN JURIDICAL COMMITTEE,

HAVING accepted the cordial invitation by the Government of the Republic of Colombia to hold its 74th regular session in Bogotá, Colombia from the 12th to the 20th of March 2009;

ACKNOWLEDGING the efforts undertaken by the Government of Colombia to ensure the regular session of the Inter-American Juridical Committee is organized and carried out successfully;

RESOLVES:

1. To express its deepest appreciation to the Government and the people of Colombia for their warm and generous welcome, with special thanks to Dr. Guillermo Fernández de Soto.

2. To let the record show how important it was for the Inter-American Juridical Committee to hold its 74th regular session in this Country, highlighting the opportunity its members had to meet with the most eminent political, juridical and academic authorities in Colombia.

3. To convey this resolution, as an expression of its appreciation, to the Government and the people of Colombia, to His Excellency the President of the Republic of Colombia, Dr. Álvaro Uribe Vélez, to His Excellency the Minister of Foreign Affairs of Colombia, Dr. Jaime Bermúdez Merizalde, as well as to the University of Rosario.

This resolution was adopted unanimously at the session held on March 19, 2009, by the following members: Drs. Guillermo Fernández de Soto, Hyacinth Evadne Lindsay, Mauricio Herdocia Sacasa, João Clemente Baena Soares, Jorge Palacios Treviño, Jean-Paul Hubert, Fabián Novak Talavera, Ana Elizabeth Villalta Vizcarra, David P. Stewart, Freddy Castillo Castellanos and Jaime Aparicio.

B. Seventy-fifth Regular Session

The 75th regular session of the Inter-American Juridical Committee took place from August 3 to 14, 2009, 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:

Jaime Aparicio
Mauricio Herdocia Sacasa
Jorge Palacios Treviño
Hyacinth Evadne Lindsay
Fabián Novak Talavera
João Clemente Baena Soares
Freddy Castillo Castellanos
Guillermo Fernández de Soto
David P. Stewart
Ana Elizabeth Villalta Vizcarra
Jean-Paul Hubert

Representing the General Secretariat, technical and administrative support was provided by Drs. Jean-Michel Arrighi, Secretary for Legal Affairs, Dante Negro, Director of the Department of International Law; Manoel Tolomei Moletta, Secretary of the Inter-American Juridical Committee, and 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 oral report on its activities since the last meeting.

The Chairman of the Inter-American Juridical Committee also reported that during the thirty-ninth regular session of the OAS General Assembly (San Pedro Sula, Honduras, June 2009), Dr. Miguel Aníbal Pichardo from the Dominican Republic had been elected as a new member of the Inter-American Juridical Committee, and that Drs. Ana Elizabeth Villalta Vizcarra (El Salvador) and Freddy Castillo Castellanos (Venezuela) were re-elected. The mandates of these three members are to commence on January 1, 2010, for a period of four years.

On August 12, 2009, Dr. Mauricio Herdocia presented a motion for the election of Dr. João Clemente Baena Soares as the Committee's Vice Chairman, since, at the end of the Chairman's mandate on December 31, 2009, he would be replaced by Vice Chairman Guillermo Fernández de Soto until August 2010, leaving the office of the Vice Chairman vacant. The motion was approved by acclamation and accepted by Dr. Baena Soares.

At its 75th regular session, the Inter-American Juridical Committee had before it the following agenda, which was adopted by means of resolution CJI/RES. 155 (LXXIV-O/09), "Agenda for the Seventy-Fifth Regular Session of the Inter-American Juridical Committee":

CJI/RES. 155 (LXXIV-O/09)

AGENDA FOR THE SEVENTY-FIFTH REGULAR SESSION OF THE INTER-AMERICAN JURIDICAL COMMITTEE (Rio de Janeiro, as of August 3, 2009)

Topics under consideration

1. Seventh Inter-American Specialized Conference on Private International Law (CIDIP-VII)
   Rapporteurs: Drs. David P. Stewart and 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. Jaime Aparicio
8. Follow-up on the application of the Inter-American Democratic Charter
   Rapporteur: Dr. Jean-Paul Hubert
9. Implementation of international humanitarian law in OAS Member States
   Rapporteur: Dr. Jorge Palacios Treviño
10. Cultural diversity in the development of international law
    Rapporteur: Dr. Freddy Castillo Castellanos
11. Strengthening the consultative function of the Inter-American Juridical Committee
    Rapporteur: Dr. Fabián Novak Talavera
12. Migratory topics: Follow-up on the Opinions of the Inter-American Juridical Committee
    Rapporteurs: Drs. Ana Elizabeth Villalta Vizcarra and David P. Stewart

This resolution was adopted unanimously at the session held on March 19, 2009, by the following members: Drs. Guillermo Fernández de Soto, Hyacinth Evadne Lindsay, Mauricio Herdocia Sacasa, João Clemente Baena Soares, Jorge Palacios Treviño, Jean-Paul Hubert, Fabián Novak Talavera, Ana Elizabeth Villalta Vizcarra, David P. Stewart, Freddy Castillo Castellanos, and Jaime Aparicio.

On that occasion, the Inter-American Juridical Committee also adopted resolution CJI/RES. 161 (LXXV-O/09), "Agenda for the Seventy-Sixth Regular Session of the Inter-American Juridical Committee," and decided, by means of resolution CJI/RES. 162 (LXXV-O/09), "Date and Venue of the Seventy-Sixth Regular Session of the Inter-American Juridical Committee," to hold its 66th session in the city of Lima, Peru, on March 15 to 24, 2010, in response to the kind offer extended by the Government of Peru.

CJI/RES. 161 (LXXV-O/09)

AGENDA FOR THE SEVENTY-SIXTH REGULAR SESSION OF THE INTER-AMERICAN JURIDICAL COMMITTEE (Lima, Peru, March 15 to 24, 2010)

Topics under consideration

1. Innovating forms of access to justice in the Americas
   Rapporteur: Dr. Freddy Castillo Castellanos
2. International Criminal Court
   Rapporteur: Dr. Mauricio Herdocia Sacasa
3. Considerations on an inter-American jurisdiction of justice
   Rapporteur: Dr. Guillermo Fernández de Soto
4. Promotion and strengthening of democracy
   Rapporteur: Dr. Jean-Paul Hubert
5. Implementation of international humanitarian law in OAS Member States
   Rapporteur: Dr. Jorge Palacios Treviño
6. Cultural diversity in the development of international law
   Rapporteur: Dr. Freddy Castillo Castellanos
7. Strengthening the consultative function of the Inter-American Juridical Committee
   Rapporteur: Dr. Fabián Novak Talavera
8. Migratory topics: Follow-up on the Opinions of the Inter-American Juridical Committee
   Rapporteurs: Drs. Ana Elizabeth Villalta Vizcarra and David P. Stewart
9. Asylum
   Rapporteuse: Dr. Ana Elizabeth Villalta Vizcarra
10. Freedom of thought and expression
    Rapporteur: Dr. Guillermo Fernández de Soto
11. Proposal of the Inter-American Juridical Committee to the Inter-American Specialized Conference on Private International Law (CIDIP)
    Rapporteurs: Drs. Ana Elizabeth Villalta Vizcarra, David P. Stewart, and Guillermo Fernández de Soto
12. Draft Inter-American Convention against Racism and all Forms of Discrimination and Intolerance
    Rapporteur: Dr. Fabián Novak Talavera

This resolution was adopted unanimously at the session held on August 13, 2009, by the following members: Drs. Mauricio Herdocia Sacasa, Jorge Palacios Treviño, Hyacinth Evadne Lindsay, Fabián Novak Talavera, João Clemente Baena Soares, Freddy Castillo Castellanos, David P. Stewart, Ana Elizabeth Villalta Vizcarra and Jean-Paul Hubert.

CJI/RES. 162 (LXXV-O/09)

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

THE INTER-AMERICAN JURIDICAL COMMITTEE,

CONSIDERING that Article 15 of its Statute provides for two regular sessions to be held annually;

BEARING IN MIND that Article 14 of its Statute stipulates the headquarters of the Inter-American Juridical Committee are to be located in the city of Rio de Janeiro,

RESOLVES to hold its 76th regular session in the city of Lima, Peru, from March 15 to 24, 2010.

This resolution was adopted unanimously at the session held on August 13, 2009, by the following members: Drs. Mauricio Herdocia Sacasa, Jorge Palacios Treviño, Hyacinth Evadne Lindsay,

Fabián Novak Talavera, João Clemente Baena Soares, Freddy Castillo Castellanos, David P. Stewart, Ana Elizabeth Villalta Vizcarra and Jean-Paul Hubert.

Finally, the Inter-American Juridical Committee adopted resolution CJI/RES. 158 (LXXV-O/09), in which it paid tribute to and honored the memory of the Panamanian jurist and former member of the Committee, Dr. Roberto R. Alemán Zubieta, who died on July 18, 2009.

CJI/RES. 158 (LXXV-O/09)

HOMAGE TO THE MEMORY OF DR. ROBERTO R. ALEMÁN ZUBIETA

THE INTER-AMERICAN JURIDICAL COMMITTEE,

IN LIGHT OF the death of Dr. Roberto R. Alemán Zubieta, distinguished jurist of Panama and former member of the Inter-American Juridical Committee, on 18 July 2009;

RECALLING that Dr. Alemán was elected as member of the Inter-American Juridical Committee at the XXIV regular session of the General Assembly of the OAS held in Belém do Pará, Brazil, in 1994, began his mandate on 1 January 1995, and resigned for health reasons on 12 June of this year;

CONSIDERING the important positions that Dr. Roberto Alemán held in his country as Advisor-Minister to the Chairman of the Republic of Panama and Ambassador to the United States of America, and the high prestige he enjoyed in Panamanian politics and diplomacy,

RESOLVES:

1. To express its acknowledgment and most heartfelt tribute to the memory of Dr. Roberto R. Alemán Zubieta, whose passing represents a sad loss not only to his country, Panama, but also to the juridical community of the Americas.

2. To send a copy of this resolution to Dr. Roberto R. Alemán Zubieta's family, as a form of expressing our condolences.

This resolution was adopted unanimously at the session held on August 6, 2009, by the following members: Drs. Jaime Aparicio, Mauricio Herdocia Sacasa, Jorge Palacios Treviño, Hyacinth Evadne Lindsay, Fabián Novak Talavera, João Clemente Baena Soares, Freddy Castillo Castellanos, Guillermo Fernández de Soto, David P. Stewart, Ana Elizabeth Villalta Vizcarra and Jean-Paul Hubert.

CHAPTER II

TOPICS DISCUSSED BY THE INTER-AMERICAN JURIDICAL COMMITTEE AT THE REGULAR SESSIONS HELD IN 2009

During 2009, the Inter-American Juridical Committee held two regular sessions. At those two meetings, the Juridical Committee's agenda covered the following topics: the International Criminal Court; follow-up on the application of the Inter-American Democratic Charter; struggle against discrimination and intolerance in the Americas; Seventh Inter-American Specialized Conference on Private International Law (CIDIP-VII); implementation of international humanitarian law in the OAS member states; migratory topics: follow-up of the Opinions of the Inter-American Juridical Committee (evaluation and follow-up on the Directive of Return approved by the European Union); innovative forms of access to justice in the Americas; considerations on an inter-American jurisdiction of justice; cultural diversity in the development of international law; strengthening the consultative function of the Inter-American Juridical Committee; asylum; freedom of thought and expression; access to public information; and legal and institutional cooperation with the Republic of Haiti.

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. International Criminal Court

Resolution	
CJI/RES. 157 (LXXIV-O/09) -	International Criminal Court
Annex: CJI/doc.337/09	Report on preparations and advances in efforts toward adopting national legislation based on guidelines of principles of the Inter-American Juridical Committee and training employees for the cooperation of the Member States of The OAS with the International Criminal Court (presented by Dr. Mauricio Herdocia Sacasa)

During its 67th regular session (Rio de Janeiro, August 2005), the Inter-American Juridical Committee adopted the inclusion of the topic "International Criminal Court" on its agenda, by mandate of the OAS General Assembly, which, by resolution AG/RES. 2072 (XXXV-O/05), requested the Juridical Committee to draw up a questionnaire to be presented to the OAS Member States, on how their laws allow for cooperation with the International Criminal Court and, on the basis of the findings of the questionnaire, to present a report to the Permanent Council, which, in turn, will transmit it to the thirty-sixth regular session of the General Assembly.

In the course of the regular session, the Inter-American Juridical Committee examined document CJI/doc.198/05, "Questionnaire on the International Criminal Court", presented by Drs. Mauricio Herdocia Sacasa, Luis Herrera Marcano, Antonio Fidel Pérez, Stephen C. Vasciannie and Ana Elizabeth Villalta Vizcarra.

The Inter-American Juridical Committee also adopted resolution CJI/RES. 98 (LXVII-O/05), "Promoting the International Criminal Court", by which document CJI/doc.198/05 rev.1 is approved, containing the "Questionnaire on the International Criminal Court", in compliance with the mandate assigned by the General Assembly. It was also decided to send this document to the Member States of the OAS via the General Secretariat, so that the Juridical Committee can present to the Permanent Council of the OAS a report on the results of the questionnaire, prior to the 36th regular session of the General Assembly. Accordingly, the deadline date for receiving the answers was set at January 30, 2006. Finally, Dr. Mauricio Herdocia Sacasa was appointed rapporteur and he was requested to present a progress report during the 68th regular session of the Inter-American Juridical Committee. The questionnaire was sent to the Member States by the Office of International Law in September 2005.

In addition, on February 27, 2006, the Office of International Law sent to the members of the Inter-American Juridical Committee the rapporteur's report on the February 3, 2006 meeting of the Committee on Juridical and Political Affairs regarding the International Criminal Court.

During its 68th regular session (Washington, D.C., March 2006), the Inter-American Juridical Committee examined document CJI/doc.211/06, "International Criminal Court", presented by Dr. Mauricio Herdocia, ,pursuant to operative paragraph 6 of General Assembly resolution AG/RES. 2072 (XXXV-O/05).

The Inter-American Juridical Committee adopted resolution CJI/RES. 105 (LXVIII-O/06), "Promotion of the International Criminal Court", which approves document CJI/doc.211/06 corr.1, presented by the rapporteur, and asks the General Secretariat to forward said document to the Permanent Council, which in turn would convey it to the OAS General Assembly at its thirty-sixth regular session. Via the General Secretariat, it also requests Member States that have not yet replied to the questionnaire drawn up by the Committee to fill it in, while asking States Parties to the "Statute of the International Criminal Court" that have completed the process of adopting laws and implementing Parts IX and X of that Statute, to notify the Inter-American Juridical Committee of that fact. The resolution also requests States that have completed the process of adopting laws that incorporate, modify or add the criminal offenses addressed in the "Rome Statute" to provide updated information thereon to the Inter-American Juridical Committee. States parties to the "Rome Statute" are also requested to report any other amendment that facilitates cooperation with the International Criminal Court. Finally, the Inter-American Juridical Committee decided to keep on its agenda, among the topics under consideration, the subject of

the "Promotion of the International Criminal Court" and to request the rapporteur of this topic to submit an updated report to the Committee at its next regular session, based on fresh information from OAS Member States on the aforementioned issues. On April 19, 2006, the Chairman of the Inter-American Juridical Committee, Dr. Mauricio Herdocia Sacasa, addressed a note to the OAS Secretary General, forwarding resolution CJI/RES. 105 (LXVIII-O/06) for the attention of the Permanent Council and attaching report CJI/doc.211/06 corr.1 "International Criminal Court". The Office of International Law forwarded said resolution to the Permanent Missions to the OAS on May 18, 2006.

At its thirty-sixth regular session (Santo Domingo, Dominican Republic, June 2006), the OAS General Assembly adopted resolutions AG/RES. 2218 (XXXVI-O/06) and AG/RES. 2176 (XXXVI-O/06), in which it asked the Inter-American Juridical Committee to continue addressing the topic. Furthermore, it asked the Committee to prepare a set of recommendations to the OAS Member States, based on the findings of the report submitted (CP/doc. 4111/06), regarding ways to strengthen cooperation with the International Criminal Court, as well as any progress made in this regard, and to submit them to the Permanent Council to be forwarded to the General Assembly at its 37th regular session.

At its 69th regular session (Rio de Janeiro, August 2006) and in compliance with the General Assembly resolutions AG/RES. 2218 and AG/RES. 2176, the Inter-American Juridical Committee discussed this topic. The rapporteur gave an overview of the contributions received at the working session that the OAS Committee on Juridical and Political Affairs held with the representative of the International Criminal Court on February 3, 2006, and explained that, with the results of that session, he would proceed to study and draw up the documents necessary to fulfill the mandates on the matter. He then asked the General Secretariat to resend the questionnaire on the International Criminal Court and the implementation of the Rome Statute to those Member States that had not yet submitted their replies.

Only Uruguay sent an update to the response it had previously submitted to the Inter-American Juridical Committee, the same that was sent to all Committee members. Said update contained a copy of Law 18.026, "Genocide, Crimes against Humanity and Cooperation with the International Criminal Court", and a copy of the law ratifying the "Agreement on Privileges and Immunities" of the International Criminal Court.

On February 2, 2007, the Permanent Council's Committee on Juridical and Political Affairs held a working meeting on the International Criminal Court, organized by the Office of International Law. This Office prepared a report summarizing the discussions at that meeting and its conclusions. Said report was sent to the rapporteur of the topic, Dr. Mauricio Herdocia Sacasa, and to the other members of the Inter-American Juridical Committee on February 9, 2007. Later, on February 15, transcripts of the panelists' remarks at that meeting were also distributed.

At the 70th regular session of the Inter-American Juridical Committee (San Salvador, February-March 2007), Dr. Herdocia Sacasa presented report CJI/doc.256/07 rev.1, "Promotion of the International Criminal Court", which updates his previous report. He offered a detailed view of the structure and the contents of the chapters of his report. In its conclusions he underscored the significance of the responses to the questionnaire, as they provide information on the countries' experience in adopting norms on cooperation with the ICC and implementing the Statute. He emphasized the necessity to urge the countries that have not yet answered the Juridical Committee's questionnaire to do so, and those that have enacted new laws or modified the existing ones to submit updated information on the matter.

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

The Inter-American Juridical Committee adopted resolution CJI/RES. 125 (LXX-O/07), "Promotion of the International Criminal Court", which highlights the preliminary recommendations put forward in the report. Through this resolution the Juridical Committee resolved to sent said report to the Permanent Council and reiterated the request to the OAS Member States that have not yet responded to the questionnaire to do so, and the States Parties to the Statute of the International Criminal Court that have passed enacting legislation to forward the respective information to the Inter-American Juridical

Committee. The resolution also reiterated the request to the States that have adopted legislation incorporating, modifying or adding criminal offenses defined by the "Rome Statute" to submit up-to-date information to the Inter-American Juridical Committee. Lastly, the resolution requested the rapporteur to use all new information received from the States to draft a report outlining the progress made in this area, bringing the situation up to date and, if appropriate, further developing the ideas and preliminary recommendations put forward in earlier reports. On 21 March 2007, the Office of International Law sent to the Permanent Council the Inter-American Juridical Committee resolution along with the rapporteur's report, which were classified as document CP/doc.4194/07, "Note from the Inter-American Juridical Committee transmitting resolution CJI/RES. 125 (LXX-O/07), Promotion of the International Criminal Court", attaching report CJI/doc.256/07 rev. 1.

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

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

On August 30, 2007, the Office of International Law sent once more to the Permanent Missions to the OAS resolution CJI/RES. 105 (LXVIII-O/06) and the questionnaire contained in document CJI/doc.198/05 rev.1. Also, on December 4, 2007, the Office of International Law sent to the rapporteur, Dr. Mauricio Herdocia Sacasa, document ODI/doc.13/07 titled "Promotion of the International Criminal Court within the OAS", in compliance with the mandate given by the Inter-American Juridical Committee during its previous regular session. Lastly, on February 14th, 2008, the Office of International Law sent to the members of the Inter-American Juridical Committee the final report of the working session on the adequate measures that States may take to cooperate with the International Criminal Court, that was held on January 28th, 2008, by the Committee on Juridical and Political Affairs with the support of the Office of International Law, and in which the rapporteur Dr. Mauricio Herdocia participated.

During the 72nd regular session of the Inter-American Juridical Committee (Rio de Janeiro, March 2008), Dr. Dante Negro reported that, in response to a request made within the Committee on Juridical and Political Affairs, the Department had again circulated the questionnaire on the topic prepared by the Juridical Committee. He also indicated that the Department of International Law drafted and distributed document ODI/doc.03/08 regarding the working session on the International Criminal Court, held on January 28, 2008 under the auspices of the Committee on Juridical and Political Affairs, and which in addition to providing information on the results of the meeting, contains legislation of Argentina, Ecuador, Costa Rica, and Venezuela on this topic.

Dr. Dante Negro reported that Dr. Mauricio Herdocia had attended the working session, in his capacity as rapporteur of the topic in the Inter-American Juridical Committee.

Dr. Mauricio Herdocia offered his comments on the aforementioned meeting, and on another held the same day in the afternoon, sponsored by Mexico, regarding the progress made on a model law for cooperation between the States and the International Criminal Court; a discussion on the latest mandate of the General Assembly had ensued. In his view, both meetings were very positive and he therefore suggested that henceforth the Juridical Committee should assign one of the rapporteurs to participate in the meetings on the respective topics in the Committee on Juridical and Political Affairs, which would allow greater participation and greater exposure of the work of the Inter-American Juridical Committee and its function in the progressive development of international law.

Dr. Herdocia also presented 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".

The Juridical Committee decided to adopt resolution CJI/RES. 140 (LXXII-O/08), "Promotion of the International Criminal Court", which accepts two reports submitted by the rapporteur stressing the importance of having the States bear in mind its considerations, principles, and guidelines towards the strengthening of the cooperation with the International Criminal Court, and forwarding said reports to the Permanent Council so that it, in turn, can transmit them to the General Assembly. It also reiterated the request made to Member States in prior resolutions and highlighted the importance of the Committee on Juridical and Political Affairs' special sessions, encouraging that Committee to continue to foster frameworks for discussion on adequate measures the States should take to cooperate with the International Criminal Court.

On March 24, 2008, the Department of International Law forwarded the aforementioned documents to the Permanent Council of the Organization.

During the thirty-eighth regular session of the OAS General Assembly (Medellín, June 2008), by resolution AG/RES. 2364 (XXXVIII-O/08), it requested the Inter-American Juridical Committee, based on its proposal to draft a model legislation on States' cooperation with the International Criminal Court, given its available means, and with the support of civil society, to promote the adoption of this model legislation by the States that do not yet have a law on the subject. It further requested the Juridical Committee, with the cooperation of the General Secretariat and the Secretariat for Legal Affairs, to support and promote training of administrative, judicial, and academic officials in Member States to this end, and to report to the 40th regular session of the General Assembly on progress made in this regard.

At the 73rd regular session of the Inter-American Juridical Committee (Rio de Janeiro, August 2008), the rapporteur on the subject, Dr. Mauricio Herdocia, proposed that the discussions on the subject be reflected *verbatim* in the minutes. These discussions appear in Minutes No. 6, corresponding to Monday, August 11, 2008.

On February 17, 2009, the report of the Working Session on the International Criminal Court organized by the Department of Internal Law and held by the Committee on Juridical and Political Affairs on December 8, 2008, by mandate of the OAS General Assembly, was distributed to the members of the Inter-American Juridical Committee.

During the 74th regular session of the Inter-American Juridical Committee (Bogota, March 2009), Dr. Dante Negro recalled that the General Assembly's mandate on the subject to the Committee is that, based on its proposal to draft model legislation on cooperation of states with the International Criminal Court, the Inter-American Juridical Committee do what it can to promote adoption of this model legislation, with the support of civil society, among states that do not yet have a law on the subject. The Committee is further requested to support and promote the training of administrative, judicial, and academic officials for this purpose in Member States, with the support of the General Secretariat and the Secretariat on Legal Affairs, and to report back to the 40th regular session of the General Assembly on progress achieved in these areas. Dr. Negro reported that on December 8, 2008, the Department of International Law organized a working meeting on the subject, held by the Committee on Juridical and Political Affairs, and that the final report of that meeting, also prepared by the Department, was distributed to members of the Juridical Committee on February 17, 2009. Dr. Negro pointed out that the rapporteur was able to participate at the earlier working meeting, and he suggested, as a good practice to follow, that the Inter-American Juridical Committee continue financing the participation of at least one of the rapporteurs on the various subjects once a year at some of these special meetings, in an effort to continue strengthening ties between the Juridical Committee and the OAS political organs. In this regard, Dr. Negro made himself available to facilitate this participation once the Committee decides on the meetings to which it will send its rapporteurs. Finally, Dr. Dante Negro indicated that pursuant to the General Assembly resolution, the Department of International Law had prepared a draft proposal for obtaining financing so that together with the Juridical Committee, the work of disseminating model legislation on cooperation with the International Criminal Court could be pursued, and that this proposal would be

shared with the rapporteur on the subject during this session so that a final version could be presented to the Project Evaluation Committee of the General Secretariat.

The Chairman of the Inter-American Juridical Committee, Dr. Jaime Aparicio, indicated that there is renewed interest in having the Committee pursue its studies on the subject, voiced particularly by the Foundation for Due Legal Process, whose President is Dr. Buergenthal, well known to the members of the Committee. Moreover, he considered that it would be a good idea to contact them with a view to obtaining resources for the Committee's activities in this area.

The rapporteur on the subject, Dr. Mauricio Herdocia, referred to the history of the subject and gave a brief recount of the reports drafted by the Inter-American Juridical Committee in compliance with General Assembly mandates. Finally, the Inter-American Juridical Committee adopted Resolution CJI/RES. 157 (LXXIV-O/09), "International Criminal Court," in which the Chairman of the Inter-American Juridical Committee is requested to contact states parties to the Rome Statute that have not yet adopted legislation on cooperation with the International Criminal Court, to make available to them the Inter-American Juridical Committee's work on the subject and technical assistance that the Secretariat, or, if appropriate, the rapporteur and other members of the Committee, might offer. Said resolution also instructed the Secretariat of the Inter-American Juridical Committee to establish communication with the Secretariats of CARICOM, CAN, SICA, MERCOSUR, and UNASUR, with a view to assessing the possibility of holding regional seminars for training administrative, judicial, and academic officials in the area of cooperation with the International Criminal Court for states parties to the Rome Statute, and instructed the Chairman of the Committee, the rapporteur, and the Secretariat to establish cooperative relations with civil society organizations interested in cooperating in efforts to promote the adoption of legislation providing for cooperation with the International Criminal Court, by states parties to the Rome Statute. Such organizations could include the coalition of NGOs for the International Criminal Court, ICRC, Parliamentarians for Global Action, the Andean commission of Jurists, and the Due Process of Law Foundation, among others. It further instructed it to establish a cooperative relationship with government sectors in every country that are involved in cooperation with the International Criminal Court, including Ministries of Justice and Ministries of Foreign Affairs among others, depending on circumstances, with a view to promoting adoption of the relevant cooperation laws and training efforts in this area. Finally it instructed the Secretariat of the Inter-American Juridical Committee to present to the OAS Project Evaluation Committee and promote a profile designed to seek funding for the training programas and for implementation of a strategy for dissemination and promotion of model laws on cooperation with the International Criminal Court.

On April 28, 2009, the Department of International Law submitted to the rapporteur on the subject a contact list with the persons who participated in the four working meetings of the Committee on Juridical and Political Affairs on the subject. On May 21, 2009, the Department of International Law also sent to the Permanent Missions a letter signed by the Chairman of the Inter-American Juridical Committee to inform them of the action taken by the Committee in the area of cooperation with the International Criminal Court, attaching resolution CJI/RES. 157 (LXXV-O/09*)* and all the work on the subject done by the Committee, and it offered any technical assistance services it could provide to help states adopt legislation on cooperation with the International Criminal Court. In that letter, it requested the assistance of countries in identifying and establishing cooperative relations with government sectors involved in this area, including Ministries of Justice and Foreign Affairs, with a view to promoting adoption of the corresponding laws on cooperation and training efforts in this area. Finally, on June 15, 2009, it sent a similar letter to the organizations referred to in items 2 and 3 of that resolution.

During the thirty-ninth regular session of the OAS General Assembly (San Pedro Sula, June 2009), by resolution AG/RES. 2505 (XXIX-O/09), the Inter-American Juridical Committee was requested to use as a basis the OAS Guide on Principles pertaining to cooperation with the International Criminal Court to promote national legislation on the subject, to the extent possible and with the support of civil society, in states that have not yet adopted such legislation. It further requested that, in cooperation with the General Secretariat and the Secretariat for Legal Affairs, it continue supporting and promoting the training of administrative, judicial, and academic officials to this end in Member States, and that it report to the states

parties on progress in this area at the next working meeting on the International Criminal Court and to the General Assembly at its 40th regular meeting. It also requested the Inter-American Juridical Committee to draft model legislation on implementation of the Rome Statute, especially with regard to the definition of the crimes under the jurisdiction of the International Criminal Court, and that it present a report on progress achieved.

During the 75th regular session of the Inter-American Juridical Committee (Rio de Janeiro, Brazil, August 2009), Dr. Mauricio Herdocia spoke of the mandates from the General Assembly set out in item 11 of resolution AG/RES. 2505 (XXIX-O/09). In connection with them, he proposed presenting the Committee with a draft model law covering the three relevant crimes set out in the Rome Statute, namely: genocide, crimes against humanity, and war crimes.

He recalled that, as agreed upon at the session held in Bogotá, the Chairman had sent a note to all the member states' missions to inform them of the Inter-American Juridical Committee's willingness to assist with encouraging their legislative processes and training efforts. With the same aim, the Chairman also wrote to the main international organizations that work on topics relating to the International Criminal Court in order to request their support. To date a response has been received from the Government of Belize regarding the authorities in charge of the topic in that country; an offer for cooperation or joint undertakings was also received from the organization Parliamentarians for Global Action, which will be visiting Jamaica in October to encourage ratification of the Rome Statute, and a member of the Committee should be in attendance. The Rapporteur therefore encouraged the Committee's members to participate in those promotion events in their respective countries.

He also noted that the Secretariat for Legal Affairs has finished a project profile to be presented to institutions that fund the organization of workshops and seminars on the topic.

He finally pointed out that the resolution adopted by the General Assembly emphasized the importance of submitting a report to the next working session of the Committee on Juridical and Political Affairs, indicating the progress made with planning those courses and, of course, the proposal to readdress the draft model legislation for identifying the crimes set out in the Rome Statute.

Drs. Castillo and Lindsay proposed combining efforts to cooperate with the seminars organized in their countries. In addition, Dr. Novak suggested that the seminar to be held in Peru take place on the same dates as the upcoming session in Lima, as part of the academic activities of the Committee on that occasion.

Regarding his oral presentation, Dr. Herdocia reported that he would be presenting a written report, including the members' contributions and indicating their willingness to assist with the seminars organized by the working group in different countries. In connection with this, he asked for that report to be incorporated into the Annual Report; thus, on August 14, 2009, the Committee Secretariat registered the document "Report on preparations and advances in efforts toward adopting national legislation based on guidelines of principles of the Inter-American Juridical Committee and training employees for the cooperation of the member states of the OAS with the International Criminal Court," CJI/doc.337/09.

Resolution CJI/RES. 157 (LXXIV-O/09) and the annexed document CJI/doc.337/09 are transcribed below:

CJI/RES. 157 (LXXIV-O/09)

INTERNATIONAL CRIMINAL COURT

THE INTER-AMERICAN JURIDICAL COMMITTEE,

BEARING IN MIND resolution CJI/RES. 140 (LXXII-O/08) of 7 March 2008, which endorses the reports presented by the rapporteur, namely, the "Report on Perspectives for a Model Law on State Cooperation with the International Criminal Court" and the "Guide to the General Principles and Agendas for the Cooperation of States with the International Criminal Court";

CONSIDERING that resolution AG/RES. 2364 (XXXVIII-O/08) calls on the Inter-American Juridical Committee, based on its proposal to draft a model law on cooperation between the States and

the International Criminal Court, to encourage the adoption of such model legislation in the States that have yet to adopt a law on the matter, doing so to the extent of its possibilities, and with the collaboration of the Secretary General and the Secretariat for Legal Affairs, to support and promote the training of administrative, judicial and academic officials to that end and to report the progress achieved in that respect to the General Assembly during its fortieth regular session.

EMPHASIZING the importance of ensuring adequate and effective internal rules, organs and procedures that allow for free-flowing cooperation with the International Criminal Court,

RESOLVES:

1. To entrust the Chairman of the Inter-American Juridical Committee to approach the States Parties to the Rome Statute that have yet to adopt legislation on cooperation with the International Criminal Court, in order to place at their disposal the work the Juridical Committee has done on the topic, which was sent to the Permanent Council on 24 March 2008, along with the technical assistance services the Secretary and, if applicable, the rapporteur and the other members of the Committee are able to provide, to the extent of their possibilities.

2. To instruct the Secretary of the Inter-American Juridical Committee to establish contact with the Secretaries of CARICOM, CAN, SICA, MERCOSUR and UNASUR to assess the possibility of holding regional training seminars for the States Parties to the Rome Statute to instruct administrative, judicial and academic officials on the subject of cooperation with the International Criminal Court.

3. To instruct the Chairman of the Inter-American Juridical Committee, the rapporteur and the Secretariat to establish cooperative relations with elements of civil society in the States Parties to the Rome Statute that are interested in collaborating with the efforts to promote the adoption of legislation on the subject of cooperation with the International Criminal Court, such as the NGO Coalition for the International Criminal Court, the ICRC, Parliamentarians for Global Action, the Andean Committee of Jurists and the Due Process of Law Foundation, among others.

4. Likewise, to identify and establish cooperative relations with government sectors in each country that are involved with the topic of cooperation with the International Criminal Court, including the Ministries of Justice and the Ministries of Foreign Affairs, among others and as the case may be, with an eye towards promoting the adoption of respective legislation on cooperation and training efforts on the subject.

5. To instruct the Secretary of the Inter-American Juridical Committee to present and promote in the OAS Project Evaluation Committee an outline focused on the search for funding to carry out the training processes and to implement a strategy to disseminate and encourage model laws on the subject of cooperation with the International Criminal Court.

6. To highlight the importance of the celebration honoring the tenth anniversary of the adoption of the Rome Statute, which creates the International Criminal Court. It was a solemn event held on 8 December 2008 in Washington, D.C., at the headquarters of the Organization of American States, during the course of the fifth special session of the Committee on Juridical and Political Affairs of the Permanent Council.

This resolution was adopted unanimously at the session held on March 19, 2009, by the following members: Drs. Guillermo Fernández de Soto, Hyacinth Evadne Lindsay, Mauricio Herdocia Sacasa, João Clemente Baena Soares, Jorge Palacios Treviño, Jean-Paul Hubert, Fabián Novak Talavera, Ana Elizabeth Villalta Vizcarra, David P. Stewart, Freddy Castillo Castellanos and Jaime Aparicio.

CJI/doc.337/09

REPORT ON PREPARATIONS AND ADVANCES IN EFFORTS TOWARD ADOPTING NATIONAL LEGISLATION BASED ON GUIDELINES OF PRINCIPLES OF THE INTER-AMERICAN JURIDICAL COMMITTEE AND TRAINING EMPLOYEES FOR THE COOPERATION OF THE MEMBER STATES OF THE OAS WITH THE INTERNATIONAL CRIMINAL COURT

(presented by Dr. Mauricio Herdocia Sacasa)

I. INTRODUCTION

The General Assembly of the OAS, in resolution AG/RES. 2505 (XXXIX-O/09), "Promotion of the International Criminal Court", adopted at the fourth plenary session held on 4 June 2009, has decided:

> To request the Inter-American Juridical Committee to promote, using as a basis the OAS Guide on Cooperation with the International Criminal Court and insofar as it is able, the adoption of national legislation in the area in States that do not yet have it, and, with collaboration from the General Secretariat and the Secretariat for Legal Affairs, to continue providing support for and promoting in Member States the training of administrative and judicial officials and academics for that purpose, and to report to the States Parties on progress thereon at its next working meeting of the International Criminal Court and to the General Assembly at its fortieth regular session.
>
> Also to request the Inter-American Juridical Committee to prepare model legislation on implementation of the Rome Statute, in particular regarding the definition of crimes within the jurisdiction of the International Criminal Court, and to present a report, prior to the fortieth regular session of the General Assembly, on progress made.

This mandate of the General Assembly to the Inter-American Juridical Committee ─ whose antecedent was resolution AG/RES. 2364 (XXXVIII-O/08) of the General Assembly ─ has the very special characteristic of entrusting it to join efforts toward qualifying and promoting adoption of national legislation in the Member States of the OAS. This implies not only the traditional form of exercise of its functions through opinions, studies, preparing conventions and model laws, but also includes it directly in the preparation of efforts as to training and education, which enhance its activities in the area, while exposing the need to rely on human and financial resources to complete its work, with the full support of the General Secretariat and the Secretariat for Legal Affairs, especially including the Department of International Law.

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

The more recent work of the Inter-American Juridical Committee on the matter goes back to the mandate received by the General Assembly of the Organization of American States on 7 June 2005, when it was asked to prepare a questionnaire for presentation to the member states of the OAS. This questionnaire aimed to obtain information on how the respective national legislations were able to cooperate with the International Criminal Court.

About two months later, in August 2005, the Inter-American Juridical Committee approved including the topic International Criminal Court in its agenda.

It should be stressed that the "Questionnaire on the International Criminal Court" covered both the member states of the Rome Statute and those that were not members at that time.

In a very short time, the "Questionnaire on the International Criminal Court" received answers from 17 countries, 11 of whom were Parties and 6 not Parties to the Rome Statute. Based on this information, the rapporteur presented the requested report.

On 6 June 2006, the General Assembly of the OAS resolved to ask the Inter-American Juridical Committee to consider the research of the report presented in drawing up a document of recommendations to the Member States of the OAS regarding how to strengthen cooperation with the International Criminal Court. This Report – CJI/doc.256/07 rev.1, "Promotion of the International

Criminal Court" – was sent to the Permanent Council, which in turn forwarded it to the General Assembly.

Pursuant to a new request from the General Assembly contained in resolution AG/RES. 2279 (XXXVII-O/07), dated 10 March 2008, the rapporteur presented a "Report on Perspectives for a Model Law on State Cooperation with the International Criminal Court", CJI/doc.290/08 rev.1. This Report came together with a "Guide to the General Principles and Agendas for the Cooperation of States with the International Criminal Court", CJI/doc.293/08 rev.1.

The rapporteur's Report and the "Guide to the General Principles" were sent to the Permanent Council on 24 March 2008.

This Report deals with the preparations and advances made toward adopting national legislation on cooperating with the ICC, based on the Guide to the General Principles of the Inter-American Juridical Committee of the OAS and support and promotion of training of administrative, judicial and academic employees in Member States, pursuant to the mandate contained in the above-mentioned resolution AG/RES. 2505 (XXXIX-O/09). It also deals with the beginning of the mandate in respect to drawing up a model legislation on implementing the Rome Statute, particularly as regards typifying the crimes within the remit of the International Criminal Court.

III. CONTENTS OF THE REPORT CJI/doc.290/08 rev.1 DATED 3 MARCH 2008

Given that resolution AG/RES. 2505 (XXXIX-O/09), "Promotion of the International Criminal Court", adopted at the fourth plenary session held on 4 June 2009, decided to base itself on the *OAS Guide on Cooperation with the International Criminal Court*, it is deemed pertinent to make a general summary of its contents and those of the general explanatory Report.

The Guide started out with the following two points:

1. The project should bring together – but not be limited to – the already existing experience in national legislations, which were briefly summarized.

2. Since the treatment of the topic of cooperation with the Court in each legislation will have certain modalities that are peculiar to the internal juridical system, on occasion it will be solely up to the Committee to indicate that determined fields require development of the national procedures, notwithstanding that it is the domestic law proper that will be responsible for indicating them, based on its own democratic institutionality.

The diversity of and difference between organs and institutions that in each State may eventually be involved in enforcing provisions as regards cooperation with the Court, and the actual modalities of their actions, would advise in favor of a general perspective when drafting a model instrument, in order to avoid a proliferation of possibilities which moreover would not necessarily cover the whole gamut of options that exists in the States.

3. Still in this area, it must be remembered that a solution must be found that responds to the various common-law and civil-law systems that exist in the hemisphere, prevailing from the fact that there already exists a unifying element, namely the Rome Statute. Bearing in mind the different juridical systems that exist in the hemisphere, the bridge between one system and the other is then the normative of the International Criminal Court, as the uniform common regime.

4. It must not be forgotten that the inter-American system and the practice in the States contain mechanisms of cooperation, mutual assistance, execution of sentences and so on, which reflect a certain dynamic of cooperation that could facilitate the avenues of a law of implementation based – *mutatis mutandi* – on such experiences, without neglecting that cooperation with the Court often demands a special treatment that is not necessarily achieved by using the traditional figures and framework contained in other treaties, without the necessary adjustments.

5. The sense of a law of cooperation with the Court must be clearly understood. It does not substitute the Statute, nor does it replace what is already in place in an international treaty such as the Rome Statute. The idea is not to make restrictive changes, but rather to complement it, render it effective, endow it with internal procedures in those areas where national provisions are really needed. There where measures of national implementation are lacking and the norms of the Statute prove insufficient, that is where the true utility of the law is seen in all its splendor. Such procedures could not contradict, hinder or make the provisions of the Statute inoperative or futile.

6. From this perspective, it is not a question of laws of cooperation whose excessive regulations make it more troublesome or more difficult to attain the substantive objectives of the

Statute. It is clearly a matter of instruments to facilitate, accelerate and render effective the norms of the actual Statute in terms of collaboration. On adopting a determined procedure, the first question to be asked should be whether it really facilitates and favors the established cooperation. An affirmative answer is the best test of efficacy.

7. To render cooperation effective, it must be borne in mind that this lies not only in mechanically established procedures but rather entails a consultation system to respond to quite specific national situations and is essential insofar as it allows, in a spirit of collaboration and creativity, adequate solutions to be found for specific problems and prevents procedures from being paralyzed in case of difficulties.[1]

8. Another point of departure is that, given the complexity of the theme, it is important to simplify whenever possible. Some of the laws already emitted show a high degree of precision, austerity and certainty, while others demonstrate great development and have addressed the matter extensively, generously and with rigor. Perhaps it is for the better that the model legislation benefits from a balance that, without ignoring core themes, points to principles and agendas on matters that may need some reinforcement from the domestic institutional machine to make a determined norm of cooperation of the Statute effective, fill lacunas and complement the array of processes whenever they prove to be insufficient.

Any attempt to go further than this without taking into account the particularities of each national system risks offering solutions that might function in a certain juridical regime without necessarily working in others, or else reveal inconsistencies.

9. Identifying criminal norms, either by remission to the Statute or by their complete incorporation, is a very useful element for cooperation, but special care must be taken to complement them with the set of rules and principles relating, for example, to the res judicata (art. 20); applicable law (art. 21); 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.

10. The measures as to cooperation, though basically concentrated in Part IX relating to international cooperation and judicial assistance, are in effect complemented by a large number of situations and provisions elsewhere in the Statute which also require collaboration of the States or norms of national implementation. The Rome Statute, an absolutely integral and indivisible text, cannot see only one of its parts without taking the others into account, and the interaction between them as links of a whole that is indissolubly united in its common objective and purpose.

11. Cooperation with the Court must be understood in a broad sense, where the efforts to adjust internal legislations to the Statute are also forms of cooperation with the objectives of international criminal justice. Likewise, it should be remembered that the States can be active subjects of cooperation with the Court in a two-way process. In this sense, according to Article 93 paragraph 10.a), the Court can cooperate and lend assistance on the request of a Party State carrying out an investigation or support a sentence on conduct that constitutes a serious crime through arrangement with the internal law of the requesting State.

12. On adjusting internal legislations, one must bear in mind the need to attend to the set of international obligations assumed by each State, which is particularly important in the ambit of International Humanitarian Law with the Geneva Conventions of 1949 and Additional Protocol I, taking into account that crimes do not necessarily coincide with infractions in all cases and that the Statute codifies war crimes that do not appear on the list of grave infractions, and especially that Additional Protocol I enumerates some crimes that do not appear in the Rome Statute or else contemplate broader elements.

13. The States which are not Party to the Statute are not excluded from cooperation with the Court. Article 87 paragraph 5.a) provides that the Court can invite any State that is not Party to this Statute to lend the assistance specified in Part IX based on a special arrangement, an agreement with that State or any other appropriate form. At the discretion of the rapporteur, some of the so-called

[1] See, for example, the case of other forms of assistance in the Rome Statute, art. 93, “Other forms of cooperation”, paragraph 3, and art. 72, “Protection of national security information”.

"other forms of cooperation" may be preferred, using – *mutatis mutandi* –conventional internal mechanisms pertaining to general international criminal cooperation.

14. Article 86 of the Statute establishes a general obligation for States Parties to "cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court"; but this is done "in accordance with the provisions of this Statute". That is to say, in strict conformity with its provisions. Thus, national legislative developments must observe this same conformity, in keeping with the duty to cooperate.

Conformity does not mean that they cannot advance any further, but that they should respect at least the minimum standards set therein. It may even be desirable for the States to be allowed to cross these boundaries to the extent that they constitute real improvements and contributions to International Criminal Law, if that should be deemed convenient.

15. The worth of a model legislation lies in offering principles and agendas that make it possible for cooperation with the Court to function better on the national level, whenever possible, or else to indicate where and on which themes domestic development needs to be improved. Yet the idea is not necessarily limited to rendering the functioning of the Court more effective, but rather especially the fundamental superior exercise of domestic criminal jurisdiction concerning these crimes, in a broader concept of cooperation. Paragraph 6 of the Preamble of the Statute of the Court recalls that "it is the duty of every States to exercise its criminal jurisdiction over those responsible for international crimes".

16. It has been said above that it is not the aim of the International Criminal Court to substitute the national administration of justice, but rather that this should be capable of safeguarding and controlling the investigation, trial and punishment of those guilty of crimes according to the Statute. As far as possible, to put it in other words, the national judge is also the judge qualified to apply his jurisdiction in the field of international criminal law.

17. The legislation of Argentina, following the line of Spanish legislation, for example, confirms this assertion by claiming that the law has its radius of action "as provided in the Rome Statute" and its complementary norm. The procedures that establish the laws thus have a fundamentally supplemental relation to the Statute, that is, they develop what is not provided in it; otherwise, the prevalent procedure is what is indicated in the original instrument of the International Criminal Court.

18. It is equally important to deduce from these norms that the non-existence of an internal law on cooperation should be no impediment or justification for not complying with the obligations of the Statute. The objective is to ensure that provisions in the international sphere are properly reflected in internal law.

19. It must also be pointed out that in the case of States known to have enacted some type of law, these have not followed a uniform procedure. While in some cases this is a matter of specific laws that are exclusively related to the theme, others involve inclusions in substantive and processual codes or else mixed techniques. There has been no single way to implement the forms of cooperation of the Statute, as shown by the various initiatives. In some cases, the solution has been to resort to the technique of remitting to what is set forth in the Statute, whereas in other cases the option has been for a single, special legislation, as well as the technique of systematic implementation in various bodies of law.

With varying degrees of development, the laws adopted coincide in the basic purpose of ensuring the existence of internal procedures that guarantee cooperation, in general maintaining conformity with the Statute, in recommendable and praiseworthy efforts.

20. In his last Report, the rapporteur considered it more convenient at this stage of the Committee's works to draft an instrument with general characteristics centered on large principles[2] and identifying some of the areas where there is a need for national legislative development and offering, when necessary, agendas and general guidelines so that the internal laws themselves – having a framework – can implement their respective norms in the light of the peculiarities of the internal systems.

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[2] See, for example "Lineamientos en cooperación judicial con la Corte Penal Internacional" (Outlines of judicial cooperation with the International Criminal Court), of the Andean Commission of Jurists, dated February 2008.

This orientation is reinforced by the existence of different sorts of juridical systems in the hemisphere, such as the common-law and civil-law systems.

21. The Guide, as its name and contents indicate, is not an international treaty but rather a model instrument liable to constant revision and improvement, conceived to work as a parameter and framework that the States can adapt when necessary to their own legitimate particularities, always and whenever these do not affect the norm contained in the Rome Statute, the Elements of the Crimes and their Rules of Procedure and Evidence.

Attached to the rapporteur's Report was the instrument CJI/doc.293/08 rev.1 of 7 March 2008: "Guide to the General Principles and Agendas for the Cooperation of States with the International Criminal Court".

The Guide to the General Principles and Agendas for the Cooperation of States with the International Criminal[3] Court establishes the purpose of ensuring the existence of internal procedures with a view to full cooperation between the States 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.

- It assigns competences to organs of the States for such purposes and establishes procedures applicable to cooperation not provided in the Rome Statute and its complementary norms.
- Supplementary to the provisions of the Rome Statute and its complementary norms, it contemplates that the integrity of the procedures already provided in the Rome Statute and its complementary norms should be respected.
- In its scopes, the 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.
- It is also applicable to crimes against the administration of justice, as set forth in article 70 of the Rome Statute.
- 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.
- 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.
- Adapting the types of crime to the domestic law must be in keeping with the obligations springing from the Geneva Conventions of 1949 and the Additional Protocol I of 1977.

As for its sphere of application, it contemplates the Universal Obligation of Judging, according to which the States shall exercise their jurisdiction in respect to any person found within 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 those States does not determine extradition to a third State or surrender to the International Criminal Court.

It contains a general obligation of cooperation according to which the organs of the States 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.

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[3] The agendas and principles contained in this instrument are simply for the purpose of indicating what have been considered to be core themes and are not intended to exhaust or limit the various forms of cooperation and legal assistance with the International Criminal Court and its principles.

- Requests for cooperation shall be attended to expeditiously and in good faith.
- 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.
- 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.
- The consultation processes established in the Rome Statute shall be used 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.
- Upon providing cooperation, the States shall take into account possible arrangements for the protection of persons, including victims and witnesses.
- Consider a system of broad diffusion of information without affecting the limited exceptions previously set forth by law.

The States 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 domestic law.

The Guide also considers the States' appointing competent bodies; remitting a situation to the Office of the Comptroller; the required waiver by the Comptroller; impugnation of the Court's competence or the admissibility of the cause; requests for detention and surrender of persons to the International Criminal Court; field investigation by agents of the International Criminal Court; serving sentence in the territory of a Party State to the Rome Statute; non-prescriptibility and the question of amnesties and pardons.

- It also contains agendas on responsibility of superior and hierarchical obedience; the system of immunities and the questions related to education and training.
- Part II of the Guide is dedicated to those States that are still not Party to the Rome Statute. Such States 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.
- It also contemplates that the States may adapt, with the changes deemed necessary and pertinent, and taking into account its condition as non-Party to the Rome Statute, the previous provisions of this Guide.
- The States may also designate an organ (in accordance with the law and the modalities provided therein) to attend to and foster cooperation with the International Criminal Court.
- It is suggested that the States under this condition shall undertake studies on the domestic legal basis and international instruments that bind them juridically to lend cooperation and assistance to the Court in the areas provided in Part 9 of the Rome Statute, and provide ratification of such.

IV. SPECIAL WORKING SESSIONS OF THE CAJP

Pursuant to the Report presented by the Department of International Law, the Working Session on the International Criminal Court (CP/CAJP-2700/09, 17 March 2009) was held on Monday 8 December 2008, organized by the Committee on Juridical and Political Affairs (CAJP) with the support of the Department of International Law of the Secretariat for Legal Affairs of the OAS.

This session took into consideration the following mandates:

> 10. Request the Permanent Council that, with the support of the Department of International Law, a working session be held on the adequate measures that the States should take to cooperate with the International Criminal Court, **to include a segment of high-level dialogue among the Member States….**

12. Request the Secretary General to promote in the headquarters of the Organization of the American States, with the sponsorship of the interested Member States and other bodies and organizations, activities to commemorate the tenth anniversary of the adoption of **the Rome Statute of the International Criminal Court.**[2/]

Presentations were made for three working panels and for the segment dedicated to the celebration of ten years of adoption of the Rome Statute.

In the panel "Adequate measures that the States should take to cooperate with the International Criminal Court in investigating, suing and sanctioning those responsible for committing war crimes, crimes against humanity and genocide" the following ideas were given special attention:

- *To congratulate the government of Surinam on having ratified the Rome Statute.*
- *To urge respect for the independence of the Court, free from political interference.*
- *To stress the transcendence of the principle of complementarity and cooperation.*
- *To typify the crime of aggression in a clear and exhaustive manner.*
- *To adopt an agreement on cooperation between the OAS and the International Criminal Court to formalize the work and strengthen the existing links between both bodies. In this sense, several delegations exhorted both institutions to work on drafting this instrument.*
- *To lend support to any action on behalf of the standardization of the International Criminal Court.*[3]

It is also appropriate to mention some of the specific ideas summarized and presented by the delegations:[4/]

The delegation of Mexico expressed interest in sharing their experience on the adoption of the Agreement on Privileges and Immunities with those States which have not yet done so or are in the process of doing so. They emphasized the importance of sharing with other members the experiences of each State to join the Statute and standardize its national legislation. They also urged ratification of the Agreement on Privileges and Immunities of the International Criminal Court.

The delegation of Canada in turn encouraged universal ratification of the Rome Statute and informed the meeting of the country's work to diffuse and in particular contribute to the financing of a Manual on the Rome Statute in several languages.

The delegation of the United States explained the country's opinion in respect to the International Criminal Court.

The delegation of Costa Rica reiterated its firm and unconditional support of the Office of the Comptroller and underscored the substantial progress of the situation in the Democratic Republic of the Congo; it manifested its concern for Darfur and also its discontent at the scant collaboration received by the governmental authorities of the Sudan in respect to surrendering people who *presumably had committed* violations and war crimes. On the other hand, Costa Rica underlined its firm support of the Court, in particular the Office of the Comptroller, besides expressing its concern about the position of the United Nations Security Council in respect to the Court.

The delegation of Ecuador emphasized the advances made in the Political Constitution recently approved in the country and recognized the need to typify the crime of aggression in a clear and exhaustive manner. Finally, it urged recognition of the right to legitimate defense within the principles and procedures clearly set out in International Law such as in the Charter of the United Nations, especially with regard to compliance with the requirements of necessity and proportionality.

The second Panel "Ratification and implementation of the Rome Statute and the Agreement on Privileges and Immunities" addressed the factors used to measure the level of fulfillment by the States as regards ratification or adhesion, as well as implementation of the Rome Statute in domestic legislation. Reference was also made of the principles of complementarity and cooperation with the International Criminal Court by means of concrete illustrations. Finally, mention was made of the relationship between the Court and compliance with international criminal law as it applies to the

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2 ORGANIZATION OF AMERICAN STATES. PERMANENT COUNCIL. COMMITTEE ON JURIDICAL AND POLITICAL AFFAIRS. **Report: Working Meeting on the International Criminal Court [AG/RES. 2364 (XXXVIII-O/08)]**. CP/CAJP-2700/09, 17 March 2009, p. 1. This is a non-official translation.

3 *Idem*, p. 3.

4 *Idem*, p. 4-5.

States. As for the Agreement on Privileges and Immunities, it is indispensable that those concerned should be afforded all the necessary guarantees to carry out their functions, and States are urged to execute this instrument and put it in place.

The third work panel "Action of international bodies /organizations in respect to cooperation with the International Criminal Court" ended by emphasizing the following ideas:

- *To request the States that have not yet done so, to become Party to the Rome Statute and the Agreement on Privileges and Immunities.*
- *To urge States to contribute to effective universality, protection and maintenance of international security.*
- *To congratulate the Court and the Office of the Comptroller on the work carried out.*[5/]

The report mentions individually some of the ideas presented by the delegations present:

The delegation of Argentina ratified its support for the efforts of the international community addressed to strengthening and standardizing the International Criminal Court. It also underlined the importance of cooperation with the International Criminal Court, and in this context suggested a possible agreement between itself and the OAS.

The delegation of Mexico urged providing for more space for delegations to participate at the next Working Meetings to allow them to take a stance on each theme.

The delegation of Venezuela thanked the panel members and asked for this type of working meeting to continue to be held with experts who present a broad and objective view in treating the themes. It ratified the commitment of the Bolivarian Republic of Venezuela against grave crimes that affect world security, and mentioned that its country will go on working to maintain the institutionality and independence of the Court.

The delegation of Uruguay stressed the positive aspects observed in the action of the States that contribute to repression of crimes against humanity. It also supported adopting an agreement on cooperation between the OAS and the Court.

The delegation of the Dominican Republic referred to the work undertaken by the Secretariat for Foreign Affairs to promote International Humanitarian Law, specifically the organization of meetings, with national and international employees, to facilitate typifying war crimes, genocide and crimes against humanity in the Criminal Code and to enable domestic legislation to adjust to international instruments. Likewise, the delegation announced that its country has submitted the Agreement on Privileges and Immunities of the Court to the appreciation of the National Congress.

The delegation of Colombia recognized and congratulated the progress made by the Court, in particular the fact that for the first time a head of State has been made responsible. It also commented on the importance of the principles of cooperation and complementarity of the States.

Finally, the delegation of Chile mentioned that its country subscribed to the Rome Statute in 1998, and at present is in the process of ratifying it (now accomplished[6], which requires constitutional and legal reforms now underway, to which end it reiterated the political will to conclude this process as soon as possible. In this sense, it supported conclusion of an eventual agreement between the OAS and the International Criminal Court, which would reaffirm the cooperation of the organization with the work of the Court.[7]

V. PREPARATIONS AND ADVANCES ON PROMOTING THE GUIDE OF PRINCIPLES

5.1 Ratifications of the Rome Statute in the Inter-American System

Based on the last report, two countries, Surinam and Chile have become Parties to the Rome Statute. The 25 countries of the Inter-American System that have now ratified the Rome Statute are:

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5. ORGANIZATION OF AMERICAN STATES. PERMANENT COUNCIL. COMMITTEE ON JURIDICAL AND POLITICAL AFFAIRS. **Report: Working Meeting on the International Criminal Court [AG/RES. 2364 (XXXVIII-O/08)]**. CP/CAJP-2700/09, 17 March 2009, p. 6. This is a non-official translation.

6 Additional explanation, since the rapporteur's Report comes after this event.

7 ORGANIZATION OF AMERICAN STATES. PERMANENT COUNCIL. COMMITTEE ON JURIDICAL AND POLITICAL AFFAIRS. **Report: Working Meeting on the International Criminal Court [AG/RES. 2364 (XXXVIII-O/08)]**. CP/CAJP-2700/09, 17 March 2009, p. 6-7. This is a non-official translation.

Antigua and Barbuda (18 June 2001), **Argentina** (8 February 2001), **Barbados** (10 December 2002), **Belize** (5 April 2000), **Bolivia** (27 June 2002), **Brazil** (14 June 2002), **Canada** (7 July 2002), **Colombia** (5 August 2002), **Costa Rica** (7 June 2001), **Dominica** (12 February 2001), **the Dominican Republic** (12 May 2005) **Ecuador** (5 February 2002), **Guiana** (24 September 2004), **Honduras** (1 July 2002), **Mexico** (28 October 2005), **Panama** (21 March 2002), **Paraguay** (14 May 2001), **Peru** (10 November 2001), **Saint Kitts and Nevis** (22 August 2006) **San Vicente and The Grenadines** (3 December 2002), **Trinidad and Tobago** (6 April 1999), **Uruguay** (28 June 2002), **Venezuela** (7 June 2000), **Surinam** (15 July 2008) and **Chile** (29 June 2009).

The 10 countries of the Inter-American System that have not ratified the Rome Statute are: **the Bahamas, Cuba, Haiti, Jamaica, Saint Lucia, United States of America, Grenada, Guatemala, Nicaragua** and **El Salvador.**

5.2 Ratifications of the APIC

Two countries (Honduras and Colombia) have joined the Agreement on Privileges and Immunities of the International Criminal Court (APIC):

The Agreement on Privileges and Immunities of the ICC has been ratified by 13 countries of the Inter-American System, namely: **Argentina** (1 February 2007), **Belize** (14 September 2005), **Bolivia** (20 January 2006), **Canada** (22 June 2004), **Ecuador** (19 April 2006), **Guiana** (16 November 2005), **Panama** (16 August 2004), **Paraguay** (19 July 2005), **Trinidad and Tobago** (6 February 2003), **Uruguay** (1 November 2006), **Mexico** (27 September 2007), **Honduras** (1 April 2008) and **Colombia** (15 April 2009).

5.3. Working Session

Also worth mentioning as a new element of great importance are the results already referred to in point IV of this Report of the Working Session on the International Criminal Court [AG/RES. 2364 (XXXVIII-O/08)] held on 8 December 2008 in the headquarters of the Organization.

Special mention should be made that such sessions have been occasions for updating the legislative advances on the part of the States in respect to implementation of the Rome Statute. At this session was reiterated the appeal to the States to send to the Inter-American Juridical Committee updated information on legislative progress and identification of authorities, as well as the themes especially requested concerning collaboration with the Committee.

5.4 List of Organizations

An overall list was drawn up of the organizations and personalities who have taken part in the five working sessions on the International Criminal Court in order to request their cooperation in fulfilling the resolutions of the General Assembly to promote the adoption of cooperation laws and undertake qualification processes.

5.5 Letter of the Chairman of the IJC

The Chairman of the IJC, Jaime Aparicio, wrote to all the Permanent Missions to the Organization of American States in order to express the following:

In its resolution AG/RES. 2364 (XXXVIII-O/08), the General Assembly of the OAS requested the Inter-American Juridical Committee, based on its proposal to draw up a model legislation on cooperation of the States with the International Criminal Court, to promote the adoption of this model legislation among the States that do not yet have a law on the matter, and to support and promote in member states the training of administrative, judicial and academic employees to this end.

In light of said mandate, in its Resolution CJI/RES. 157 (LXXIV-O/09) "International Criminal Court", the Inter-American Juridical Committee gathered in March 2009 in Bogotá, Colombia, resolved, among other things, to "commission its Chairman to address the Party States to the Rome Statute that have not adopted legislation on cooperation with the International Criminal Court in order to place at its disposition the work of the Committee on the matter, as well as any services of technical assistance that the Secretariat and the rapporteur and other members of the Committee can possibly offer". (…)

In addition, I very respectfully beg your assistance to "identify and establish relations of collaboration with the sectors of the government in each country involved in the theme of cooperation with the International Criminal Court, including the Ministries of Justice and Foreign Affairs, among others and as the case may be, aiming at fostering adoption of the corresponding laws of cooperation and the efforts to qualify personnel on the matter". In this respect, we request that you send the

necessary information to the Secretariat of the Inter-American Juridical Committee in Rio de Janeiro at mtmcji@terra.com.br."

The works of the Committee were resent in the documents attached to this letter.

To date, only Belize has answered this communiqué.

5.6. Communiqués to organizations

A very similar communiqué – mutatis mutandis – was sent to the international organizations, as follows:

IN ENGLISH	**IN SPANISH**
Richard Dicker Director of the Universal Justice Program of the Human Rights Watch 350 Fifth Avenue, 34th Floor New York, NY 10118-3299	Jaime Villarroel Ferrer President of the Court of Justice of the Andean Community (CAN) Calle Augusto Egas No. 33-65 y Bosmediano Sector Bella-Vista - Quito, Ecuador
Cheryl Thompson-Barrow General Counsel, Legislative Drafting Facility Legal Services, CARICOM Secretariat, Turkeyen, Greater Georgetown, GUIANA	Paulina Vega González Coordinator for Latin America and the Caribbean of the Coalition of Non-Governmental Organizations for the International Criminal Court (CICC), PO Box 19519, 2500 CM, The Hague The Netherlands
Geoff P. Loane Head of the Regional Delegation of the United States and Canada, International Committee of the Red Cross (ICRC) 1100 Connecticut Avenue, NW Suite 500, Washington, District of Columbia 20036	Carlos Antonio Guerra Gallardo President of the Central-American Court of Justice, System of Central-American Integration (SICA), Bolonia #1804, Managua - Nicaragua
Deborah Ruiz Verduzco Senior Programme Officer, International Law and Human Rights Programme, Responsible Parliamentarians for Global Action (PGA) The Hague Office, Laan van Meerdervoort 70, 2517 AN The Hague, The Netherlands	Juan E. Méndez President, International Center for Transitional Justice (ICTJ) 5 Hanover Square, 24th Floor, New York, NY USA 10004
William R. Pace Convenor Coalition for the International Criminal Court c/o WFM, 708 3rd Avenue, 24th Floor New York, NY 10017	Oscar López Goldaracena Human Rights Watch 21 de Septiembre 2508 Montevideo - Uruguay
	Luis Enrique Aguilar COMISION ANDINA DE JURISTAS Área de Derechos Humanos **Los Sauces 285, Lima 27 -** Perú
	Katya Salazar Executive Director DPLF 1779 Massachusetts Avenue, N.W, Suite 510A, Washington, D.C., 20036

5.7. Cooperation Project

A project was prepared on Strengthening Cooperation of the States with the International Criminal Court concerning legislation, to last an estimated 3 years beginning February 2010 and ending February 2013, for the purpose of strengthening the capacity of State bodies in respect to legislative cooperation of the States with the ICC. Two stages are planned:

a) Seminar or Course on the perspectives of the model legislation of the Inter-American Juridical Committee, addressed to a first group of Spanish-speaking countries that have ratified the Rome Statute. Convocation will be done in such a way that each country appoints 4 high-level employees connected to the Ministries of Justice, Foreign Affairs, the Judicial Sector and Parliament. The 15 countries initially selected will be: Venezuela, Costa Rica, Honduras, Argentina, Paraguay, Peru, Ecuador, Panama, Brazil, Bolivia, Uruguay, Colombia, Mexico, the Dominican Republic and Chile. The participants shall answer a questionnaire on the advances made in their countries at the moment the training comes to an end. The participation of those States that have not yet ratified the Statute may eventually be contemplated.

b) Seminar or Course on the perspectives of the model legislation of the Inter-American Juridical Committee, addressed to a second group of English-speaking countries that have ratified the Rome Statute. Convocation shall be done in such a way that each country appoints 4 high-level employees connected with the Ministries of Justice, Foreign Affairs, the Judicial Sector and Parliament. The 10 countries selected for this second activity will be: Trinidad and Tobago, Belize, Canada, Dominica, Antigua and Barbuda, San Vicente and The Grenadines, Barbados, Guiana, San Kitts and Nevis, and Surinam. The participants must answer a questionnaire on the progress made by their country at the moment they terminate training. The participation of those States that have not yet ratified the Statute may eventually be contemplated.

In principle, the expected results consist in:

i) 96 high-level employees of the Ministries of Justice, Foreign Affairs, the Judicial Sector and Parliament qualified in the sphere of cooperation of the States with ICC, in order to enable national legislations to act in coherence with the Rome Statute and so that national employees can interpret and properly apply the juridical instruments so as to facilitate cooperation with the ICC.

ii) Another desired result consists in "A follow-up mechanism implemented on the national development made on the legislative, administrative and judicial level in the countries whose employees received training".

5.8 Offer of collaboration

The members of the Inter-American Juridical Committee from Venezuela, Jamaica, Peru (host of the next regular session of the IJC), among others, offer the collaboration of their countries for immediate actions in qualifying and training in matters related to the International Criminal Court or to promote adoption of laws based on the Guide of Principles of the IJC.

5.9 Possible collaboration

The rapporteur and the Department of International Law have contacted organizations such as the Coalition for the International Criminal Court and Parliamentarians for Global Action, among others, to advance possible forms of collaboration. Likewise, several organizations have been contacted during the Committee's regular sessions.

VI. MODEL LAWS FOR CRIMES

The CJI proposes to work on drafting a model legislation on implementation of the Rome Statute, particularly in respect to typification of war crimes. To this end, it intends to consult the International Committee of the Red Cross and other organizations, following the orientation that it has been working on. Similarly, it intends to take advantage of the work already being carried out by the Committee in the area of International Humanitarian Law and the mandate of the General Assembly contained in Resolution AG/RES. 2507 (XXXIX-O/09), "Promotion of and Respect for International Humanitarian Law", as below:

> To request the Inter-American Juridical Committee (CJI) to continue preparing and to propose, as soon as possible, model laws to support the efforts made by member states to fulfill obligations under international humanitarian law treaties, on the basis of priority topics determined in consultation with the member states and the International Committee of the Red Cross…

2. Promotion and strengthening of democracy

Resolutions

CJI/RES. 159 (LXXV-O/09)	The Essential and fundamental elements of representative democracy and their relation to collective action within the framework of the Inter-American Democratic Charter
CJI/RES. 160 (LXXV-O/09)	Follow-up on the application of the Inter-American Democratic Charter
Annex: CJI/doc.317/09 corr.1	Follow-up on the application of the Inter-American Democratic Charter (presented by Dr. Jean-Paul Hubert)

At its 62nd regular session (Rio de Janeiro, Brazil, March 2003), the Inter-American Juridical Committee decided to include in its agenda the item on the "Implementation of the Inter-American Democratic Charter". Dr. Eduardo Vio Grossi introduced document CJI/doc.127/03, entitled "Democracy in the Inter-American System: Follow-up Report on Applying the 'Inter-American Democratic Charter'" and was appointed rapporteur of the topic. The Committee decided to consider the document at its next regular session.

At its 63rd regular session (Rio de Janeiro, Brazil, August 2003), the Inter-American Juridical Committee adopted resolution CJI/RES. 64 (LXIII-O/03), entitled "Application of the Inter-American Democratic Charter", in which it noted that, to date, the agenda of the competent organs of the Organization contained no request for the implementation of the mechanisms provided for in the Inter-American Democratic Charter and decided that the item should remain on its agenda as a follow-up item. Lastly, it requested the rapporteur, Dr. Eduardo Vio Grossi, to submit a new report on the topic at the Committee's 64th regular session.

The General Assembly during its thirty-fourth regular session (Quito, Ecuador June, 2004), through resolution AG/RES. 2042 (XXXIV-O/04), requested the Inter-American Juridical Committee, within the framework of this topic, to analyze, in light of the provisions contained in Chapter III of the Inter-American Democratic Charter, the legal aspects of the interdependence between democracy and economic and social development, bearing in mind, amongst other things, the Recommendations of the High Level Meeting on Poverty, Equity and Social Inclusion contained in the Declaration of Margarita, the Monterrey Consensus, the Declarations and Plans of Action in the Summits of the Americas, and the purposes contained in the Declaration of the Millennium of the United Nations.

At its 66th regular session (Managua, Nicaragua, February 28–March 11, 2005), the Inter-American Juridical Committee decided to add Dr. Antonio Fidel Pérez as one of the topic's rapporteurs. Dr. Luis Herrera Marcano recalled that the Juridical Committee had kept this topic on the agenda as a follow-up topic, should a new mandate from the General Assembly be given, or should the need arise for the Committee to review some specific topic.

At its 35th regular session (Fort Lauderdale, United States of America, June 2005), the General Assembly did not assign any tasks on this topic to the Inter-American Juridical Committee.

During the 67th regular session of the Inter-American Juridical Committee (Rio de Janeiro, Brazil, August 2005), the co-rapporteurs of the theme, Drs. Eduardo Vio Grossi and Antonio Fidel Pérez felt the need to wait for some juridical consultation on the part of the Permanent Council. Additionally, the Juridical Committee decided to keep this topic on its agenda as a follow-up topic and to change the title of the topic to "Follow-up on the application of the Inter-American Democratic Charter," without offering further comments on the matter.

At its 68th regular session (Washington, D.C., United States of America, March 2006), the Inter-American Juridical Committee did not consider the topic.

At its 69th regular session (Rio de Janeiro, Brazil, August 2006), the Inter-American Juridical Committee did not consider the topic either.

At its 70th regular session (San Salvador, El Salvador, February-March 2007), the Inter-American Juridical Committee adopted resolution CJI/RES. 132 (LXXI-O/07), "Follow-up on the application of the Inter-American Democratic Charter", in which it resolved to revisit this item on its agenda. It also decided to interpret the conditions and the means by which the Inter-American Democratic Charter can be invoked, based on the OAS Charter and other basic legal instruments concerning the defense and promotion of democracy in the Americas. Finally, Drs. Ana Elizabeth Villalta Vizcarra, Jaime Aparicio, Mauricio Herdocia Sacasa, Ricardo Seitenfus, Eduardo Vio Grossi, Freddy Castillo Castellanos and Jean-Paul Hubert were named as rapporteurs for the topic. Dr. Eduardo Vio Grossi presented an explanation of his vote on this resolution (CJI/doc.281/07), and Dr. Antonio Fidel Pérez presented an explanation of his dissenting vote (CJI/doc.284/07).

On April 10, 2007, the OAS Office of International Law forwarded document CP/doc.4184/07, "The Inter-American Democratic Charter: Report of the Secretary-General pursuant to resolutions AG/RES. 2154 (XXXV-O/05) and AG/RES. 2251 (XXXVI-O/06)," to the members of the Juridical Committee.

During the 71st regular session of the Inter-American Juridical Committee (Rio de Janeiro, Brazil, August 2007), Dr. Antonio Fidel Pérez presented document CJI/doc.264/07, "Report concerning the Report of the Secretary General of the Organization of American States on the implementation of the Inter-American Democratic Charter." In turn, Dr. Seitenfus presented an unnumbered document on the close relations that exist between democracy and freedom of the press. The decision on whether to leave the topic on the agenda was deferred until the next session.

During the 72nd regular session of the Inter-American Juridical Committee (Rio de Janeiro, Brazil, March 2008), the Chair of the Committee, Dr. Jean-Paul Hubert, stated that there was no current mandate for the Committee on this topic and that the rapporteurs had not submitted reports on it, either. At Dr. Mauricio Herdocia's request, the discussion on this topic was recorded verbatim, and it can be found in Minutes.

During the 73rd regular session of the Inter-American Juridical Committee (Rio de Janeiro, August 2008), Dr. Mauricio Herdocia supported Dr. Ricardo Seitenfus' proposal that the rapporteur consider the preventive value of the Inter-American Democratic Charter, namely, the value of anticipating the causes and roots of conflicts so that they can be prevented.

During the 74th regular session of the Inter-American Juridical Committee (Bogota, March 2009), Dr. Jean-Paul Hubert, rapporteur on the subject, presented his report entitled "Follow-Up on Application of the Inter-American Democratic Charter" (CJI/doc.317/09). At the request of the members of the Committee, the exchange of views on the subject was recorded verbatim in Record No. 6 of the minutes of that session. It was decided that the report would be discussed again at the next regular session of the Inter-American Juridical Committee.

During the 75th regular session of the Inter-American Juridical Committee (Rio de Janeiro, Brazil, August 2009), Dr. Jean-Paul Hubert gave an overview of the origin of the topic within the Committee, as was proposed by Dr. Eduardo Vio Grossi in 2003. He recalled that on several occasions, it had been said that the Committee should not get involved with what was essentially a political matter. However, bearing in mind the Secretary General's report, his visit to the Committee, and his class during the Course on International Law at which he urged the Committee to continue its work on this topic, the Rapporteur prepared another document, which was presented at the Bogotá session. In connection with this, Dr. Hubert noted his concern at the adoption, by the General Assembly in Honduras, of a resolution noting the importance of the topic (without issuing any mandates), and urged the Committee to continue with its study of the matter. He inquired about the use the Committee would make of the document presented.

In turn, the Chairman spoke of the two documents prepared by the rapporteur, Dr. Jean-Paul Hubert, which deal in depth with monitoring the application of the Inter-American Democratic Charter; he also stated that at this time, the Committee should work on a more specific topic, such as the essential elements of democracy in light of OAS documents as well as those adopted by other bodies, such as Mercosur and the Rio Group.

Dr. Jean-Paul Hubert stated that those texts had already been debated extensively and that it was not necessary for the Committee to address the concept of democracy, which is already set out in the OAS Charter and in the Democratic Charter. He also noted that the Committee had already produced documents with a great impact and that the topic consequently demanded more specific action with the approval of a text containing all the comments made to date.

Dr. Mauricio Herdocia agreed that it was essential to address the specific matters arising from the two reports presented by Dr. Hubert. He proposed that the final document should allow those reports to be sent to the Permanent Council and, along with them, the essential elements that the Committee might develop.

He therefore also suggested that the draft resolution should set out the problems detected that affect democracy without constituting a *coup d'état* in the traditional sense. In recent cases, it has been the executive branch that has affected other branches of government. To achieve this, other methods for overcoming objective difficulties were needed, so that third parties unconnected to the executive branch can report incidents to the OAS's political bodies.

The Chairman supported the idea of refraining from attempting to define the concept of democracy, and instead said that the Committee should set about interpreting the essential elements of democracy, with the challenge of covering the gaps in the Charter and, as far as possible, overcoming them. In referring to the elements of representative democracy, what is involved is not only traditional coups d'état, but also collective action against any threat that could upset the legitimate exercise of power by the other branches of government and even other institutions: such as the case in Nicaragua, where the electoral institute is a supreme power of the State.

He stressed that Article 3 of the Inter-American Democratic Charter has already clearly defined the essential elements of representative democracy, including the separation of powers, human rights, and free elections: in other words, those components without which a democratic government cannot exist. At this juncture, an additional step must be taken to allow the Juridical Committee to tie the essential elements of democracy in with the concept of a serious alteration of the democratic order, as set out in Article 19 of the Inter-American Democratic Charter, and thus obtain a mechanism for responding collectively to any serious breach of those essential elements of representative democracy.

The first task of the study would therefore be to distinguish between serious alterations and interruptions of the democratic order, with the latter implying a traditional *coup d'état* and the former affecting the essential elements of representative democracy expressly identified in Article 3 of the Inter-American Democratic Charter. Thus, a serious alteration would have the following characteristics: it would be serious and systematic, and there would be no mechanism under domestic law for remedying it.

Dr. João Clemente Baena Soares said he agreed with publishing Dr. Hubert's work through the OAS's institutional channels, both in the member states and beyond the Hemisphere. He proposed that the document to be produced as the conclusion of the Rapporteur's efforts should not be philosophical, but instead practical in nature. In connection with this, he expressed his interest in studying the judiciary, the only branch of government which is not elected but which ultimately has a decisive influence on the democratic order. He stressed that individuals are the ultimate target of all political and juridical discussions and therefore emphasized that the Committee's work should not lose focus, through an excess of either academic zeal or pragmatism. He concluding by calling attention to the title of the topic, since follow-up on the application of the Inter-American Democratic Charter implied political action, not juridical, and he therefore suggested following the Chairman's proposal, without citing specific cases, of invariably basing the CJI's opinions on solid legal foundations, to avoid their being misinterpreted by political opinion.

The Chairman clarified that he had at no time suggested working on the concept of democracy, but he did reiterate the comments already made about working on the interdependent juridical elements that are essential for a democratic system to function. The relationship to be addressed is thus the one that exists between the Inter-American Democratic Charter and the rule of law. He suggested the creation of a working group that would submit a draft to the plenary.

Dr. Fabián Novak Talavera, after agreeing with the comments already made, expressed his opinion that the document to be adopted should not only reaffirm the elements that must be present in any democratic regime, but should also indicate that democracy exists provided that it manifests itself both vertically and horizontally: in other words, democracy must be such in its electoral origin but also in the exercise of power. He also called attention to the principle of nonintervention, stating that it reaches its limit when representative democracy or its components are undermined. Finally, he proposed creating a working group to prepare a draft resolution.

Dr. Freddy Castillo Castellanos supported both the previous comments and the creation of a working group.

Dr. Guillermo Fernández de Soto said that disagreement with the essential elements of democracy was not possible, since they were clearly defined in Articles 2, 3, and 4 of the Inter-American Democratic Charter, which speak of the rule of law and of the fundamental elements for the exercise of democracy. Agreeing that the aim was not to conduct a political examination of current circumstances or particular situations, they were the essential principles that must be observed by all, without which democracy cannot be fully exercised.

Dr. Jean-Michel Arrighi reminded the meeting that the elements of democracy had already been defined by the Fifth Meeting of Ministers in 1959. The problem arises when a grave alteration of those elements takes place. The OAS system offers mechanisms for breakdowns in the human rights that are covered by the Convention. Similarly, mechanisms exist for elections in which fraud has been perpetrated. He thought it would be useful for the Committee to readdress the topic of the independence of branches of government, such as the independence of the judiciary; in other words, to conduct specific studies to determine the parameters that exist in relations between judiciary and the other branches of government.

Consequently, a working group was set up, comprising Drs. Jean-Paul Hubert, Jaime Aparicio, Ana Elizabeth Villalta Vizcarra, Fabián Novak Talavera, and the rapporteur, Mauricio Herdocia Sacasa. The rapporteur presented a preliminary document for consideration by the plenary on August 11: document CJI/doc.332/09 rev. 1, "Draft Resolution: Essential and fundamental elements of representative democracy and their relationship with collective action under the Inter-American Democratic Charter."

He explained that the Working Group thought it was important to take an additional step with the interpretation of the Inter-American Democratic Charter, pointing to the existence of those essential elements and fundamental components and to their relationship with the rule of law. Without them, a democratic order in the Americas could not exist. He clarified that the Working Group had focused basically on texts already approved by the General Assembly or included in the Inter-American Democratic Charter, and on documents adopted by the General Assembly, such as the Declaration of Managua on the promotion of democracy and development.

Emphasis was placed on the articles of the Inter-American Democratic Charter that enshrine the right of the peoples of the Americas to democracy and the obligation of promoting and defending it and, of course, on the fact that democracy is essential as a general framework for the social, political, and economic development of the peoples of the Hemisphere. Reference was made to Article 2 of the IADC, as the article that connects the effective exercise of representative democracy with the rule of law, as well as to Articles 3 and 4, which set out the essential elements of representative democracy and the basic elements for the exercise of democracy.

In addition, reference was made to the CJI's resolution of 1995, to the Secretary General's Report on the Inter-American Democratic Charter, to the reports prepared by Dr. Jean-Paul Hubert on the juridical aspects of the interdependence between democracy and economic and social development and on the follow-up to the application of the Inter-American Democratic Charter, and to the report "Improving the administration of justice in the Americas."

Similarly, a detailed analysis of each item of the resolution was submitted, emphasizing the principles and values that make up democracy and on which those items are based. Finally, the importance of the 1959 Declaration of Santiago de Chile was recalled, along with the relationship that exists between alterations of the democratic order and an assessment of the status of the essential elements and

fundamental components of democracy. The Chairman then opened the session to hear the members' opinions.

Dr. Freddy Castillo Castellanos said that the draft resolution as presented quoted Article 2 of the Inter-American Democratic Charter only in part; he thought it should do so in full because that article includes the fundamental principle of participation by the citizenry in strengthening democracy.

He also thought that paragraph 1 of the draft resolution, stating that the Democratic Charter was "inseparable" from the Charter of the Organization of American States could pose problems in that it could be interpreted as meaning that we hold the former to be binding by reason of being an "inseparable" part of the latter and, for that reason, he proposed deleting that phrase.

Dr. David P. Stewart addressed a number of points that seemed unclear to him and questioned the central aim of the draft resolution, stating that it needed a greater degree of precision if the goal was to interpret the Inter-American Democratic Charter. If that was not the case – in other words, if new elements for interpreting the concept of representative democracy were being specified – they needed to be more explicit in terms of the progressive development they represent. As he saw it, important elements, such as education, freedom of expression, and the right of assembly, should not be omitted. Thirdly, he stressed the bond between the rule of law and representative democracy, since the language used in Article 4 could be interpreted as meaning that a democratically elected government could act undemocratically. He asked whether that meant that a government would be acting unlawfully or whether, doing so under the rule of law, it would be acting undemocratically. In his opinion, the most important aspect of the draft should be its study of breakdowns in the democratic order. Finally, he made available to the Working Group a document prepared by the Organization for Security and Co-operation in Europe, on the occasion of the coup against Gorbachev in Moscow, which contains language on this question, principally on the subversion of the democratic order under arguments alleging a state of emergency; he expressed his hope that it would be of use to the rapporteurs.

The Chairman clarified that the goal of the resolution was to offer a juridical interpretation, focusing on the essential elements and fundamental components of representative democracy and on their relationship with collective action under the framework of the Inter-American Democratic Charter.

The members noted the need to identify the Organization's basic documents dealing with democracy, since they should not be considered separate instruments. They stressed the need for the Committee to take a position on that question.

Finally, it was agreed that the Working Group would proceed to review the draft resolution to reflect the comments made by the plenary. Thus, following a brief break, a reviewed version of the original proposal was submitted and approved, as "Essential and fundamental elements of representative democracy and their relationship with collective action under the Inter-American Democratic Charter" [CJI/RES. 159 (LXXV-O/09)].

It was also decided to prepare a briefer text for distribution to the press and publication on the web page of the OAS. It should also be noted that the Chairman called for a vote on the draft resolution on "Follow-up on the application of the Inter-American Democratic Charter" presented by Dr. Jaime Aparicio, which was adopted unanimously on August 12, 2009 [CJI/RES. 160 (LXXV-O/09)]. That resolution is accompanied by Rapporteur's document CJI/doc.317/09 corr.1, "Follow-up on the application of the Inter-American Democratic Charter," of March 19, 2009.

Both resolutions and the corresponding document are transcribed in the following paragraphs.

CJI/RES. 159 (LXXV-O/09)

THE ESSENTIAL AND FUNDAMENTAL ELEMENTS OF REPRESENTATIVE DEMOCRACY AND THEIR RELATION TO COLLECTIVE ACTION WITHIN THE FRAMEWORK OF THE INTER-AMERICAN DEMOCRATIC CHARTER

THE INTER-AMERICAN JURIDICAL COMMITTEE,

CONSIDERING that the General Assembly, in its resolution AG/RES. 2515 (XXXIX-O/09) took note "of the importance of the Committee's continuing consideration of issues related to the Inter-American Democratic Charter and in particular 'the promotion and strengthening of democracy' by following up on the Inter-American Democratic Charter, assisting with its implementation by member states, supporting member states in their efforts to modernize and strengthen democratic institutions…";

RECALLING that the Inter-American Democratic Charter declares in article 1 that "The peoples of the America have a right to democracy and their governments have an obligation to promote and defend it" and that "Democracy is essential for the social, political and economic development of the peoples of the Americas";

BEARING IN MIND that article 2 of the Inter-American Democratic Charter sets forth that "The effective exercise of representative democracy is the basis of the rule of law and of the constitutional regimes..." and that "Democracy is essential for the social, political, and economic development of the peoples of the Americas";

BEING AWARE also that articles 3 and 4 of the Inter-American Democratic Charter establish, although in a non-exhaustive manner, essential elements of representative democracy and the fundamental components of the exercise of democracy;

REAFFIRMING that in accordance with Resolution CJI/RES.I-3/95: "the international legal regulations with regard to the effective exercise of representative democracy in the States of the Inter-American System form a specific and special order;" and that "the effective exercise of representative democracy constitutes a legally protected interest or value in the Inter-American System";

TAKING INTO ACCOUNT the Report of the General Secretary on the Inter-American Democratic Charter in fulfillment of resolutions AG/RES. 2154 (XXXV-O/05) and AG/RES. 2251 (XXXVI-O/06) [CP/doc.4184/07]; the Reports "Legal Aspects of the Interdependence between Democracy and Economic and Social Development" (CJI/doc.190/05 rev.3) and "Follow-up on the Application of the Inter-American Democratic Charter" (CJI/doc.317/09 corr.1), as well as the Report "Improving the Administration of Justice in the Americas: Protection of and Guarantees for Judges and Lawyers in the Exercise of their Functions" (CJI/doc.7/99);

REAFFIRMING Resolution CJI/RES.I-3/95 in which it is stated 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",

RESOLVES:

1. To remind that the Inter-American Democratic Charter was conceived as a tool to update, interpret and apply the fundamental Charter of the OAS, and represents a progressive development of International Law.

2. To affirm the right of every State to choose its political, economic and social system without any outside interference and to organize itself in the way best suited to it. This right is limited by the commitment to respect the essential elements of representative democracy and the fundamental components of the exercise of such as enumerated in the Inter-American Democratic Charter as follows:

2.1 "Essential elements of representative democracy include, inter alia, respect for human rights and fundamental freedoms, access to and the exercise of power in accordance with

the rule of law, the holding of periodic, free, and fair elections based on secret balloting and universal suffrage as an expression of the sovereignty of the people, the pluralistic system of political parties and organizations, and the separation of powers and independence of the branches of government;" and

2.2 "Transparency in government activities, probity, responsible public administration on the part of governments, respect for social rights, and freedom of expression and of the press are essential components of the exercise of democracy.

The constitutional subordination of all state institutions to the legally constituted civilian authority and respect for the rule of law on the part of all institutions and sectors of society are equally essential to democracy."

3. The Declaration of Santiago de Chile adopted at the Fifth Meeting of Consultations of Ministers of Foreign Affairs held in August 1959 enunciated some of the essential attributes of Democracy that are fully in effect and should be taken into account along with essential elements and fundamental components spelled out in the Inter-American Democratic Charter. Such attributes are:

"(1) The principle of the rule of law should be assured by the separation of powers, and by the control of the legality of governmental acts by competent organs of the state; (2) The governments of the American republics should be the result of free elections; (3) Perpetuation in power, or the exercise of power without a fixed term and with the manifest intent of perpetuation, is incompatible with the effective exercise of democracy; (4) The governments of the American states should maintain a system of freedom for the individual and social justice based on respect for fundamental human rights; (5) The human rights incorporated into the legislation of the American states should be protected by effective judicial procedures; (6) The systematic use of political proscription is contrary to American democratic order; (7) Freedom of the press, radio, and television, and, in general, freedom of information and expression, are essential conditions for the existence of a democratic regime; (...)."

4. To emphasize that there is a vital link between the effective exercise of representative democracy and the rule of law which is expressed concretely in the observance of all the essential elements of representative democracy and the fundamental components of the exercise of same.

Therefore democracy does not consist only in electoral processes, but also in the legitimate exercise of power within the framework of the rule of law, which includes respect for the essential elements, components and attributes of democracy mentioned above.

5. To point out that the risks to the democratic institutional political process or to the legitimate exercise of power (article 17 of the IADC); situations that might affect the development of democratic institutional political process or the legitimate exercise of power (article 18 of the IADC); breakdown of the democratic order (articles 19 and 21 of the IADC), and alteration to the constitutional order that seriously affects democratic order (articles 19 and 20 of the IADC) are situations which must be seen in the light of validity of the essential elements of representative democracy and the fundamental components of the exercise of same.

6. To indicate that, given the importance of the effective and transparent exercise of the judicial function in the democratic order, it is necessary to strengthen independent Judicial Powers invested with autonomy and integrity, professional, non-partisan and subject to a non-discriminatory regime of selection.

7. To stress that the essential elements of representative democracy and the fundamental components of same are of great value in preventing and anticipating the very causes of the problems that affect the democratic system of government, in light of the Declaration of Managua for the Promotion of Democracy and Development [AG/DEC.4 (XXIII-O/93)].

8. The Committee will keep working on this matter.

This resolution was adopted unanimously at the session held on August 11, 2009, by the following members: Drs. Jaime Aparicio, Mauricio Herdocia Sacasa, Jorge Palacios Treviño, Hyacinth Evadne Lindsay, Fabián Novak Talavera, João Clemente Baena Soares, Freddy Castillo Castellanos, David P. Stewart, Ana Elizabeth Villalta Vizcarra and Jean-Paul Hubert.

CJI/RES. 160 (LXXV-O/09)

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

THE INTER-AMERICAN JURIDICAL COMMITTEE,

TAKING INTO ACCOUNT the Report of the General Secretary on the Inter-American Democratic Charter in fulfillment of resolutions AG/RES. 2154 (XXXV-O/05) and AG/RES. 2251 (XXXVI-O/06) (OEA/Ser.G, CP/doc.4184/07), presented to the Permanent Council on April 4, 2007;

TAKING INTO ACCOUNT that article 100 of the OAS Charter stipulates that the Committee "may (…), on its own initiative, undertake such studies and preparatory work as it considers advisable;

TAKING INTO ACCOUNT its resolution CJI/RES. 132 (LXXI-O/07), "Follow-Up on the Application of the Inter-American Charter" whereby it resolved:

> *1. To re-include the "Follow-up on the application of the Inter-American Democratic Charter" among its "topics under consideration".*
>
> *2. To conduct an interpretation on the conditions and access routes to the applicability of the Inter-American Democratic Charter, in the light of the OAS Charter, and other basic juridical instruments on the protection and promotion of democracy in the Americas.*

CONSIDERING document CJI/doc.317/09 corr.1 of 19 March de 2009, which contains the Report presented by the rapporteur, Dr Jean-Paul Hubert, on the "Follow-Up on the Application of the Inter-American Democratic Charter", and acknowledging that this report is a useful and valuable contribution,

RESOLVES:

To thank the rapporteur, Dr. Jean-Paul Hubert, for his valuable Report on the Follow-Up on the Application of the Inter-American Democratic Charter (CJI/doc.317/09 corr.1), accept this report, and attach it to the resolution herein to be brought to the attention of the Permanent Council of the Organization of American States and to be incorporated in the Annual Report of the Inter-American Juridical Committee.

This resolution was adopted unanimously at the session held on August 12, 2009, by the following members: Drs. Jaime Aparicio, Mauricio Herdocia Sacasa, Jorge Palacios Treviño, Hyacinth Evadne Lindsay, Fabián Novak Talavera, João Clemente Baena Soares, Freddy Castillo Castellanos, David P. Stewart, Ana Elizabeth Villalta Vizcarra and Jean-Paul Hubert.

CJI/doc.317/09 corr. 1

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

(presented by Dr. Jean-Paul Hubert**)**

Summary

Introduction. 1. The Mandate. 2. Immediate Antecedents for the Mandate: i. Resolution AG/RES. 2154 (XXXV-O/05) "Promotion of regional cooperation for implementation of the Inter-American Democratic Charter" (AG/DEC. 41 (XXXV-O/05); ii. "The Inter-American Democratic Charter - Report of the Secretary General" to the Permanent Council, dated 4 April 2007; iii. Conference by the OAS Secretary General at the XXXIV Course on International Law of the Inter-American Juridical Committee, on 3 August 2007. 3. "Democracy" in Instruments of the Inter-American System; From the 1948 OAS Charter to the 2001 Inter-American Democratic Charter – A Brief Review: i. The 1948 OAS Charter; ii. Fifth Meeting of Consultations of the Foreign Ministers held in Santiago, Chile, 12-18 August 1959; iii. Article 2(d) added to the OAS Charter, 1985; iv. The *Santiago Commitment to Democracy* and resolution on *Representative Democracy*, ("Resolution 1080"), 1991; v. The *Protocol of Washington,* 1992. 4. … And Then Came the Inter-American Democratic Charter. 5. The Inter-American Democratic Charter – What It Says, and Some Preliminary Interpretations and Observations; i. Some general principles; ii. What is "democracy" in the Inter-American System?; iii. Chapter IV of the Inter-American Democratic Charter: Strengthening and Preservation of Democratic Institutions. 6. On the Nature and Significance of the Inter-American Democratic Charter. 7. Democracy and the Inter-American Juridical Committee. 8. The three main 'limitations' on the Inter-American Democratic Charter – General Overview: i. Lack of precision in the criteria for defining when and to what extent a country's democratic institutions have been altered, when the OAS is confronted with a situation of an unconstitutional alteration or interruption of the democratic order, and when there is a crisis; ii. The obvious tension between the principle of non-intervention and the possibility of protecting democracy through collective mechanisms; iii. Problems of access for those seeking to avail themselves of the Charter's mechanisms. 9. Some general considerations based on a preliminary analysis conducted by the Inter-American Juridical Committee.

Annex. A limited survey of some of the more recent specialized literature devoted to the Inter-American Democratic Charter.

INTRODUCTION

> *"The effective exercise of representative democracy is the basis for the rule of law and of the constitutional regimes of the Member States of the Organization of American States." (*Art. 2, IADC*)*

The legal character of Inter-American Democratic Charter is well established. Secretary General José Miguel Insulza has rightfully referred to it as *"the most important instrument within the **legal** ambit of the Americas for the purposes of dealing with democracy, (…) the cornerstone upon which we want to make progress in relation to the democratic process within our continent"*. At the same time, as we shall see later, it has been labelled "*the Hemispheric instrument with the most transcendental **political** character since the advent of the OAS Charter*".

In taking upon itself the interpretation of the conditions and access routes to its applicability, the Inter-American Juridical Committee was, and remains, fully aware of the difficulties that result from the combination of those two elements, i.e. legal and political, as evidenced by recent debates among the membership of the OAS.

The initial intent of the Committee was to see whether there could be ways to enable the Inter-American Democratic Charter to better achieve its intended purposes in the face of changing threats to the democratic order in the Americas. A task that one of its members pointedly suggested was not

susceptible of producing immediate and conclusive results, and that would necessitate prolonged reflection.

The present report does not therefore purport to suggest answers to all the underlying questions raised by the issue under consideration. As indicated at the conclusion of the report, the rapporteur attempted to bring together as many elements as he could possibly indentify within the time and means at his disposal that he saw as relevant to the issue. With the hope that those could contribute usefully to the pursuit of the required further analysis[8].

1. The Mandate

On August 9, 2007, on the occasion of its 71st regular Session held in Rio de Janeiro, the Inter-American Juridical Committee adopted Resolution "Follow-up on the Application of the Inter-American Democratic Charter[9], whereby it resolved:

> *1. To re-include the "Follow-up on the application of the Inter-American Democratic Charter" among its "topics under consideration".*
>
> *2. To conduct an interpretation on the conditions and access routes to the applicability of the Inter-American Democratic Charter, in the light of the OAS Charter, and other basic juridical instruments on the protection and promotion of democracy in the Americas.*

The Committee based its decision on Article 100 of the OAS Charter, which provides that the Inter-American Juridical Committee can, on its own initiative, undertake studies and work that it considers advisable.

2. Immediate Antecedents for the Mandate

Democracy, including its defense and promotion, has long been a subject of close study and attention on the part of the Committee. To use fairly recent examples only, "Democracy in the Inter-American System" was already one of the topics under its active consideration in the early '90s when it was expressly mandated by the Permanent Council to proceed with its work on the subject "… *in so far as this refers to one of the pillars of the Inter-American System*" (CP/doc.2479/94). In the same year, it was the General Assembly that requested the Committee to continue its studies "… *given that this is one of the basic topics of the Organization*" [AG/RES. 1266 (XXIV-O/94)].[10]

The "instruction" given by the 2001 Third Summit of the Americas to the Hemisphere's Foreign Ministers "*to prepare, in the framework of the next General Assembly of the OAS, an Inter-American Democratic Charter to reinforce OAS instruments for the active defense of representative democracy"* and its adoption later that same year have naturally resulted in the Committee's continued consideration of the general subject of Democracy in the Inter-American System. The Committee contributed important inputs into the drafting of the Inter-American Democratic Charter, notably through the adoption of its resolution CJI/RES. 32 (LIX-O/01) of 16 August 2001, "Observations and Comments of the Inter-American Juridical Committee on the Draft Inter-American Democratic Charter". And soon thereafter it added "Follow-up on the application of the Inter-American Democratic Charter" to its agenda, an early expression on its part on the need to look into its implementation.

Failing any express mandate originating from other organs of the OAS to consider any specific issues related to such implementation, the Committee kept the item amongst those "in abeyance" on its agenda, between 2003 and 2007. During that period, it discussed various reports of a general nature prepared on the subject by some of its members. It is worth recalling here, though, that the 2004 General Assembly did request the Inter-American Juridical Committee, by its Resolution AG/RES. 2042 (XXXIV-O/04), to analyze, in light of the provisions contained in Chapter III of the Inter-

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8. The rapporteur has chosen not to attribute any of what follows, with very few exceptions, to any members of the Committee in particular, though he remains much indebted to his colleagues, whose preliminary analysis was precisely conducted for the purpose of offering him some guidance for the preparation of this report.
9. CJI/RES. 132 (LXXI-O/07).
10. In fulfilment of those mandates the Committee would later adopt resolution CJI/RES. I-3/95 "*Democracy in the Inter-American System*", to be discussed later in the present report.

American Democratic Charter, the legal aspects of the interdependence between democracy and social development."[11]

More immediately, what prompted the Juridical Committee to decide to focus its attention to the "*conduct [of] an interpretation on the conditions and access routes to the applicability of the Inter-American Democratic Charter" can be traced to:*

i. **Resolution AG/RES. 2154 (XXXV-O/05) "Promotion of regional cooperation for implementation of the Inter-American Democratic Charter",** adopted by the OAS on June 7, 2005 at the thirty-fifth regular session of its General Assembly. By that resolution, the Member States:

"AWARE (…) of the need to provide the Organization with procedures that facilitate cooperation in complying with the standards and principles contained in the Inter-American Democratic Charter, so that it may contribute effectively to the preservation and consolidation of democracy in the countries of the Hemisphere; (…)[12]

- *"entrusted" the Secretary General "with presenting to the Permanent Council, in the near future, a report for its consideration and analysis that describes the manner in which the Inter-American Democratic Charter has been implemented since its entry into force in 2001*"[13]; and
- "*instructed*" *the Secretary General,* "after engaging in consultations with the Permanent Council, and taking into account the purposes and principles of the OAS Charter, in particular that of promoting and '*consolidating representative democracy, to devise proposals* for *timely, effective, balanced, gradual initiatives for cooperation, as appropriate, in addressing situations that might affect the workings of the political process of democratic institutions or the legitimate exercise of power, in keeping with the provisions of Chapter IV of the Inter-American Democratic Charter, with respect for the principle of nonintervention and the right of self-determination, and to present those proposals to the Permanent Council."*[14]

[That mandate also appears *verbatim* in paragraphs 2 and 3 of the "Declaration of Florida – Delivering the Benefits of Democracy"[15] adopted on the same date; it was also reiterated by the OAS General Assembly in Resolution "Promotion of regional cooperation for implementation of the Inter-American Democratic Charter on the occasion of its fifth anniversary" adopted on June 6, 2006 at its thirty-sixth regular session[16].

ii. **"The Inter-American Democratic Charter - Report of the Secretary General pursuant to resolutions AG/RES. 2154 (XXXV-O/05) and AG/RES. 2251 (XXXVI-O/06)"**, dated 4 April 2007, presented to the Permanent Council.[17]

iii. A Conference by the OAS Secretary General on 3 August 2007 given before the participants to the XXXIV Course on International Law of the Inter-American Juridical Committee, in Rio de Janeiro, during which he reviewed and expanded upon his above report.[18]

Both the above **Report** and **Conference** will be discussed later in the present report.

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11. That specific mandate led the Committee to discuss and consider at length a report entitled "Legal Aspects of the Interdependence Between Democracy and Economic and Social Development" prepared by the author of the present report (CJI/doc.190/05 rev. 3, 20 March 2006), and to adopt resolution CJI/RES. 106 (LXVIII-O/06) of 29 March 2006 on that same subject. More on this later.
12. From the Preamble.
13. Operative paragraph 1.
14. Operative paragraph 2.
15. AG/DEC. 41(XXXV-O/05).
16. AG/RES. 2251 (XXXVI-O/06), Santo Domingo, Dominican Republic.
17. OEA/Ser.G, CP/doc.4184/07, original Spanish.
18. INSULZA, José Miguel. **Palabras de inauguración del XXXIV Curso de Derecho Internacional, (2008)** v. 27 **XXXIV Curso de Derecho Internacional**, i-xiv. On that same occasion the Secretary General was received by the Committee, for a general discussion on present day challenges relating to the implementation of the Democratic Charter.

3. "Democracy" in Instruments of the Inter-American System; from the 1948 OAS Charter to the 2001 Inter-American Democratic Charter – A Brief Review

The 2001 Inter-American Democratic Charter can undoubtedly be considered to trace its true roots to the original 1948 OAS Charter. But more immediately, it came at the end – no doubt provisional - of an evolutionary road that started taking real shape with the 1991 *Santiago Commitment to Democracy and the Renewal of the Inter-American System* and Resolution 1080 on *Representative Democracy*, and the ensuing 1992 *Protocol of Washington* that amended the OAS Charter. And as mentioned above, it was the direct result of the express desire of the highest authorities of the OAS Member States assembled at the 3rd Summit of the Americas in April of 2001 to equip the region with a formal instrument, a "*Charter*", which would *"**reinforce** OAS instruments for the **active defense** of representative democracy"* [19]. The specific instruction they issued at Quebec City aimed for the preservation of what was by then an unprecedented level of democracy in the region. It is the 'translation' of their will into reality that would lead a few months later to the adoption of an Inter-American Democratic Charter which quickly came to be recognized as the centerpiece of the inter-American democracy architecture.

One can therefore confidently say that the Inter-American Democratic Charter is all and foremost about actively defending democracy in the Americas, and, consequently that, to interpret *"the conditions and access routes to [its] applicability"*[20] is all and foremost about exploring the avenues meant to achieve the Charter's stated ends.

As Uruguay's then Foreign Minister Didier Opertti would rightly recall during a Protocolar Session of the OAS Permanent Council held on 16 September 2002 to commemorate the first anniversary of its adoption, the Inter-American Democratic Charter was not a magic and instantaneous phenomenon that suddenly just happened. No less rightly, he also pointed out, its coming into being had to be seen not only as inscribed within the context of the evolution of the OAS, but also as part of a process which is all at once political, normative and historical[21]. A brief review of what can be seen as the 'antecedents' of the treatment of democracy in some documents of the Inter-American System that antedate the Inter-American Democratic Charter could be useful, not only to better understand its purview, but also to analyse what, with the passage of time and the advent of new forms of threats to democracy, are now seen as its shortcomings[22].

i. The 1948 OAS Charter

In the original text of the OAS Charter, dating from 1948, one finds a reaffirmation by the American States, of the principle that "The solidarity of the American States and the high aims which are sought through it require the political organization of those States **on the basis of the effective exercise of representative democracy**; (…)"[23]. A language still present in today's Charter, at Article 3 (d). In the words of Secretary General José Miguel Insulza, the consecration of such a principle in the 1948 Charter recognized and reflected the fact that the obligation of Member States to be democratic existed at least a decade, if not two, prior to the creation of modern day OAS[24].

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19 Emphasis added.

20 As per the mandate the Committee gave itself.

21 See DE LA CALLE, Humberto. **Carta Democrática Interamericana: documentos e interpretaciones**. Consejo Permanente, Organización de los Estados Americanos. Columbus Memorial Library: Washington; 2003; p. 231. The full text of that key document can be found on-line at <http://www.oas.org/OASpage/esp/Publicaciones/CartaDemocratica_spa.pdf>.

22. In his book OEA (São Paulo: Manole, 2004), Jean-Michel ARRIGHI, OAS Secretary for Legal Affairs, conducts such a review in Chapter VI entitled "La defensa del sistema democrático". His review begins in times anterior to the 1948 OAS Charter, with the 1936 Inter-American Conference for the Consolidation of Peace (Buenos Aires). I am indebted to him for some of what follows in this part of my Report. [Note: quotes from his book used in the present report have been translated from an original Spanish version of the text that would later be translated into Portuguese by the editors; that Spanish text has not been published. In Portuguese, Chapter VI reads "A defesa do sistema interamericano"].

23. Emphasis added.

24. At his above-mentioned conference of 3 August 2007.

It is worth noting that the OAS was thus the first international organization to include the concept of representative democracy in its constitutive document. There is no mention of democracy in the United Nations Charter, signed on June 25, 1945[25].

ii. Fifth Meeting of Consultation of Ministers of Foreign Affairs, held in Santiago, Chile, 12-18 August 1959

The ensuing years were difficult ones for democracy in the region, for a host of reasons, among them the Cold War, the multiplicity of - at times very harsh – dictatorships, repeated military coups, etc. Yet, those sombre days did not entirely prevent the OAS Member States to deal with the subject of democracy. As but one example, one can refer to the Fifth Meeting of Consultations of the Foreign Ministers held in Santiago, Chile, 12-18 August 1959[26]. One of the two items on its agenda was *"II. The effective exercise of representative democracy and respect for human rights, including: (a) Theoretical study, taking into account the strict observance of the principle of non-intervention, of the possible juridical relation between the effective respect for human rights and the exercise of representative democracy and the capacity of applying the mechanisms provided for in the positive American international law; (b) Methods that would allow to determine compliance with two fundamental principles of American international law: effective exercise of representative democracy and respect for human rights; and measures that must be taken in cases where those principles are violated".*

The Declaration of Santiago de Chile adopted on that occasion was no doubt inspired in good part by political events taking place elsewhere in the region[27]. Yet, it contained language that would endure and resurface in later years. For example, it referred to "*the desire of the American peoples to live under democratic institutions*", and to their "*faith in the effective exercise of representative democracy as the best mean to promote their political and social progress*". It affirmed that "*the existence of antidemocratic regimes amounts to a violation of the principles on which the Organisation of American States is founded*".

It also proceeded to enunciate some of the attributes of democracy, in order to enable "public *opinion, national and international, to determine the degree to which political regimes and governments identify*" with representative democracy. Among those listed*: "(1) The principle of the rule of law must be insured through the independence of the Powers and the control of the legality of government actions by judicial organs of the State; (2) The governments of the American Republics must originate in free elections; (3) Continuation in power or the exercise of power without a fixed term and with the evident intent to perpetuate it are incompatible with the exercise of representative democracy; (4) The governments of the American States must maintain a regime of individual liberty and social justice based on respect for the fundamental rights of the human being; (5) The human rights incorporated in the law of American States must be protected by effective judicial means; (6) the systematic use of political interdiction runs contrary to the American democratic order; (7) Freedom of the press, radio and television, and in general freedom of information and expression are essential conditions for the existence of a democratic regime; (…)"*

Quite interestingly, the same Fifth Meeting of Consultations adopted a resolution on Effective Exercise of Representative Democracy[28] which *"Asked the Council of the Organization of American States to prepare, in cooperation with the technical organs of the Organization and in consultation with the Government of the American States, a draft Convention on the effective exercise of representative democracy, that determine the procedure and the measures to be applied in that respect".* This bears a striking resemblance with the instruction given more than 41 years later by the region's Heads of State and Government assembled at the 2001 Third Summit of the Americas asking their foreign ministers "*to prepare, in the framework of the next General Assembly of the OAS, an Inter-American Democratic Charter to reinforce OAS instruments for the active defense of representative democracy".*

25. Nor was there any in the Covenant of the League of Nations, signed on June 28,1919.
26. The text of its Final Act can be found (in Spanish) at <http://www.oas.org/CONSEJO/SP/RC/Actas/Acta%205.pdf>. The various quotes that follow are taken from the "*Acta final*", translated by the author.
27. For example with its explicit references to "communism" and "totalitarianism".
28. Resolution IX, **Acta Final**, p. 12.

iii. Article 2(b) added to the OAS Charter, 1985

But political realities were not then propitious to much movement in furtherance of the translation of such noble aspirations into regional instruments. It was not before 1985 that a notable dimension was added to the OAS Charter when Article 2 (b) was introduced; it reads in part: "*The Organization of American States, in order to put into practice the principles on which it is founded and to fulfill its regional obligations under the Charter of the United Nations, proclaims the following essential purposes: (…) (b) To promote and consolidate representative democracy, with due respect for the principle of non-intervention"*[29]. The reference to "the principles on which it is founded" as a source of the "essential purpose" identified as the promotion and consolidation of representative democracy, is worthy of note.

Looking at this new Article 2 (b) and the original Article 3 (d) has led the OAS Secretary for Legal Affairs to conclude that taken together they can certainly be interpreted a consecration by the OAS Charter of "the commitment of the American States to the exercise of representative democracy, and the intention, if not the obligation, of the Organization to work to insure such exercise"[30].

iv. The *Santiago Commitment to Democracy* and resolution on *Representative Democracy*, ("Resolution 1080"), 1991[31]

During the '80s, the political landscape in the region underwent rapid transformation, with democratically elected governments coming to power nearly everywhere. The door was open for the Organization of American States to further instrumentalize the pursuit of the principles proclaimed in its Charter. That led to the adoption by the 21st regular session of its General Assembly, held in Santiago, Chile, in June 1991 of *The Santiago Commitment to Democracy* and of resolution *Representative Democracy*, generally referred to as "Resolution 1080".

In their "Commitment to Democracy" the OAS Member States acknowledged that *"the changes towards a more open and democratic international system are not completely established"* and that those *"favorable trends"* had to continue[32]. They emphatically stated that **"***representative democracy is the form of government of the region and that its effective exercise, consolidation, and improvement are shared priorities"*[33]**.** A remarkably strong and unequivocal statement: "democracy is THE form of government". They declared their *"inescapable commitment to the defense and promotion of representative democracy and human rights in the region"*[34]**.** They stated their *"determination to continue to prepare and develop a relevant agenda for the Organization, in order to respond appropriately to the new challenges and demands in the world and in the region",* and decided to *"assign special priority"* on that agenda, to a series of specific actions, among them *"strengthening representative democracy as an expression of the legitimate and free manifestation of the will of the people, always respecting the sovereignty and independence of Member States"*[35]. They committed to *"adopt efficacious, timely, and expeditious procedures to ensure the promotion and defense of representative democracy, in keeping with the Charter of the Organization of American States"*[36]**.**

Putting deed to word, they immediately proceeded to adopt Resolution 1080, in many ways a 'revolutionary' step, even if limited in scope. Among the premises for their decision they referred to "*the widespread existence of democratic governments in the Hemisphere",* thus explicitly acknowledging that the general spread of genuine democracy was opening the door to regional action to maintain and defend it. And they considered "*that the principle, enshrined in the Charter, that the solidarity of the American states and the high aims which it pursues require the political organization of those states to be based on effective exercise of representative democracy, must be made operative"*[37]**.** They then proceeded "*To instruct the Secretary General to call for the immediate convocation of a meeting of the Permanent Council in the event of any occurrences giving rise to the*

29. That same language was repeated in the very first paragraph of the preamble to the Inter-American Democratic Charter. Emphasis added.
30. ARRIGHI, Jean-Michel, *op.cit,* p. 109.
31. AG/RES. 1080 (XXI-O/91).
32. *Commitment*, preamble, 3rd para.
33. *Commitment*, preamble, 35th para.
34. *Commitment,* 1st declar. para.
35. *Commitment*, 3rd declar. para.
36. *Commitment*, 5th declar. para.
37. Resolution 1080, preamble, 2nd para**.**

sudden or irregular interruption of the democratic political institutional process or of the legitimate exercise of power by the democratically elected government in any of the Organization's Member States, in order, within the framework of the Charter, to examine the situation, decide on and convene and ad hoc meeting of the Ministers of Foreign Affairs, or a special session of the General Assembly, all of which must take place within a ten-day period", further stating that *"that the purpose of the ad hoc meeting of Ministers of Foreign Affairs or the special session of the General Assembly shall be to look into the events collectively and adopt any decisions deemed appropriate, in accordance with the Charter and international law".*[38]

For the first time, Resolution 1080 was providing the OAS with an automatic, rapid-response mechanism against *coups d'état*. In the words of Hawkins and Shaw, by issuing such instructions to its Secretary General it "*slightly increased levels of obligation, precision and delegation within the OAS"*[39]. In assessing the significance of Resolution 1080, Pastor writes that by adopting it "the governments of the Americas sidestepped Article 18[40] of the OAS Charter and began a journey to instill substance into the fulsome declarations of democratic solidarity", a journey "toward a collective defence of democracy [which later] passed an important marker with the unanimous approval of the Inter-American Democratic Democracy Charter on September 11, 2001*"*[41]**.** In his view, and we could certainly agree with him, by authorizing the Secretary General to call an emergency meeting of the Permanent Council in the event of an interruption of the democratic process, Resolution 1080 actually "re-defined sovereignty*"*[42]. As for Graham, he wrote: "For a region where the high walls of sovereignty, enshrined in the OAS Charter, had long sheltered illegal and dictatorial governments from outside censure, Santiago Resolution 1080 represented an extraordinary change: a determination not only to collectively condemn the violent overthrow of constitutionally elected governments, but also to invest the OAS with the authority of expulsion and sanctions to defend and maintain the democratic gains of the preceding fifteen years. No regional organization outside Western Europe and not even the United Nations had struck out so boldly for the values of democratic governance*"*[43].

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38. Resolution 1080, operative para. 1. One can note that no specific measures or sanctions are foreseen.
39. HAWKINS, Darren, and SHAW, Carolyn M., **The OAS and Legalizing Norms of Democracy,** p. 25, in Promoting Democracy in the Americas, ed. by Dexter B. Boniface, Sharon L. Lean and Thomas Legler, John Hopkins University Press, 2007. Prof. Hawkins is with the Department of Political Science at Brigham Young University, USA; Prof. Shaw is with the Department of Political Science at Wichita State University, USA.
40. Which today has become Article 19. It reads: "*No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. The foregoing principle prohibits not only armed force but also any other form of interference or attempted threat against the personality of the State or against its political, economic, and cultural elements*". In other words, Resolution 1080 gave the principle of non-intervention a qualified meaning.
41. PASTOR, Robert, **A Community of Democracies in the Americas – Instilling Substance Into a Wondrous Phrase,** p. 14, in "The Inter-American Democratic Charter: Challenge and Opportunities for the Collective Defence and Promotion of Democracy in the Americas", Canadian Foreign Policy, v. 10, Num. 3 (Spring 2003). Pastor's paper was one of several published in that thematic issue of Canadian Foreign Policy which resulted from a two-day conference convened at the University of British Columbia in November of 2002 by former Canadian Foreign Minister Lloyd Axworthy and the Liu Institute of UBC to seek a better understanding of "*the dilemma and the options for multilateral efforts to strengthen democracy in the Americas"*. At that time, Pastor, a former Executive Secretary of the Council of Presidents and Prime Ministers of the Americas, was Vice President of International Affairs, Professor, and Director of the Center for Democracy and Election Management at American University in Washington.
42. *Ibid.,* p. 15; that, he claims, "*was the moment that the OAS crossed the Rubicon"*.
43. GRAHAM, John, **A Magna Carta For The Americas: The Inter-American Democratic Charter: Genesis, Challenges and Canadian Connections**, Policy Paper FPP-02-09, p. 3; FOCAL (Canadian Foundation for the Americas), Ottawa, 2002. John Graham, a former Canadian ambassador to Venezuela, was the first head of the OAS Unit for Promotion of Democracy, the creation of which, argue Hawkins and Shaw (*op. cit.,* o. 25) constituted an important step in what they refer to as "*the legalization of democracy*"; they define "legalization" as "*increasing the level of obligation, precision, and third-party delegation in international rules*"; more on this later.

v. The *Protocol of Washington,* 1992

Resolution 1080 had obvious limitations. Its purview did not extend beyond the traditional notion of *coups d'état*; it did not specify what were the possible sanctions to follow a "*sudden or irregular interruption of the democratic political institutional process or of the legitimate exercise of power by the democratically elected government"* and simply called for them to be "*appropriate, in accordance with the Charter and international law"*. Furthermore, as a 'mere' resolution of the General Assembly, its carried little, if any, obligatory force. As writes Arrighi[44], measures to obviate at least in part such shortcomings were soon discussed and lead to the adoption in 1992 of the Protocol of Washington which proceeded to amend the OAS Charter by adding to it what today is its Article 9.

Article 9 of the OAS Charter stipulates that "*A Member of the Organization whose democratically constituted government has been overthrown by force may be suspended from the exercise of the right to participate in the sessions of the General Assembly, the Meeting of Consultation, the Councils of the Organization and the Specialized Conferences as well as in the commissions, working groups and any other bodies established"*. Among other things, it adds that "*(a) The power to suspend shall be exercised only when such diplomatic initiatives undertaken by the Organization for the purpose of promoting the restoration of representative democracy in the affected Member State have been unsuccessful;* and that "*(d) The suspension notwithstanding, the Organization shall endeavour to undertake additional diplomatic initiatives to contribute to the re-establishment of representative democracy in the affected Member State"*.

By so doing, wrote Hawkins and Shaw, Member States "took their most dramatic step to legalize democracy. (…) As an amendment to the Charter, the measure imposes the highest possible level of obligation of ratifying states"[45], adding that the protocol also "increased the level of precision absent from Resolution 1080, especially by laying out clear and specific procedures to be followed when democratic governments are overthrown by force"[46]. For Secretary General Insulza, the Protocol of Washington finally transformed into reality what had been merely proclaimed in the 1948 Charter, since it turned democracy into an obligation, and into a condition for continued membership in the Organization[47].

In other words, Article 9 reaffirmed that representative democracy is the norm expected of members; that sanctions can flow from interference with it; and that its restoration and re-establishment are to be pursued in cases of interruption[48].

4. ... And Then Came the Inter-American Democratic Charter

When they look at the constantly evolving political scene in the Americas in the years that immediately followed the steps (bold by all accounts, even if still limited in their purview) taken in defense of democracy embodied by the Santiago *Commitment* and *Resolution 1080*, observers, scholars and politicians alike, nearly all point to the rise of new and worrisome developments. The region witnessed the emergence of new ways, more 'sophisticated' that the traditional *coups d'état*, to

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44. *Op. cit.,* p. 113-114.
45. *Op. cit.,* p. 26. Arrighi, *op. cit*., and many others, have dealt extensively with the different levels of legal status of the various OAS instruments that relate to the promotion and defence of democracy in the Americas, including of course the Inter-American Charter of Democracy, and the difficulties that poses. For example, Arrighi wonders if just like the applicable-to-all but non-binding *Resolution 1080* led to the adoption of the binding but only-applicable-to-signatories *Protocol of Washington*, one day we may not have a new Protocol amending the OAS Charter a result of which would be to confer higher legal hierarchy to the *Inter-American Democratic Charter.* There is general agreement that the political conditions required for the required consensus for such a thing to become possible are currently not reunited.
46. *Ibid*.
47. At his above-referenced conference of 3 August 2007.
48. Several other documents could be added to those considered thus far, notably that of the 1990 *Declaration of Managua for the Promotion of Democracy and Development* [AG/DEC. 4 (XXIII-O/93)], whereby, as the 16th para. of the preamble of the Inter-American Democratic Charter would later recall, "*the Member States expressed their conviction that the Organization's mission is not limited to the defense of democracy wherever its fundamental values and principles have collapsed, but also calls for ongoing and creative work to consolidate democracy as well as a continuing effort to prevent and anticipate the very causes of the problems that affect the democratic system of government"*.

interrupt the constitutional order. For example when such interruptions come from a democratically elected executive power or other organized social sectors other than the military[49]. There were indeed instances of what came to be designated as *autogolpes*, with an elected president closing congress, suspending the constitution, resorting to ruling by decree; or of the executive power purging the courts and/or reorganizing the judiciary so as to guarantee impunity for itself.[50] As expressed by Legler, Lean and Boniface, "by the end of the decade (…) authoritarian backsliding by democratically elected leaders had joined *coups* and self-*coups* as a widespread threat to democracy[51].

So there developed among leaders of the Hemisphere a will to equip the OAS with new means to try and prevent "democratically elected leaders from acting unconstitutionally to alter or interrupt the democratic order", through resort to *autogolpes* or other forms of violations of democratic constitutions[52]. A will they firmly expressed in unequivocal terms in the Declaration of Principles they adopted at their Third Summit (Quebec City, Canada, 20-22 April. 2001), in the following terms[53]:

- "*We acknowledge that* ***the values and practices of democracy are fundamental*** *to the advancement of all our objectives.* ***The maintenance and strengthening of the rule of law and strict respect for the democratic system*** *are, at the same time, a goal and* ***a shared commitment*** *and are* ***an essential condition*** *of our presence at this and future Summits. Consequently,* ***any unconstitutional alteration or interruption of the democratic order in a state of the Hemisphere constitutes an insurmountable obstacle*** *to the participation of that state's government in the Summit of the Americas process*[54]*. Having due regard for existing hemispheric, regional and sub-regional mechanisms,* we agree to conduct consultations in the event of a disruption of the democratic system *of a country that participates in the Summit process*"[55].
- **"Threats to democracy today take many forms**. To enhance our ability to respond to these threats, **we instruct our Foreign Ministers** to prepare, in the framework of the next General Assembly of the OAS, an **Inter-American Democratic Charter to reinforce OAS instruments for the active defense of representative democracy"**.[56]

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49. Arrighi, *op. cit.*, p. 114.
50. See CAMERON, Maxwell and HECHT, Catherine. **Canada's Engagement with Democracies in the Americas**, Canadian Foreign Policy, v. 14, n. 3 (2008); that entire issue was devoted to papers presented at a conference on "Canada and the Americas: Defining Re-engagement" held in Ottawa on March 13-14, 2008. Cameron was then a professor in the Department of Political Science at the University of British Columbia (UBC), in Canada, and Hecht a doctoral candidate in the same Department.
51. LEGLER, Thomas, LEAN, Sharon L. and BONIFACE, Dexter B., "The International and Transnational Dimensions of Democracy in the Americas", in **Promoting Democracy in the Americas**, ed. by Dexter B. Boniface, Sharon L. Lean and Thomas Legler; John Hopkins University Press, 2007. Thomas Legler is a Professor of International Relations at the Universidad Iberoamericana in Mexico City and a fellow at the Center for the Study of Democracy at Queen's University in Toronto; Sharon Lean is a professor of Comparative Politics, Latin America and Democratization in the Department of Political Science, Wane State University, Detroit; Dexter Boniface is Associate Professor of Political Science and Director of the Latin American & Caribbean Studies Program at Rollins College in Winter Park, FL.
52. See CAMERON AND HECHT, *op. cit*.
53. Some of which have been quoted earlier in the present Report.
54. That came to be known as the "*democracy clause*" of the Quebec Declaration.
55. 5th para. of the *Declaration*; emphasis provided..
56. 6th para. of the *Declaration*; emphasis provided. The Venezuelan delegation at the Summit reserved its position on this paragraph (as well as paragraph 1, for the same treason) of the Declaration of Quebec City, "*because, according to our government, democracy should be understood in its broadest sense and not only in its representative quality; we understand that the exercise of democracy encompasses, as well, citizen participation in decision-making and in government management, with a view to the daily formation of a process directed towards the integral development of society, because of this, the Venezuelan government would have preferred and thus requested that, in this Summit, the text of the Declaration would expressly reflect the participatory character of democracy*".

- *"We reaffirm that the constitutional subordination of armed forces and security forces to the legally constituted civilian authorities of our countries, as well as* ***respect for the rule of law on the part of all national institutions and sectors of society, are fundamental to democracy***"[57].

It is of particular interest within the context of the present Report that Hemispheric leaders, in expressing their support for democracy and calling for a new instrument[58] specifically meant to reinforce regional instruments for the active defense of representative democracy in the face of new threats[59], would reaffirm that respect for the rule of law on the part of all national institutions and sectors of society are fundamental to democracy. So is the fact that in the *Plan of Action*[60] they adopted at the same Summit they would recognize that ***"****good governance requires effective, representative, transparent and accountable government institutions at all levels, public participation, effective checks and balances, and the separation of powers****, (…)"*. For there cannot be any doubt that those requirements for "good governance" all fall within what are often understood to be as essential parts or attributes of democracy.

Less than four months later, after intense consultations and negotiations, the Inter-American Democratic Charter was adopted on September 11, 2001 at a special session of the OAS General Assembly held in Lima, Peru[61].

5. The Inter-American Democratic Charter – What It Says, and Some Preliminary Interpretations and Observations

i. Some general principles

Politicians, political scientists, OAS officials and … the Inter-American Juridical Committee have discussed and argued at great length over the nature and purview of the Inter-American Juridical Charter. And more recently, about its shortcomings. Before addressing such discussions, a review of, and some initial commentary on, some parts of its content particularly relevant to the present report would seem to be in order. But before proceeding on that basis, it is worth repeating, with Ambassador Humberto de la Calle, the coordinating editor of *Carta Democrática Interamericana: documentos e interpretaciones*,[62] that the Inter-American Democratic Charter "(…) was conceived as a tool to actualize and interpret the fundamental Charter of the OAS, (…)[63]**.** In the same vein, Dr. Mauricio Herdocia Sacasa, in his book *Soberanía clásica, un principio desafiado: ¿hasta dónde?*, wrote that "The Inter-American Democratic Charter constitutes, without any possible doubt, the reaffirmation and interpretation, on one hand, and the normative development on the other, of principles already included in an anterior treaty such as the OAS Charter, which, from its beginnings in 1948, consecrates the effective exercise of representative democracy amongst its principles"[64]. Such observations are key to both the interpretation and the application of the Inter-American Democratic Charter.

The Preamble to the Inter-American Democratic Charter, like all preambles, establishes important 'contextual markers' for the operative clauses that they introduce. The Member States assembled in General Assembly chose to recall therein "that one of the purposes of the OAS is to promote and consolidate representative democracy, with due respect for the principle of non-

57. 8th para. of the *Declaration;* my underlining.
58. Which they already called an *Inter-American Democratic Charter.*
59. Such as those indentified above.
60. In the 1st para. of their Declaration, the Heads of States and Governments wrote*: "We have adopted a Plan of Action to strengthen representative democracy, promote good governance and protect human rights and fundamental freedoms".*
61. LEGLER *et al. op. cit.*, at p. 115-116, refer to the presidential attempt to rig elections in 2000 and to the determination of the interim Peruvian government of President Valentín Paniaga and the Peruvian democratic resistance to Fujimori to see "that the OAS would have the means necessary to prevent and/or respond to the rise of future 'democratic dictators' ", and attribute the crafting of the initial draft of the Inter-American Democratic Convention to "the former opponents of Fujimori, (…) and then Alejandro Toledo's government".
62. DE LA CALLE, Humberto, **Carta Democrática Interamericana:** documentos e interpretaciones. Washington, D.C.: Consejo Permanente de la Organización de los Estados Americanos: Columbus Memorial Library, 2003, p. viii The full text of that key document can be found to be found on-line at <http://www.oas.org/OASpage/esp/Publicaciones/CartaDemocratica_spa.pdf>
63. Idem. Introduction, p. viii. A conclusion fully shared by many other analysts.
64. HERDOCIA SACASA, Mauricio; 1a ed., Managua: 2005.

intervention"[65], a repeat of language found in Article 2 (b) of the OAS Charter. They also recalled their adoption at the Third Summit of the Americas of "a democracy clause which establishes that any unconstitutional alteration or interruption of the democratic order in a state of the Hemisphere constitutes an insurmountable obstacle to the participation of that state's government in the Summits of the Americas process"[66]. (Such a repeated reference to democracy as a precondition for participation in the Summits of the Americas is totally in line with Article 9 of the OAS Charter, introduced as seen above by the 1992 Protocol of Washington, and which establishes clearly that representative democracy is the norm expected of members of the Organization). They furthermore referred to the determination of their foreign ministers expressed in the Santiago Commitment to Democracy and the Renewal of the Inter-American System "to adopt a series of effective, timely, and expeditious procedures to ensure the promotion and defense of representative democracy, with due respect for the principle of non-intervention", before proceeding to create, by their adoption of Resolution 1080 "a mechanism for collective action in the case of a sudden or irregular interruption of the democratic political institutional process or of the legitimate exercise of power by the democratically-elected government in any of the Organization's Member States, thereby fulfilling a long-standing aspiration of the Hemisphere to be able to respond rapidly and collectively in defense of democracy"[67]. Finally, they recognized the need, or "advisability" as they wrote, "of clarifying the provisions set forth in the OAS Charter and related basic instruments on the preservation and defense of democratic institutions, according to established practice"[68].

Article 1 of the Inter-American Democratic Charter proclaims: "The peoples of the Americas have a right to democracy and their governments have an obligation to promote and defend it. (…)". This clear affirmation (a) that there is such a thing as a "right to democracy", (b) that such a right belongs to "the peoples", and (c) that the governments of the Americas have an "obligation" to promote and defend that right, is of course of prime significance to the present study. Indeed, the emphatic recognition of the existence of a "right to democracy" is at the heart of the entire instrumentation that the OAS and its members have developed over time in order to fulfill the 'obligation' to promote and defend democracy. For example, the 2003 Declaration on Security in the Americas (Mexico City) declared: "We reaffirm that democracy is a right (…)"[69]. In 2004, the Heads of States and Governments assembled at a Special Summit in Monterrey, Mexico, adopted the Declaration of Nuevo León in which the exact same phrase as just quoted from Article 1 of the Inter-American Democratic is repeated verbatim[70]. The 2005 Declaration of Florida likewise made a specific reference to the Inter-American Democratic Charter as "establish(ing) that the peoples of the Americas have a right to democracy"[71].

This existence in what might be referred to as the international law of the Americas, of a right to democracy, initially met with some resistance. However, as one analyst points out, "(…) when the dust had settled, it was found that (…) Article 1 lifts the concept to a significantly advanced reciprocal contract of peoples with governments. (…). Whether an instrument that is a political declaration becomes part of the fabric of customary international law is a function of precedent. In the case of the Charter, as was the case with Resolution 1080, precedents are already providing validation".[72]

Of no less importance is the fact that to the "right to democracy" belonging to the peoples corresponds the "obligation" of their government to "promote and defend it". In his previously mentioned book, Dr. Mauricio Herdocia Sacasa writes that "Such a collective obligation (…) removes the circumstances related to the serious alteration of the democratic institutional political processes and

65. 1st para. of preamble.
66. 3rd para. of preamble.
67. 14th para., of preamble. As we shall see later, the entire Chapter IV of the Inter-American Democratic Charter is devoted to such a *"series of effective, timely, and expeditious procedures to ensure the promotion and defense of representative democracy, with due respect for the principle of non-intervention"*.
68. 16th para., of preamble.
69. Ch. III, para. 5 of the *Declaration on Security*.
70. 3rd Ch, 8th para. of the *Declaration of Nuevo León*.
71. Preamble, 2nd para. The *Declaration of Florida* was adopted at the 35th regular session of the General Assembly (June 2005) in Fort Lauderdale.
72. GRAHAM, John, *op.cit.*, p. 7.

to the legitimate exercise of power from the internal legal ambit and throws it into the inter-American one"73. From which he later concludes: "Today one must accept that there also exist a collective action and a legitimate answer on the part of the Organization [OAS] in relation to the defense of democracy and human rights."[74]

Article 2 of the Inter-American Democratic Charter, again in what must be seen as the reaffirmation of basic principles stemming from the OAS Charter itself, proclaims that "The effective exercise of representative democracy is the basis for the rule of law and of the constitutional regimes[75] of the Member States of the Organization of American States", and that strengthening and deepening it requires "permanent, ethical, and responsible participation of the citizenry within a legal framework conforming to the respective constitutional order". The recognition within the ambit of the Inter-American System of such an immediate linkage between representative democracy and the rule of law is worth underlining in the context of the present study. Some political scientists have advanced that "democracy without the rule of law is an oxymoron"[76.] Secretary General Insulza echoed those words when he said, about the Inter-American Democratic Charter, that what it deals with is "a democracy of laws, a republic governed by laws; therefore, Rule of Law and Democracy are absolutely equivalent according to the Charter"[77].

ii. What is "democracy" in the Inter-American System?

Some of the problems with the interpretations to be given to the content, purview and application of the Inter-American Democratic Charter are attributable to the meaning to be given to such concepts as "democracy", "unconstitutional interruption" of the democratic order, "unconstitutional alteration" of a constitutional regime, etc. For democracy alone, a survey of various writings from political scientists and legal scholars has identified no less than 311 definitions.[78]

Articles 3 and 4 of the Inter-American Democratic Charter broke new grounds in the Americas by going further than ever before in attempting to define or describe the notion of what exactly that "right to democracy" entailed when it came to exercise, protect and defend it. Article 3 gives a non-exhaustive list of what it considers to be "essential elements of representative democracy". All can be considered as equally important; but some – easily identifiable - are more immediately relevant to the present study, because they have arguably been trampled with in the recent past by occurrences of what has come to be called "backsliding" in the hands of democratically elected leaders. They have been clearly identified by Secretary General Insulza in his 2007 Report to the Permanent Council and his Conference later that same year at the IAJC's XXXIV Course on International Law. Those essential elements mentioned in Article 3 are: "respect for human rights and fundamental freedoms, access to and the exercise of power in accordance with the rule of law, the holding of periodic, free, and fair elections based on secret balloting and universal suffrage as an expression of the sovereignty of the people, the pluralistic system of political parties and organizations, and the separation of powers and independence of the branches of government"[79].

Pastor[80], referring to Article 3, writes that it covers what have been described as the "two axes of accountability" in a democracy, i.e. the vertical (elections) and the horizontal (separate branches)[81].

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73. *Op.cit.,* p. 133 of a chapter (p. 133-152) devoted entirely to "The Inter-American Democratic Charter, a New Instrument for Collective Action".
74. *Ibid.*, p. 134.
75 Emphasis provided.
76. CAMERON AND HECHT, *op. cit.,* p. 10.
77. During his August 2007 Conference; my translation. Earlier, in his previously mentioned *Report to the Permanent Council* he had explained: "I use the word "republican" in the sense defined by the Encyclopedia Britannica: "a government in which supreme power resides in a body of citizens entitled to vote and is exercised by elected officers and representatives responsible to them and governing according to law."
78. See LEGLER, *op. cit.,* p. 21. And that does not take into account the several known instances of blatant misuse of the term: have not some of the worst dictatorial and 'anti-democratic' régimes in history been labeled "popular and democratic republics" by their authoritarian leaders?
79. Emphasis provided.
80. *Op. cit.*, p. 17.
81. More on this in Part 8, i and the Annex, (A) and (C), *infra*.

As for Article 4, it lists as "essential components" of the exercise of democracy: "(t)ransparency in government activities, probity, responsible public administration on the part of governments, respect for social rights, and freedom of expression and of the press", as well as "(t)he constitutional subordination of all state institutions to the legally constituted civilian authority and respect for the rule of law on the part of all institutions and sectors of society"[82].

Reflecting on the significance of those two articles, Legler comments that up until 2000 the prevailing consensus in the Americas about "democracy" did not go much beyond the criterion of free, fair and transparent elections, and that "what happened between elections continued to be the domain of sovereign, democratically elected leaders"[83]. In his judgment, the lack of a consensus on a wider meaning made it "truly difficult to gauge at what point an incumbent, elected state leader, could be considered to erode democracy"[84]. As we remember, the need for the OAS to be able to deal effectively with new threats to democracy such as, but not exclusively, autogolpes, is what had inspired the leaders of the Americas to call for a new instrument, the future Inter-American Democratic Charter. Hence, no doubt, the subsequent agreement of the Member States on the language of article 3 and 4, as a result of which, again in Legler's word, "it finally became much clearer what exactly Member States (…) were defending and promoting"[85]. But that may be a hasty judgment, given the current debate on how the Charter needs to be made more effective if it is to serve its purposes, especially in the face of what appears to be a growing number of not only new threats, but actual instances of "backsliding".

iii. Chapter IV of the Inter-American Democratic Charter: Strengthening and Preservation of Democratic Institutions

Chapter IV of the Inter-American Democratic Charter, devoted to the "Strengthening and Preservation of Democratic Institutions" (Articles 17-22), is at the very center of the above-mentioned debate. A debate which Secretary General Insulza has quite clearly summed up and dealt with in both his 2007 Report and Conference. A debate which focuses, to a large extent, to the ways of access to the Charter.

The following reviews that Chapter with the above in mind.

Article 17: "When the **government** of a member state considers that its **democratic political institutional process** or its **legitimate exercise of power** is at risk, it may **request assistance from the Secretary General or the Permanent Council** for the strengthening and preservation of its democratic system"[86].

a) This spells out the first channel of access to the Charter.

b) Together with Article18, its provisions are preventive in nature, and seek to avoid the escalation of political problems into a more serious crisis.[87]

c) The initiative for action - in the form of unspecified "assistance" - either by the Secretary General or, collectively, by the Permanent Council - lies in the hands of the government of state immediately concerned; in other words, Article 17 is a "self-help" provision[88]; the 'trigger' to set Article 17 in motion must be the country concerned.

Article 18: *"When **situations** arise in a member state that may **affect** the **development of its democratic political institutional process** or the **legitimate exercise of power**, the **Secretary General or the Permanent Council may, with prior consent of the government concerned,** arrange for visits or other actions in order **to analyze** the situation. The Secretary General will submit a report to the Permanent Council, which will undertake **a collective assessment of the situation** and, where necessary, **may adopt decisions** for the **preservation** of the democratic system **and its strengthening**".*

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82. Emphasis provided.
83. LEGLER, Thomas. The Inter-American Democratic Charter: rhetoric or reality. In: **Promoting Democracy in the Americas** (see *supra*), p. 113-130, at p. 114.
84. *Ibid.*
85. *Ibid.*, p. 116.
86. In this Article 17 and those immediately following, emphasis is added.
87. According to LEGLER, *op. cit.*, p. 16, the preventive nature of Article 17 represented a precedent for the inter-American system; his comment also applies to Article 18.
88. In the words of PASTOR, *op. cit.*, p. 18; see also LEGLER, *op. cit.*, p. 116.

a) This spells out the second channel of access to the Charter.

b) Its provisions are likewise preventive in nature, and also seek to avoid the escalation of political problems into a more serious crisis.

c) Again here, action can be undertaken by both the Secretary General and the Permanent Council, but only with the prior consent of the government of the country concerned.

Legler[89] refers to Article 18 as *"a 'community watch' measure"*, because it opens the door for a call for a collective assessment of the situation in a country under threat, provided of course there is prior consent of the host government.

In a study titled "*Carrots and Sticks for Democracy in the OAS: Comparison With the East European Experience*"[90], Lisa McIntosh Sundstrom refers to what she calls the "hindrances to the apparent power" of the procedures outlined in Articles 17 and 18, among others, of the Inter-American Democratic Charter. Hindrances which are quite obvious to all. The Secretary General's 2007 Report to the Permanent Council reviews them at length. To use Prof. McIntosh Sundstrom's words in summarizing them, "unless the government of the member state itself is worried that it is being threatened by the situation in the country, (…) it is unlikely to consent to an outside investigation; if the conduct of the government itself constitutes the danger to democracy, that government is unlikely to agree to allow an OAS investigatory mission into the country".[91] Commenting on the same two articles in relation to several 'situations' that did occur in the region where democracy was under threat, Legler writes: "How the Democratic Charter was used or not used in these instances reveals a lot about its shortcomings, as well as the overall difficulty of converting its noble principles into collective action in defense of democracy"[92].

Article 19: *"**Based on the principles of the Charter of the OAS** and subject to its norms, and in accordance with the democracy clause contained in the Declaration of Quebec City, **an***

89. *Ibid*., p. 116,
90. Published in the previously referenced thematic issue of **Canadian Foreign Policy**, v. 10, n. 3 (Spring 2003) devoted to "The Inter-American Democratic Charter: Challenge and Opportunities for the Collective Defence and Promotion of Democracy in the Americas". McIntosh was then Assistant Professor of Political Science at University of British Columbia, in Canada
91. *Ibid*., p. 46.
92. *Ibid*., p. 119. He gives several examples of the "highly noticeable (…) failure to use the Democratic Charter's preventive mechanism contained in Articles 17 and 18". About Article 17: "Aristide did not invoke the self-help clause contained in Article 17 following an armed attack on the presidential palace in December 2001, nor did he use it in the weeks leading up to his ouster by an armed rebellion on February 19, 2004. Despite months of heightening tension in Venezuela prior to the April 2002 coup, Hugo Chavez did not turn to Article 17 either. In Bolivia, President Gonzalo Sánchez de Lozada (2003) and his successor Carlos Mesa (2005) also failed to invoke the self-help clause as their respective presidencies were threatened by mass demonstrations demanding their resignation." And on Article 18: "(That) community watch clause, has only been invoked in two of the aforementioned country cases [Haiti, 2001 & 2004; Venezuela 2002; Bolivia, 2003 & 2005; Ecuador & Nicaragua]. On April 22, 2005, Article 18 was finally invoked in Permanent Council Resolution 880. Article 18 made its debut as the grounding for a high-level mission to Ecuador by acting Secretary-General Luigi Einaudi to explore ways to strengthen democracy in that country. It is worth noting that Article 18 made its appearance only after President Lucio Gutiérrez had resigned in the midst of a full-blown political crisis. Neither was Article 18 nor any other Democratic Charter measures invoked in December 2004 when Gutiérrez unconstitutionally undermined the separation of powers between the executive and the judiciary in Ecuador, nor in the weeks prior to Gutierrez' demise. Article 18, was used for only the second time some six weeks later, at the annual OAS General Assembly in Fort Lauderdale, Florida. In a declaration entitled *Support for Nicaragua*, the General Assembly made reference to Article 18 in the preamble as the basis of authorization for sending a mission headed by Secretary-General Insulza to Nicaragua for the purpose of establishing a dialogue among the polarized elites in that country's political crisis. Importantly, that marked the first use of Article 18 and the Inter-American Democratic Charter as they were meant to be used: as preventive tools of diplomacy. In contrast to the previous reluctance by threatened governments (…) to consent to Article 18, undoubtedly the impulse for Article 18 came largely from the Bolaños government".

unconstitutional interruption[93] ***of the democratic order or an unconstitutional alteration***[94] ***of the constitutional regime that seriously impairs the democratic order*** *in a member state, constitutes, while it persists,* ***an insurmountable obstacle to its government's participation*** *in sessions of the General Assembly, the Meeting of Consultation, the Councils of the Organization, the specialized conferences, the commissions, working groups, and other bodies of the Organization".*

As can be seen, Article 19 introduces the remainder of Chapter IV of the Charter by expressly reiterating the 'democracy clause' of the Declaration of Quebec. By differentiating between 'unconstitutional interruptions' and 'unconstitutional alterations', and by considering that both situations can lead to the same serious consequence, it acknowledges that both traditional *coups* and other forms of impairment of the democratic order – such as 'backsliding' on the part of democratically elected leaders – have come to represent equal threats and violations of the basic principles established by the OAS Charter. And that is exactly what the Quebec Summit had called for.

One of the important consequences of Article 19, according to some, was that it 'conditionalized' the notion of sovereignty in the Inter-American System. For Legler, for example, by making the OAS "a club restricted to democratic membership", Article 19 "clearly reserved the sovereign right of international recognition of states", something that he sees as "run(ning) contrary to the Latin American tradition of upholding sovereign prerogatives of Member States in an absolute sense"[95].

Articles 19-21[96] provide the third channel of access to the Inter-American Democratic Charter, a channel which is open to the Secretary General or any Member State. As we have seen, the consent of the 'government' of the country concerned is required in the case of the "preventive" action foreseen in Articles 17 and 18, for the OAS to avert or prevent a breakdown in the "*democratic political institutional process or (the) legitimate exercise of power"*. Such a pre-condition results in obvious limitations to the potential usefulness of the Charter to serve its intended ends, as briefly alluded to above, when we referred to the "hindrances" attached to those two articles. But there are no such hindrances, at least in appearance, attached to articles 20 and 21, which deal with *ex post facto* situations, that is when harm has already been done and the "democratic order" has either been interrupted or seriously impaired. Still, as pointed out by the Secretary General in his 2007 Report to the Permanent Council, the lack of a clear definition of what constitutes an alteration or interruption of the institutional order remains in itself a serious limitation on possible recourses by the OAS to Articles 19-21 of the Inter-American Democratic Charter.[97] As he pointedly writes, "if the principal

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93. Dealt with by Article 21 of the IADC, which reads: "*When the special session of the General Assembly determines that there has <u>been an unconstitutional interruption</u> of the democratic order of a member state, and that diplomatic initiatives have failed, the special session shall take the decision to suspend said member state from the exercise of its right to participate in the OAS by an affirmative vote of two thirds of the Member States in accordance with the Charter of the OAS. The suspension shall take effect immediately. The suspended member state shall continue to fulfill its obligations to the Organization, in particular its human rights obligations".* In the Spanish version of the IADC the term "*ruptura*" is used for "interruption". Emphasis provided.
94. Dealt with by Article 20 of the IADC, which reads: "*In the event of* ***an unconstitutional alteration*** *of the constitutional regime that seriously impairs the democratic order in a member state,* ***any member state or the Secretary General*** *may request the immediate convocation of the Permanent Council to undertake* ***a collective assessment*** *of the situation and to* ***take such decisions as it deems appropriate.*** *The Permanent Council, depending on the situation, may undertake the necessary diplomatic initiatives, including good offices, to foster the restoration of democracy. If such diplomatic initiatives prove unsuccessful, or if the urgency of the situation so warrants, the Permanent Council shall immediately convene a special session of the General Assembly. The General Assembly will adopt the decisions it deems appropriate, including the undertaking of diplomatic initiatives, in accordance with the Charter of the Organization, international law, and the provisions of this Democratic Charter. The necessary diplomatic initiatives, including good offices, to foster the restoration of democracy, will continue during the process*". Emphasis provided.
95. *Ibid*., p. 117.
96. See above footnotes for the full text of Articles 20 and 21.
97. Notably, at p. 12 of his Report. More on this later.

asset to be safeguarded is democracy, how can we do so without clearly defining when and how it is imperilled?"

There are important negative consequences to what Legler calls the lack of "a clear set of benchmarks to serve as a threshold for determining precisely at what point the OAS should intervene according to the main action clauses in Articles 17-21". As he explains, there is "an important magnitude issue at play; (…) it is unclear what antidemocratic measures are serious enough violations of the Democratic Charter to warrant OAS action; were the OAS to respond to every minor infraction of the Democratic Charter, it would need to intervene constantly in its Member States' internal affairs to defend democracy; yet by choosing not to respond to minor transgressions and to focus only on major threats, the OAS runs the risk of allowing the incremental erosion of democracy, or its 'death-by-a-thousand-cuts' "[98].

6. On the Nature and Significance of the Inter-American Democratic Charter

Thus far, the present study has dealt with some of more remote 'historical' background of the Inter-American Democratic Charter, some of its more immediate antecedents, and some of its content. In the rapporteur's belief, those were elements which should assist in the search for possible ways to bridge what some are now seeing as a gap between, on one part, the high principles that have inspired it and the expectations it has created, and, on the other, the actual capacity for the Inter-American Democratic Charter to deal effectively with the preservation of the democratic ideal enshrined in the OAS Charter.

One can easily surmise that it is precisely that concern that has led the OAS Member States to instruct the Secretary General "to devise proposals for timely, effective, balanced, gradual initiatives for cooperation, as appropriate, in addressing situations that might affect the workings of the political process of democratic institutions or the legitimate exercise of power"99. A concern which, as a consequence, the Secretary General addressed thoroughly and extensively in his subsequent report "The Inter-American Democratic Charter - Report of the Secretary General pursuant to resolutions AG/RES. 2154 (XXXV-O/05) and AG/RES. 2251 (XXXVI-O/06)", of 4 April 2007[100], already mentioned above.

The situation described by the Secretary General has been the object of numerous studies, before and after his above-mentioned Report, which it might also be useful to review. But before doing so[101], and always in the context of the search for ways to interpret the Inter-American Democratic Charter so that it may better serve democracy in the Americas, here is a sampling of authoritative opinions, mostly coming from close observers – when not actual participants in its making - on the nature and significance of that charter.

(Note: A good part of what follows is taken from the rapporteur's previous report, "Legal Aspects of the Interdependence Between Democracy and Economic and Social Development"[102].)

As mentioned earlier, the Inter-American Democratic Charter was the direct result of express instructions issued at the highest political level, namely by the Heads of State and Government of the Americas gathered at their Third Summit in Quebec City in April of 2001. That explains why it is often referred to as first and foremost a "political" document. For example, Uruguay's former Minister of Foreign Affairs, Didier Opertti, described it as "a political Charter", at the Protocolar Session of the Permanent Council held on 16 September 2002, to commemorate its 1st anniversary. Similarly, it was labelled "the Hemispheric instrument with the most transcendental political character since the advent of the OAS Charter" at the Informal Dialogue of OAS Foreign Ministers at the 2002 Bridgetown at

98. *Ibid*, p. 122. Legler gives the example of Peru during the 1990s under Fujimori, where, he says, "by the time the OAS took action to defend democracy, the country had long since slipped into authoritarianism". The expression "slow-motion constitutional coup" has also been used by others, notably by Maxwell A. Cameron, as quoted by Legler, at p. 120.
99. AG/RES. 2154 (XXXV-O/05).
100. OEA/Ser.G, CP/doc.4184/07, original Spanish.
101. In part 8 and the Annex, *infra*.
102. CJI/doc.190/05 rev. 3, 20 March 2006.

General Assembly[103]. Hence the fully understandable conclusion that the Charter's fate, ultimately, can only rest in the hands of the political authorities of the OAS Member States.

That being said, and since those same political authorities have repeatedly reaffirmed the importance they attach to respect for, the maintenance, and the strengthening of the rule of law[104], the legal nature or character of the Inter-American Democratic Charter has been the subject of much study. Especially in relation to the obligations it creates both on the OAS itself as an organization and on its Member States, given that it is a declaration, and not a treaty. One key factor in the discussions surrounding this issue is that the drafters of the Inter-American Democratic Charter saw fit to include the following language in the last paragraph of its preamble: "*BEARING IN MIND **the progressive development of international law** and the advisability of clarifying the provisions set forth in the OAS Charter and related basic instruments on the preservation and defense of democratic institutions, according to established practice, (…)"*[105].

That has led Ambassador Humberto de la Calle, in his introduction to *Carta Democrática Interamericana: documentos e interpretacione*s, to write that the Democratic Charter, in spite of being a resolution and not a treaty, is in reality more than 'just an ordinary Resolution' "because", in his words, "it was conceived as a tool to actualize and interpret the fundamental Charter of the OAS, within the spirit of the progressive development of international law"[106].

The Inter-American Juridical Committee has already pronounced itself with regard to this specific issue when, by its Resolution CJI/RES. 32 (LIX-O/01) of 16 August 2001, it approved a report on "Observations and Comments of the Inter-American Juridical Committee on the draft Inter-American Democratic Charter"[107]. Those "Observations and Comments", noted the Report, had been drafted *"on the assumption that the Draft Inter-American Democratic Charter will be adopted as a resolution of the General Assembly (…)"*[108]*. It then went on to say: "The provisions of resolutions of this nature generally have as their purpose the interpretation of treaty provisions, the provision of evidence of the existence of customary norms, the affirmation of general principles of law, or the proclamation of common aspirations, and they may contribute to the progressive development of international law. (…)"*[109].

Many have underlined, stressed, and expanded upon that important aspect of what we might call the overall 'legal atmospherics' – if we may use such an expression – within which the Inter-American Democratic Charter is to be viewed and implemented.

For example, early in the drafting of what would become the Inter-American Democratic Charter, Ambassador Manuel Rodríguez Cuadros, then Vice Minister and Secretary General for External Relations of Peru, in his address to the September 2001 Regular Session of the Permanent Council, having first labelled democracy "a global condition of the present international system", and spoken of "new norms of international laws, formal and customary, regional and universal, which consecrate it [democracy] and submit it to international responsibility", added: "Those processes allow us to see there now begins to exist **a universal tendency to look at democracy from a juridical angle, as an internationally exigible obligation.** The Inter-American Democratic Charter constitutes, in that context, a contribution to that worldwide tendency, maybe the most developed and the most advanced (…). In many ways the Charter **goes beyond the prior *status quo* in terms of principles, norms and mechanisms** relating to the preservation and defense of democracy in the OAS, as seen in the dynamic perspective of the progressive development of international law"[110].

Ambassador Didier Opertti also spoke with clarity on this same issue, in his then capacity as Minister of Foreign Affairs of Uruguay, when he said: "(…) we were asking ourselves how to make of the Charter a resolution which at the same time would have the very **rank of a binding international instrument**, over and above the normative level that the hierarchical pyramid of the OAS reserved for

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103 By the Representative of Peru, Ambassador Eduardo Ferrero Costa; the theme of that "Informal Dialogue" was: *"Follow-up and Development of the Inter-American Democratic Charter"*.

104 Notably, but that is but one example, in their Quebec Declaration and Plan of Action.

105 Emphasis added.

106 *Ibid.,* at p. viii. A conclusion fully shared by many.

107 That Report was published as CJI/doc.76/01, 15 August 2001.

108 Para. 3 of the IAJC Report.

109 See para. 5 of the IAJC Report. Dr. Mauricio Herdocia Sacasa quotes that paragraph in *op. cit.*, p. 147.

110 DE LA CALLE, *op. cit.*, p. 78; emphasis added.

it. And it is then (…) that sprang the idea of **making of that Charter a chapter in the progressive development of our contemporary international law,** and conferring upon it the character of an authentic interpretation. The General Assembly, supreme organ of the System, interprets this [Democratic] Charter as a progressive development of the OAS Charter"[111].

Ambassador Ferrero Costa, speaking a few weeks before Min. Opertti, likewise affirmed at the *Jornadas de Derecho Internacional* (Florianopolis, Brazil, 2002) that conceiving the Charter as part of the **progressive development of international law** was seen as a solution to everybody's desire to confer legal weight and value upon the Charter, while remaining short of using the formal treaty route[112].

For Ambassador Manuel Rodríguez Cuadros, one of the principal Peruvian negotiators of the Charter, it is because that instrument is based on the principle of the progressive development of international law that it could in fact "reform"[113] the OAS Charter without the necessity of having recourse to a new treaty. In his opinion, "that is why the Inter-American Democratic Charter is **binding: it constitutes a normative development of the OAS Charter**"[114].

Not everyone would entirely agree with such a conclusion. There is no unanimity amongst legal scholars that a 'resolution' passed by the body of an international organization can be of legally obligatory application unless the constitutional texts of such organizations expressly allow it. But international law is not static; it does evolve, or 'progressively develops', largely of course on the basis of the concordant behavior of States and the expression of their political will. Especially when those States are regrouped within a regional organization with strong habits of decisions by consensus.

Dr. Mauricio Herdocia Sacasa, a former Chairman of the Inter-American Juridical Committee and currently still one of its members, has addressed those same issues at some length in his recent study Soberanía clásica, un principio desafiado: ¿hasta dónde?, mentioned earlier. He writes that "The International Law of the Americas has extended its action into the sphere of the internal political organization, in relation to the essential elements of Representative Democracy, which cannot be transgressed (…)"[115]. Which later leads him to affirm: "The contribution of the Inter-American System to the 21st century will be its contribution to the universal consecration of the principle of Representative Democracy as a legally binding obligation worldwide (…)"[116].

Secretary General Insulza for his part, while recognizing that the Inter-American Democratic Charter does not have the same force as an international treaty, nevertheless calls it "the most important instrument within the legal ambit of the Americas for the purposes of dealing with democracy (…) the cornerstone upon which we want to make progress in relation to the democratic process within our continent"[117]. In his Report to the Permanent Council, he refers to it as "the most complete inter-American instrument enacted to date for promoting democratic practices in the states of the Hemisphere and pursuing the cooperative activities that are needed in cases where performance is clearly not up to standard".

Outside observers have commented on the same issue. For example, Steven Wheatley, while rejecting the claim that international law should recognize a universal obligation for states to introduce and maintain democratic governments, seems to acknowledge that there are inroads towards such a recognition being made at regional levels. In "Democracy in International law: a European

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111. Again during the Protocolar Session of the Permanent Council of 16 September 2002 held in commemoration of the first anniversary of the Inter-American Democratic Charter, as quoted in DE LA CALLE, *op. cit*., p. 232; emphasis added.
112. The full report of those *Jornadas* has been published as **Jornadas de Derecho Internacional** (Florianopolis, Brazil, 2002), Secretaría General de la OEA, Washington DC, 2003. Ambassador Ferrero Costa's presentation can be found at p. 427-446.
113. Note that he did not use "amend".
114. As quoted by Ambassador Ferrero Costa in *Jornadas*, at p. 441; emphasis added.
115. *Ibid.,* p. 137.
116. *Ibid.,* p. 138.
117. To be more precise, "*el instrumento más importante de ordenamiento jurídico de las Américas en este aspecto de la regulación de la democracia (…) la piedra angular en torno a la cual queremos progresar en este proceso democrático dentro del continente"*, during his previously mentioned conference of 3 August 2007.

Perspective"[118], while asserting that it is not yet possible – at least at the time he wrote, i.e. 2002 - to identify such a universal obligation, he does concede that "the evolving internal aspect of the right of a people to self-determination, the increasing numbers of states party to universal and regional human rights instruments (which all contain provisions on free and fair elections and political participation), and recognition that a democratic system of government may not be legitimately be replaced by an authoritarian one, indicates a progressive and irreversible movement to a world community of democratic states"[119]. For their part, Hawkins and Shaw consider that the repeated invocations of the Inter-American Democratic Charter in OAS resolutions and other documents imply that it has "a fairly high level of obligation despite its status as a resolution"[120]. As for Cameron and Hecht, they see the Charter as "a milestone not only because it articulates the essential elements of democracy but also because it signals commitments of OAS Member States to the collective promotion of democracy"[121].

7. Democracy and the Inter-American Juridical Committee

Before proceeding with a look at the present difficulties with the application or implementation of the Inter-American Democratic Charter, including some of its flaws, shortcomings and drawbacks generally identified as factors limiting its effectiveness, the rapporteur would now like to look at but a few of earlier pronouncements by the Inter-American Juridical Committee on the subject of democracy in the Inter-American system.

Throughout the years, the Committee has studied several reports prepared by a number of its members[122]. It has also occasionally adopted resolutions which enunciated what it considers to be principles of continued relevance today. One of the most important was resolution "Democracy in the Inter-American System" of March 23, 1995[123]. After having stated that "the effective exercise of representative democracy constitutes a legally protected interest or value in the Inter-American System", that resolution declared that in relation to the effective exercise of representative democracy the OAS and its members observe a series of principles and regulations, in line with the Charter of the Organization, among which:

> "*FIRST. Every State in the Inter-American* System **is obliged to effectively exercise representative democracy in its political organization and system**. *This obligation exists in relation to the Organization of American States and for the fulfillment thereof, every Inter-American State has the right to select the ways and means deemed appropriate thereby".*
>
> *"SECOND. The principle of non-intervention and the right of each State in the Inter-American System to choose its political, economic and social system without external intervention, and to organize its structure in the way best suited to it,* ***may not cover a violation of the obligation to effectively exercise representative democracy in said system and organization."***
>
> *"FIFTH. The State in the Inter-American System that fails to meet the obligation of effectively exercising representative democracy is* ***obliged to resume the effective exercise thereof****. The*

118. In: **International and Comparative Law Quarterly (ICQL),** v. 51, April 2002, p. 225-247.
119. *Ibid.,* p. 234.
120. *Ibid.,* p. 27.
121. *Ibid*., p. 8.
122. To name but a few: "Study on the relation between respect for human rights and exercise of democracy" (**Inter-American Juridical Committee, Recommendations and Reports, Official Documents, v. VI, 1959-1960**. Rio de Janeiro, GB, 1961, p. 221 ff.); "Study on legitimacy in the Inter-American System and the inter-relationship between the provisions of the OAS Charter on self-determination, non-intervention, representative democracy and protection of human rights" (CJI/SO/II/doc.13/91, rev. 2, 13 August 1992, by Drs. Seymour Rubin and Francisco Villagrán-Kramer; a series of reports by Dr. Eduardo Vio Grossi entitled (a) "Democracy in the Inter-American System", (CJI/SO/II/doc.10/93; CJI/SO/I/doc.11/94; CJI/SO/II/doc.37/94 rev. 1 corr. 2; CJI/SO/I/doc.7/95, rev. 2; (b) "Democracy in the Inter-American System; Follow-up report: a New Methodological Approach: Instrument, Declaration or Inter-American Treaty on Democracy" (CJI/doc.35/00 rev.1), and (c) "Democracy in the Inter-American System; Follow-up report on Applying the Inter-American Democratic Charter" (CJI/doc.127/03); "Legal Aspects of th Interdependence Between Democracy and Economic and Social Development" by the author of the present Report (CJI/doc.190/05 rev.3).
123. CJI/RES. I-3/95.

purpose of the resolutions adopted by the Organization of American States in such an event should ensure the resumption thereof." [124]

When it adopted another resolution on "Democracy in the Inter-American System"[125] three years later, on March 18, 1998, the IAJC reiterated *verbatim* the principles it had enunciated in CJI/RES. I-3/95. It also recognized that "The concept of Representative Democracy and the systems in which it is reflected are undergoing permanent evolution and development, prompting an update of studies focused on this issue". But it immediately proceeded to conclude that "(a)n exhaustive study of the various elements constituting this topic would require a major effort, demanding the use of economic and technical resources that are equally sizable, due to its scope and complexity, and which are not available to the Inter-American Juridical Committee"[126]. It therefore resolved "to place on record that, in its view, there are other aspects of this topic that could be analyzed (…) but due to the scope and complexity thereof, the funding will be needed to study them exceeds the amounts currently available".

The Committee's next resolution on "Democracy in the Inter-American System"[127] dates from 19 August 2000 and came following an OAS Special Mission sent to Peru on the basis of resolution AG/RES. 1753 [(XXX-O/00)] of 5 June 2000, at the invitation of the Government of that Member State. The objective of the mission was "exploring, with the Government of Peru and other sectors of the political community, options and recommendations aimed at further strengthening democracy in that country, in particular measures to reform the electoral process, including reform of judicial and constitutional tribunals, as well as strengthening freedom of the press". That resolution came as a result of consideration by the Committee of a report submitted by Dr. Eduardo Vio Grossi based on the above Special Mission to Peru, and in which he concluded that for such a mission to comply with its mandate, it would have to compare the law and national practices in the state under observation with international norms, not all of which are included in treaties in force[128.]

Dr. Vio Grossi's argumentation convinced the IAJC "that in order for such missions to fulfill their objectives, it would be useful if they had available generally accepted guidance as to the principles, norms, criteria and practices concerning the effective exercise of representative democracy as related to their functions" and "that the principle of juridical security in inter-American relations makes it advisable to seek a more precise definition of the international principles, norms, criteria and practices concerning the matter within the inter-American context"[129]. But the Committee did not go any further than inviting its members interested in the issue to formulate proposals or initiatives and circulate them for future discussion, and requesting the other agencies of the Organization that are also involved in this issue in the framework of their respective responsibilities, and especially the General Secretariat, through the Secretariat for Legal Affairs and the Unit for the Promotion of Democracy, to

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124. Emphasis added.

125. CJI/RES.5/LII/98.

126. Things have not really changed since then ….

127. CJI/RES. 17 (LVII-O/00). That resolution began by recalling once more the "principles and norms" observed by OAS Member States "with regard to the effective exercise of democracy" first enunciated in its Resolution CJI/RES. I-3/95 and reiterated in its Resolution CJI/RES. 5/LII/98.

128. CJI/doc.35/00 rev.1, of 17 August 2000. In his report, Dr. Vio Grossi's raised the issue of which law should be applied by observation missions to form their conclusions and recommendations about further strengthening democracy in a particular state. He took care to explain that it was not a question of excluding totally from internal, domestic or exclusive state jurisdiction everything related to electoral processes and democracy. But rather simply that if a state consents to international observation, equally international norms should be made available for the mission to be carried out.

129 Quoted from the Preamble of CJI/RES. 17 (LVII-O/00). More precisely, what Dr. Vio Grossi had in mind was the need for "a Draft Project of an Instrument, Declaration or Inter-American Treaty that would include such topics as the development of the norms of the Charter of the OAS on democracy, the connection between democracy and human rights, the segregation of State powers, State judicial and comptroller agencies, electoral systems and citizen participation, respect for minorities, the party political system, the status of the armed forces, pressure groups, and so on, in addition to all that represents a challenge not only for the juridical development of the Inter-American System in this matter but also what can be expected of it in the foreseeable future" (para. 21 of his report).

lend their collaboration to the Juridical Committee members in the preparation of their eventual reports or drafts[130].

During the intense drafting period that followed the April 2001 Quebec Summit and its request for the preparation of a Democratic Charter, the Inter-American Juridical Committee was invited by the OAS Permanent Council to support the latter's Working Group entrusted with the preparation of such a charter. The Committee prepared and adopted a report "Observations and Comments of the Inter-American Juridical Committee on the Draft Inter-American Democratic Charter"[131]. The Committee's view on the nature of the proposed instrument has already been quoted, supra. Among the long list of comments and suggestions made by the Committee and which later found their way in the final text of the Inter-American Democratic Charter, one can note the following:

- since the proposed Article 1 of the Charter was understood to reflect the political commitment of the American States, the Committee felt there was no need to "enter into an analysis of the different meanings that the word 'peoples' may have nor the nature of the aforementioned 'right' "[132];
- when the Committee suggested that the term popular sovereignty" in the draft be replaced by "sovereignty of the people"[133], it commented that "(t)his sovereignty of the people, which is the basis of democracy, requires free and fair elections; the exercise of power in accordance with the rule of law and responsibility of the authorities for their acts; separation of powers, particularly the independence of the Judiciary; freedom of political expression, including the freedom of the press; and control of the armed forces by elected authorities"[134], notions that are now all present in the Democratic Charter;
- the Committee also noted, with regard to what has now become Chapter IV of the Charter, "that throughout this section different terms are used [in the draft text]: 'unconstitutional alteration', 'unconstitutional interruption' and, as expressed in resolution AG/RES. 1080 (XXI-O/91), an 'abrupt or irregular interruption' "and it therefore suggested that the possibility be considered to standardize the terminology, adding that "in any case, the term 'unconstitutional interruption' could be simplified by removing the word 'unconstitutional', without changing the meaning of the provision"[135]. A suggestion that was not retained for the final text, possibly for political reasons;
- with regard to what has now become Article 18 of the Charter, and which reads in part "the Secretary General or the Permanent Council may, with prior consent of the government concerned, arrange for visits or other actions in order to analyze the situation", the Committee, maybe anticipating the limitation thus placed on the Organization to act in support of endangered democratic political institutional processes or legitimate exercise of power, commented that "it should also be clarified whether government consent is required only for the visits mentioned therein, or also for any other initiatives or efforts"[136];
- the Committee also dealt at length with a set of what it considered to be three apparent contradictions between the then draft articles 12-16 of the proposed Democratic Charter and Article 9 of the OAS Charter. One such contradiction, the Committee noted, relates to the fact that whereas Article 9 of the Charter of the Organization provides that the suspension of a Member State may occur in the event of the overthrow by force of a democratically constituted government, draft Articles 12-16 refer to an unconstitutional interruption; such an apparent contradiction led the Committee to ponder whether there were not two possible interpretations of Article 9; the first would assume that the overthrow by force of a democratically elected government "could only be understood as a reference to the classic coup d'état or revolution, by which the legitimately constituted

130 Paras. 3 and 4 of the operative part of CJI/RES. 17 (LVII-O/00).
131 CJI/doc.76/01, 15 August 2001, and CJI/RES. 32 (LIX-O/01), 16 August 2001.
132 Para. 7 of the report.
133 "Sovereignty of the people" is the expression that was finally adopted for Article 3 of the Democratic Charter.
134 Para. 10 of the report.
135 Para. 27 of the report.
136 Para. 29 of the report.

powers of government are replaced"; the second "would recognize that the relevant text of Article 9 is susceptible to a broader interpretation, and it would maintain that the overthrow by force of a democratically constituted government could encompass any other rupture that violates basic constitutional principles and is so grave and not easily rectifiable through domestic measures as to prevent the government in question from being considered democratically constituted"; under the first interpretation, the Committee continued, "the contradiction could only be resolved by amending the Charter of the Organization"; while under the second interpretation, "it would be unnecessary to amend the OAS Charter, provided that the text of the Democratic Charter explicitly states that it is setting forth an interpretation of the OAS Charter, and assuming, of course, that the Democratic Charter is adopted by consensus"[137].

Finally, when it considered the report "Legal Aspects of the Interdependence Between Democracy and Economic and Social Development" prepared in compliance of a mandate emanating from the OAS General Assembly, the Committee adopted a resolution under the same name[138], in which it reaffirmed "that observation of the attributes inherent to democracy supported on the rule of law is indissolubly linked to the enforcement of representative democracy". That resolution accepted the above-mentioned report, which enunciated several "conclusions" stemming from an extensive study of the Inter-American Democratic and OAS Charters, as well as of several other regional and international instruments. Some of those emanated directly from previous IAJC resolutions and have already been stated earlier in the present report. Others, also relevant to the present study, are worth reproducing here:

- "The Inter-American Democratic Charter is inseparable from the OAS Charter, since it is generally agreed (…) that in actual fact it constitutes without any possible doubt, the reaffirmation and interpretation, on one hand, and the normative development, on the other, of principles already included in the OAS Charter, with regard to the effective exercise of representative democracy";
- "There is ample support for the proposition that the Inter-American Democratic Charter represents 'an exercise of actualization of positive norms in vigor, in accordance with the principle of the progressive development of International Law' "[139];
- "The Rapporteur shares the view that 'there now begins to exist a universal tendency to look at democracy from a juridical angle, as an internationally exigible obligation" and that "the Inter-American Democratic Charter constitutes, in that context, a contribution to that worldwide tendency, maybe the most developed and the most advanced (…)"[140];
- "The Rapporteur shares the view that the Inter-American Democratic Charter was adopted as 'a resolution which at the same time would have the very rank of a binding international instrument, over and above the normative level the hierarchical pyramid of the OAS reserved for it' and for that purpose was conceived as 'a chapter in the progressive development of our contemporary international law' "[141];
- "The Rapporteur shares the view that through the Inter-American Democratic Charter 'the International Law of the Americas has extended its action into the sphere of the internal political organization, in relation to the essential elements of Representative Democracy, which cannot be transgressed (…)' "[142];

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137 Paras. 37-41 of the report; emphasis added.

138 CJI/RES. 106 (LXVIII-O/06), 29 March 2006.

139 Ambassador Celso Lafer, Foreign Minister of Brazil, at the XXXI Regular Session of the General Assembly of June 2001 in San José, as quoted by Ambassador Valter Pecly Moreira at the regular session of the Permanent Council of September 6, 2001, in DE LA CALLE, *op. cit*., p. 64.

140 Ambassador Manuel Rodríguez Cuadros, Vice Minister and Secretary General for External Relations of Peru, as quoted earlier in this Report.

141. Ambassador Didier Opertti, Minister of Foreign Affairs of Uruguay, at the XXXI Regular Session of the General Assembly of June 2001 in San José, as quoted by Ambassador Valter Pecly Moreira at the regular session of the Permanent Council of September 6, 2001, in DE LA CALLE, *op. cit*., p. 64.

142. Dr. Mauricio Herdocia Sacasa, as quoted earlier in this Report.

- "While it is not possible to define "democracy", taken in the abstract, in any precise or authoritative manner, what it entails in a general fashion can be, and has often been, described, notably by simply using what are generally regarded as its constitutive or essential elements (for example, in Article 3 of the Inter-American Democratic Charter)";
- "It is also well agreed (a) that democracy is not a 'fixed' concept; especially and above all when looked upon through the modalities of its practical application in individual countries, and thus (b) that there is no one model of democratization or democracy suitable to all societies";
- "The OAS's mission to defend democracy is clearly accompanied by that of preventing and anticipating the causes that affect democracy".

8. The three main 'limitations' on the Inter-American Democratic Charter– General Overview

As stated by Secretary General Insulza in his 2007 Report to the Permanent Council, the Inter-American Democratic Charter has been recognized as "the most complete inter-American instrument enacted to date for promoting democratic practices in the states of the Hemisphere and pursuing the cooperative activities that are needed in cases where performance [in terms of democracy] is clearly not up to standard"[143]. Or, as he would say a few months later in Rio, the Democratic Charter represented "a great step in the history of our Americas, a great juridical step, which probably was ahead of its time". It would be difficult to come forward with a more concise, yet complete, description of the Charter than that of Legler: "In sum, the Democratic Charter contains provisions for dealing potentially with both *coup* and non-*coup* threats to democracy, using a variety of different measures, from nonthreatening to punitive ones. It encompasses crisis prevention and response. (…) it provides the basis for a graduated, flexible response in accordance with the severity of the problem, from constructive, preventive, and proactive measures to more severe, punitive ones. It allows for creative diplomacy rather than a single 'cookie-cutter' approach to defending democracy"[144].

Yet, as acknowledged by Secretary General Insulza, although it has become "the hemispheric benchmark for the preservation of democracy", the Democratic Charter has revealed "some limitations as to its legal, operational, and preventive scope" when it has been put to the test in existing or potential crisis situations[145]. Among the criticisms most frequently directed at the Charter, and more precisely its Chapter IV, he rightfully has indentified:

a) a lack of precision in the criteria for defining when and to what extent a country's democratic institutions have been altered, when the OAS is confronted with a situation of an unconstitutional alteration or interruption of the democratic order, when there is a crisis;

b) the obvious tension between the principle of non-intervention and the possibility of protecting democracy through collective mechanisms; and

c) problems of access for those seeking to avail themselves of the Charter's mechanisms[146].

All of which are interrelated.

The OAS Members States, as well of course as the members of the Inter-American Juridical Committee, are very familiar with the Secretary General's diagnosis of what he sees as the Charter's 'shortcomings' in its ability to achieve purposes for which it was conceived initially. They are likewise aware of the proposals he has advanced as possible ways to remedy such shortcomings. They also are fully cognizant of the reticence manifested by part at least of the membership concerning those proposals. Nevertheless, the rapporteur sees some utility in reviewing some of the Secretary General's analysis[147], both as expressed in his afore-mentioned April 2007 Report to the Permanent Council and in his subsequent address of August 2007 at the XXXIV Course on International Law of the Inter-American Juridical Committee. In the hope that the search for answers to the challenges faced by the Inter-American Democratic Charter be facilitated by considering such analysis in the light of all that precedes.

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143. At p. 3 of his Report.
144 *Ibid*, p. 118.
145. At p. 3 of his Report.
146. See p. 11 of his Report.
147. To the extent that it has not been covered earlier in this report.

[In the preparation of the present report, the rapporteur has also felt that to complete his panorama of the problematic around the general issues raised by the current on-going questioning and interrogations related to the implementation of the Inter-American Democratic Charter, including the "conditions and access routes to [its] applicability"[148], a survey or general overview, albeit necessarily limited, of some of the more recent specialized literature devoted to the Charter, might be of assistance in the search for solutions. Those can be found in the annex to this report.]

i. Lack of precision in the criteria for defining when and to what extent a country's democratic institutions have been altered, when the OAS is confronted with a situation of an unconstitutional alteration or interruption of the democratic order, when there is a crisis

The absence of any precision in the Inter-American democratic Charter of what may constitute an unconstitutional alteration or interruption of the democratic order does indeed render its application uncertain. As the Secretary General pointed out, "if the principal asset to be safeguarded is democracy, how can we do so without clearly defining when and how it is imperiled?" To explain that "important imperfection of the Charter", he surmised, in all likelihood quite correctly, that the Member States probably wanted to reserve for themselves the qualification of each situation on a case-by-case basis, and that maybe they are still reticent to give those expressions any precise meaning, because of past occurrences that have marked the history of hemispheric relations.

To assist in the interpretation of the above concepts, one could certainly start by arguing, thus repeating a point made in Part 5, iii above, that when Member States adopted Article 19 of the Democratic Charter and thus chose to differentiate between 'unconstitutional interruptions' and 'unconstitutional alterations'[149] and concluded that both situations can lead to the same serious consequence, they acknowledged that both traditional coups and other forms of impairment of the democratic order – such as 'backsliding' on the part of democratically elected leaders – have come to represent equal threats and violations of the basic principles established by the OAS Charter. We can pursue the argument further. Again as mentioned before[150], quite clearly, Article 19 of the Inter-American Democratic Charter, seemingly 'expanded' or went beyond Article 9 of the OAS Charter, which provides that the suspension of a Member State may occur in the event of the overthrow by force of a democratically constituted government. Under the assumption the Democratic Charter is not in contradiction with the OAS Charter, we could accept, as suggested by the Inter-American Juridical Committee in its "Observations And Comments Of The Inter-American Juridical Committee On The Draft Inter-American Democratic Charter"[151], that the members States have implicitly agreed that there are situations other than the overthrow by force of a democratically constituted government that can so violate basic principles of democracy so as to remove all democratic legitimacy from the government concerned.

Those arguments do not in themselves resolve the issue of what, precisely, is needed for such situations to 'qualify' as an unconstitutional alteration of the democratic order that would be serious enough to set in motion the mechanisms foreseen in the Democratic Charter. In his Report to the Permanent Council, Secretary General Insulza refers to initiatives coming from outside the Organization to define more precisely those situations that seriously affect democratic institutions. As an example of such initiatives he refers to a speech by former U.S. President Jimmy Carter, given at the inauguration of the Lecture Series of the Americas, in January 2005, in which he referred to the proposal put forward by political scientist Robert Dahl for a definition of the concept of "unconstitutional alteration or interruption" of the democratic order. Dahl suggests that in his judgment such a definition must include the following: 1. Violation of the integrity of central institutions of the state, including the weakening or inaction of reciprocal checks and balances governing the separation of powers; 2. Elections that do not meet minimal international standards; 3. Failure to hold periodic elections or to abide by electoral outcomes; 4. Systematic violations of basic freedoms, including freedom of expression, freedom of association, or respect for minority rights; 5. Unlawful termination of the term in office of any democratically elected official by another official, elected or not; 6.

148. As per the formulation of the mandate.

149 Thereby expressly reiterating the 'democracy clause' adopted by the leaders of the region in the *Declaration of Quebec*.

150 See part 7, *supra*.

151 CJI/doc.76/01, 15 August 2001, and CJI/RES. 32 (LIX-O/01), 16 August 2001.

Arbitrary or unlawful appointment of, removal of, or interference in, the service or deliberations of members of the judiciary or electoral bodies; 7. Interference by nonelected officials, such as military officers, in the jurisdiction of elected officials; 8. Use of public office to silence, harass, or disrupt the normal and legal activities of, members of the political opposition, the press, or civil society. In the opinion of the Secretary General, this proposal "goes generally in the right direction"[152].

Prof. Maxwell Cameron justifies his use of what he and others have labeled "theories of horizontal accountability" to draw up a similar list of situations that should be considered as "unconstitutional alteration or interruption of the democratic order"[153]. Those theories oppose "horizontal accountability" to "vertical accountability" as applied to democracy. They correspond to the distinction that Secretary General Insulza makes between "democracy of origin" (vertical) and "democracy as practiced" (horizontal)[154]. There can be no doubt that the Inter-American Democratic Charter covers and protects both. For Pastor[155], horizontal accountability is closely related to the separation of powers[156], and it is threatened when one branch of government oversteps its constitutional prerogative to control another branch. He gives, as most common examples, the overthrow or replacement of a president, the closing of Congress or changes to the highest court by a president in a significant and arbitrary fashion[157]. Cameron equates the concept to "the checks and balances inherent in a constitutional system of the separation of powers", and considers that unless the Democratic Charter succeeds in addressing the deficit of horizontal accountability in the region[158] it risks irrelevance[159].

The Secretary General himself doubts that the Inter-American Democratic Charter could be amended in a foreseeable future so as to include precise definitions of unconstitutional alteration or interruption of the democratic order[160]. Only the Member States could determine whether or not to give more precision to those concepts, and how to incorporate that added precision to OAS instruments and/or their application. That being said, it is suggested here that the Inter-American Juridical Committee would certainly agree that democracy as protected both by the OAS and the Inter-American Charters calls for the respect of all the elements expressly or impliedly contained therein, including those attached to the notion of "horizontal accountability". For there is no doubt in the rapporteur's mind that the obligation that is binding upon all Member States by the combined effect of both Charters comprises that of collegially addressing the various situations suggested above as potentially constituting serious threats to democracy.

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152 See p. 11-12 of his Report.

153 See Annex, I (A) for a full list and further development of his criteria.

154 In Spanish, he uses "*democracia de origen y democracia de ejercicio*".

155 *Ibid.,* p. 17.

156 Which Cameron aptly describes as "an essential feature of the constitutional state that underpins liberal democracy".

157 Pastor adds: "Threats of horizontal accountability are more difficult to prevent because democracy is often undermined by a process of slow erosion, and it's difficult to know how and when to intervene in the process".

158 He, with others, considers that deficit to be "one of the greatest threats to democracy" in the Americas.

159 At pp. 16 and 17 of his 2007 Report, the Secretary General writes: "(…) we may say that, while there is growing compliance with the IDC with respect to the inception of democracy, there remain important shortcomings in our Hemisphere in the separation, independence, and reciprocal control of the branches of government, and in full respect for the three spheres of citizenship: political, civic, and social". Which is why he adds, when it comes to specific preventive action the OAS can take in the fulfilment of its mandate in favour of promoting, preserving and defending democracy: "Consequently, when I think about expanding and developing the Democratic Charter, I also think about expanding and consolidating republican organization. The separation and balance of powers, a legislative branch endowed with its own political and technical capacity, a professional and fully independent judiciary; clear limits on the exercise of power; clear and stable rules for the democratic process; strengthening of political parties –– these are some of the elements of the democratic rule of law we want to strengthen. The republican form of government also attaches particular importance to mechanisms of citizen oversight. A democracy without accountability will inspire little confidence, and it is in the lack of confidence that most of today's crisis of representation has its roots".

160 He even doubts that given the present state of the political situation in the Americas there could be consensus today around the text of the present 2001 Charter.

Whether the suggested criteria were to be adopted or embraced, there is ample reason to believe that the 'political' prerogative of the Members States would be preserved. As pointed out by Cameron, and realistically echoed by the Secretary General in his report, making the meaning of unconstitutional alterations of the constitutional regime more explicit "does not imply (…) that the determinations of such an alteration are ever cut-and-dried, nor that such determinations are a matter of technical or expert judgment. One must not forget that Article 19 of the Democratic Charter talks about alterations that "seriously impair the democratic order". "The determination as to whether a violation impairs the democratic order", rightfully adds Cameron, "requires political judgment, and cannot be resolved a priori".

ii. The obvious tension between the principle of non-intervention and the possibility of protecting democracy through collective mechanisms

There is no better way of summarizing the second of the three main "criticisms" leveled at the Inter-American Democratic Charter than to quote from the Secretary General's 2007 Report to the Permanent Council: "The OAS Charter itself prohibits all states from intervening "directly or indirectly, for any reason whatever, in the internal or external affairs of any other State," and affirms, later on, that 'every State has the right to choose, without external interference, its political, economic, and social system and to organize itself in the way best suited to it'[161]. How can we reconcile this language with Chapter IV of the Democratic Charter, which provides for means of collective action when a clearly "internal" matter threatens or interrupts the democratic process?"[162] Legler describes the same dilemma in other words when he writes about the "on-going clash between new pro-democracy norms and more established sovereignty norms", where "collective action in support of democracy, which are in effect forms of intervention, run up against existing regional sovereignty norms of territorial inviolability, nonintervention, and self determination"[163].

Chilean Ambassador Heraldo Muñoz[164] addressed that issue in the following terms in an article he published in 1998 on "The Right to Democracy in the Americas"[165]. He wrote that "the increasing recognition of a right to democracy in the Americas has called into question the classic notion that internal political legitimacy is essentially a matter under the state's exclusive jurisdiction, and therefore that it is exempt even from a 'soft intervention by international organizations or by the entire international community' ". He also wrote that "traditional sovereignty has been challenged (…) by the recognition that the international community can and should insist on the right to democratic rule". And he later concluded: "(…) the concept of sovereignty has evolved, at least in the Western Hemisphere, from a jurisdictional authority once considered supreme, absolute, and unlimited to an authority perceived as equal to that of any other independent state, but bound by international law and based on the will of the people of the particular territory; it follows that actions to condemn or pressure a government that comes to power through means other than the free expression of popular sovereignty do not violate the principle of non-intervention, because this principle draws its authority from the internationally recognized right of peoples to decide their own destiny freely (…); therefore, illegal intervention is intervention that subverts popular sovereignty, whether it originates from external or internal sources".

One can note that the Secretary General speaks of "tension", and not of "contradiction". The principle of non-intervention has deep historical roots and is as old as the Inter-American System; it has long and repeatedly been brandished as one of its fundamental pillars, and no doubt remains so. It is of course closely associated with fears, which history and the vagrancies of geopolitics have proven

161. Article 3 (e) of the OAS Charter.

162. At p. 12-13 of the Report. During his August 2007 Conference in Rio, the Secretary General dealt with the same issue in the following terms (my translation): "(…) many people fear that the norms of international law can be used to ends different from those for which they were designed. In our America, that tension between the right to self-determination or the right to non-intervention and the universal application of human rights, of political rights, etc is a permanent one. Today I would say that it has been present in our region and in the history of the OAS since its beginnings".

163. *Ibid*., p. 123.

164. As Chile's Permanent Representative to the OAS he had a first hand in the drafting of the 1991 Santiago Commitment and Resolution 1080.

165. **Journal of Anti-American Studies and World Affairs,** Spring 1998.

to be founded, of unilateral intervention (even if undergone for the stated purpose of defending "democracy").

As seen above, notably in Part 3 of the present report, positive changes throughout the Americas, accompanied by no less positive mutations in the world at large[166], have gradually led to a situation, in the 1990s, where the Members States of the OAS saw it both possible and advisable to, in Arrighi's words, "equip the Organization with juridical and institutional instruments designed for cooperation in the promotion and protection of democracy"[167]. As a result, and for the first time in the region, they accepted that the interruption of the democratic order in any of them could justify collective sanctions that would not be considered a violation of the principle of non-intervention; something, it is worth recalling, that was seen as amounting to a re-definition of sovereignty[168]. The word "collective" here is key; because the OAS Charter says "**every state** has the duty to abstain from intervening (…)".

The Secretary General was saying the same thing when he pointed out in his Report that when they adopted the Inter-American Democratic Charter, the Member States were not introducing any new principle or purpose into the OAS Charter. On the contrary, "they were reaffirming something already in force" by simply recognizing "that representative democracy is indispensable for the region's stability, peace, and development, and that it is possible to promote and build representative democracy without violating the principle of nonintervention"[169].

The rapporteur also agrees with the Secretary General when he points to Article 1 of the Inter-American Democratic Charter, which declares that democracy is a right of peoples and an obligation of governments, as further support for such an interpretation. The Members States, through their highest representatives, have clearly mandated the OAS to act in the defense of that right to democracy, and it must be understood that when it does so it is cannot be deemed to be acting in violation of other rights or principles protected under the Inter-American System. The real interveners are those who are responsible, whatever their motives, for serious and/or systematic encroachments on those rights in breach of their obligations.

The rapporteur suggests that the Inter-American Juridical Committee can subscribe to the proposition, as formulated by Arrighi, that such reconciliation between the principle of non-intervention and the possibility of protecting democracy through collective mechanisms has now been "integrated into our regional legal patrimony"[170]. In fact, the Committee it has already done so when, in its previously quoted Resolution "Democracy in the Inter-American System" of March 23, 1995[171], it determined that "***The principle of non-intervention and the right of each State*** in the Inter-American System to choose its political, economic and social system without external intervention, and to organize its structure in the way best suited to it, **may not cover a violation of the obligation to effectively exercise representative democracy in said system and organization**"[172].

iii. Problems of access for those seeking to avail themselves of the Charter's mechanisms

As very succinctly described by the Secretary General there are only three channels of access to the Democratic Charter: (i) "when the government of a member state considers that its democratic political institutional process or its legitimate exercise of power is at risk …" (Article 17); (ii) when the Secretary General or the Permanent Council considers that situations have arisen in a member state that may affect the development of its democratic political institutional process or the legitimate exercise of power, (Article 18[173]); or (iii) when in the event of an alteration of constitutional order in a

166. Such as the end of the Cold War.
167. *Op. cit.*, p. 109.
168. See Pastor, *op. cit.*, p. 15, and Part 3, iv, *supra*,
169. At p. 13 of his Report.
170. *Op. cit.*, p. 118.
171. CJI/RES. I-3/95.
172. Emphasis added.
173. In which case the consent of the government of the state concerned if, as a result, *in situ* visits or other actions are considered before a report is made to the Council for a collective assessment of the situation and, where necessary, decisions for the preservation of the democratic system and its strengthening.

member state, any member state or the Secretary General requests the immediate convocation of the Permanent Council (Article 20)[174].

Each of those three channels leads to the Permanent Council. As discussed by the Inter-American Juridical Committee[175], that in effect brings about apparent limitations on access to the Inter-American Democratic Charter. Because, logically, representation before the Permanent Council rests with the executive powers of the Member States, where the conduct of external relations is the hands of whoever heads that executive power. That in turn would seem to imply that powers other than the executive (e.g. judicial, legislative) or even other sectors affected by an institutional alteration or interruption are precluded from having their voice heard by the Permanent Council or effectively appealing to the Secretary General. This has led one observer to conclude that "implementing the charter depends on the political will of governments"[176]. And another to write that in other words regional leaders "gave impulse to the creation of a collective-defense-of-democracy regime to insure their political survival in the face of antidemocratic threats, but on their terms and with their consent and not to challenge their authority, either at home or at the OAS"[177].

This brings us back is to the on-going clash between new pro-democracy norms and more established sovereignty norms mentioned earlier. Those two set of norms have merged, suggests Legler, into what he calls "a new hybrid 'by invitation only' operative norm", that can result in potentially perverse scenarios, whereby preventive action by the OAS in the face of serious threats to democratic order originating with the executive power of a Member State requires the blessing of the offending 'government'[178].

In addressing those limitations on the ways or means of access to the mechanisms of the Inter-American Democratic Charter, the Secretary General wrote: "It seems clear that we must broaden the means of access to the mechanisms of the IDC. Along these lines, I want to propose what seems to me the simplest form. While the expression 'government' used in the IDC has been interpreted as meaning the 'Executive', the truth is that 'government' must be understood as referring to all the branches of state. It is natural, then, that the other branches of government of a country should be able to turn to the OAS, citing the IDC, to denounce the disruption or breakdown of democratic institutions in their country. As always, it will, of course, be up to the Permanent Council to determine whether the complaint is valid. But the effectiveness of the IDC seems seriously limited when only the executive can use it to defend a democracy"[179]. Interpreting the word "government" as used in the Democratic Charter to mean and include all branches of government – after all, the expression "branches of government" has long been universally and commonly used – presents no legal difficulty whatsoever. But, and for reasons that should by now seem quite obvious, this certainly would require a political decision on the part of the Member States. A political decision that, realistically speaking, everyone agrees is unlikely to become possible, at least in the short term.

As one member of the Inter-American Juridical Committee has expressed during the previously mentioned session (and the rapporteur fully subscribes to that line of thinking), the challenges to a more effective implementation of the Inter-American Democratic Charter evidence the presence in the region of differences of philosophical conceptions about democracy. Is there agreement among Members States about the meaning of democracy? Is there agreement on what abiding by the rule of law means? And when it comes to deal among 34 States with such an instrument as the Democratic Charter, how to reconcile such differences about the very philosophical concept of democracy with mutually agreed mechanisms to guarantee such democracy, becomes both difficult and delicate.

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174. See p. 14 of the Secretary General's Report.
175. During its LXXII Regular Session (Rio de Janeiro, 3-14 March, 2008).
176. See McCoy in Annex, II.
177. LEGLER, *op. cit.*, p. 125.
178. Consequently, "the OAS's abilities to prevent democratic crisis from occurring or to deal effectively with authoritarian backsliding are therefore severely constrained"; LEGLER, *op. cit.*, p. 123-124. See also the views of Lisa McIntosh Sundstrom, Annex, I (B).
179. At p. 15 of his Report.

9. Some general considerations based on a preliminary analysis conducted by the Inter-American Juridical Committee

During their deliberations on the present mandate, members of the Inter-American Juridical Committee have analyzed at length the issues raised in the present report. For a good part, this report is inspired by their deliberations, which they considered preliminary. Some of the points made during those exchanges follow.

Discussions about how to interpret the conditions and access routes to the applicability of the Inter-American Democratic Charter must take into account other aspects of the charter. If one looks at the Democratic Charter, at where it came from in terms of the historical development of the treatment of democracy in the Americas, at the values (legal and others) it embodies, one can legitimately conclude that it establishes a wide constitutional frame of reference for the Inter-American System. A frame of reference whereby the Member States agree on their reciprocal respect for their respective entities as constitutional regimes based on the Rule of Law. And the Rule of Law as it applies to a democratic state incorporates a series of essential elements, such as respect for human rights, free and fair elections, the separation of powers, etc.[180] The obligation to respect the Rule of Law does not apply only to government, but also to all sectors of society. So, if in relation to the implementation of the democratic Charter there remain issues of interpretation, every effort should be made to resolve them so that any internal situation in a given country can be resolved in conformity both with that country's institutional frame of reference, and with the general norms of the Democratic and OAS Charters.

As to the apparent limitation on access to the Inter-American Democratic Charter that would result from the fact that representation before the Permanent Council rests with the executive powers of the Member States[181], again this can be contrasted. If indeed such a limitation exists, one must remember that what is fundamental about the Democratic Charter is that it protects against any attempts to do away with the democratic order, any attempt. That means: (1) that the concept of "unconstitutional interruption of the democratic order or an unconstitutional alteration of the constitutional regime that seriously impairs the democratic order in a member state" is so general so as to go beyond the idea of the traditional coup d'état; and (2) that by so expanding beyond the notion of coup d'état the Democratic Charter acknowledges that any of the powers of government can in fact be the victim of such alteration. It follows that it must be recognized and emphasized that the Inter-American Democratic Charter allows, if considered in its broadest implications, for intervention in the case of "unconstitutional interruption of the democratic order or an unconstitutional alteration of the constitutional regime that seriously impairs the democratic order in a member State", no matter if suffered by the executive, judicial or legislative (electoral) power. And consequently that the Organization of American States must be considered as empowered to deal with any such situation.

The rapporteur submits that those elements, which are at the core of the Inter-American Democratic Charter, could possibly enrich future deliberations and discussions on the subject, within the Committee itself, by the Secretariat and among the membership of the OAS.

Finally, the rapporteur acknowledges that there are other crucial elements of the Inter-American Democratic Charter that deserve consideration and analysis in relation to the search for solutions to the issues raised by the Committee's mandate. To cite but some examples, the (often neglected) pro-active versus (at times over-emphasized) punitive functions of the Democratic Charter; the role of civil society at large in the common task of promoting, preserving and defending democracy in all of its acceptation...

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180. There is nothing new in this; see above in part 3, ii, on the Declaration of Santiago de Chile adopted at the Fifth Meeting of Consultations of the Foreign Ministers held in Santiago, Chile, 12-18 August 1959.

181. See Part 8, iii, *supra*.

Annex

A limited survey of some of the more recent specialized literature devoted to the Inter-American Democratic Charter[182]

As indicated in a footnote earlier on, a little less than a year after the adoption of the Inter-American Democratic Charter former Canadian Foreign Minister by Lloyd Axworthy and the Liu Institute for Global Issues of the University of British Columbia[183] held a two-day conference[184] aimed at seeking a better understanding of "the dilemma and the options for multilateral efforts to strengthen democracy in the Americas". Among the questions discussed by participants: what counts as an unconstitutional alteration of a constitutional regime? Is the Charter too reliant on the political will of the Member States of the OAS, and if so, how can it be used in more pro-active, flexible, and creative ways? Can civil society, which the Charter exhorts Member States to value, be used more effectively in the application of the Charter itself? Would the Charter be improved by a mechanism to commission thematic or country reports on progress or backsliding in the democracies of the Americas? Does it need an early warning system? How can the Unit for the Promotion of Democracy be reinforced to play a more visible role in the application of the Charter? Following are a few particularly relevant extracts of some of the presentations made at that conference, in the order they have been published.[185]

A) By Robert A. Pastor[186]:

- "In all, the Charter fails to add very much to the democracy resolutions of the previous decade, and given the circumstances, that represents a serious missed opportunity. If the hemisphere's leaders were serious about forging a collective defense of democracy rather than just praising the idea, then there is much that they could and should do".

- "The clearest lesson to be drawn from the experiences of the last decade is that the Americas have not yet devised a formula for dealing with the 'gray' areas – threats to democracy that stop short of a coup".

- "The Québec Declaration and the Democratic Charter are positive steps in the evolution of the Inter-American policy toward democracy, but both have seven serious omissions or flaws. (…) Both fail to define "democracy" with the kind of precision that would permit the hemispheric community to distinguish between problems and crises. (…). Nevertheless, unless the definition is clarified, the collective defense of democracy will continue to stand on a precarious foundation". (…) The two declarations fail to define an interruption of constitutional government, taking us no further than Resolution 1080. (…) The twin Declarations fail to establish an institution or a process beyond OAS consultation for interpreting potential threats to democracy or for identifying the lines that should not be crossed".

- "One of the reasons that the OAS failed to act against Peruvian President Alberto Fujimori at the OAS General Assembly in Windsor, in June 2000, was because a fraudulent election was not viewed as constituting an interruption of constitutional government. It should, but there are two more difficult questions that lie beneath the confusion on this issue and the specific question of fraudulent elections: what are the minimal attributes of democracy, and at what point does a problem become a threat that would justify a collective response? Democracy is nowhere perfect. Every democratic country – from the US to Paraguay – has problems of governance, but an effective hemispheric strategy requires making distinctions among such problems, and that is difficult to do, in part, because there is no settled definition as to the critical attributes of democracy".

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182. The opinions surveyed here are understandingly often quite similar. Quoting from those authors, either here or in the body of the present report, is not to be necessarily construed as an endorsement by the rapporteur of the views and judgements expressed therein.

183. The Liu Institute is a research unit within the College for Interdisciplinary Studies at the University of British Columbia.

184. 12-13 November 2002.

185. Again as indicated earlier, those have been published in a thematic issue of Canadian Foreign Policy, v. 10, n. 3 (Spring 2003), under the title "The Inter-American Democratic Charter: Challenge and Opportunities for the Collective Defence and Promotion of Democracy in the Americas".

186. As indicated before, his paper was entitled "*A Community of Democracies in the Americas – Instilling Substance Into a Wondrous Phrase*", at p. 15-29.

- "The threats in the weaker democracies are not so much poverty, crime, or economic depression, as the perception that "democracy" causes these problems or is incapable of solving them".

- The focus of inter-American attention should be on the threats, and there are three kinds. 1. Threats to vertical accountability. These are the most serious threats because they are aimed at the fairness of the electoral process. They may include physical intimidation of candidates, political party leaders, or voters; manipulation of the voter list or the count; prevention of a party from delivering its message to voters; or indefinite postponement of elections. These violations can sever the bonds of accountability between leaders and voters. 2. Threats to horizontal accountability. This occurs when one branch of government oversteps its constitutional prerogative to control another branch. Most obvious is when the military replaces the President or the President closes the Congress or changes the Court in a significant and arbitrary fashion. 3. Threats of an economic or social nature. Economic depression, poverty, growing inequality, or increasing crime rates – these erode the democratic foundation, but whether they constitute direct threats to democracy depends, in part, on whether voters hold democracy or the incumbent accountable. (…). The most serious threats are those of vertical accountability – unfree elections. (…). Threats of horizontal accountability are more difficult to prevent because democracy is often undermined by a process of slow erosion, and it's difficult to know how and when to intervene in the process".

B) By Lisa McIntosh Sundstrom[187]:

- "The first set of mechanisms, essentially 'sticks', is outlined in Articles 17 through 22. There are two key characteristics of this process that merit attention as hindrances to the apparent power of these outlined procedures. One is that, in the first situation where the Secretary General or Permanent Council may be concerned about threats to democracy in advance of an actual suspension of democratic institutions, the OAS can only enter the member state to analyze the situation upon the prior consent of that member state. This means that, unless the government of the member state itself is worried that it is being threatened by the situation in the country, i.e., dangers that a coup will be attempted or oppositional protests are gaining strength, it is unlikely to consent to an outside investigation. If the conduct of the government itself constitutes the danger to democracy, that government is unlikely to agree to allow an OAS investigatory mission into the country. The second key characteristic of the OAS procedures also has to do with the [the fact that] only the state parties or the Secretary General/Permanent Council can consider and make judgments on when democratic institutions are threatened within a member state. There is no identified procedure included in the Charter itself for allowing NGOs in member countries to make submissions to the OAS to argue that democratic institutions are threatened, and to request OAS assistance in resolving the threat. There is also no clear role for nongovernmental actors in Member States to raise their arguments on whether or not the threats to democracy have been removed in advance of a General Assembly vote on whether to lift a state's temporary suspension of membership, as outlined in Article 22. Here again, the process is completely in the hands of the ruling governments of the OAS states, rather than including representation of the viewpoints of opposition groups and citizens' groups".

- "The OAS Democratic Charter contains formal language that may become revolutionary in its impact if the tools to enforce the Charter and the actors eager to enforce it emerge in a significant way. One key to strengthening the Democratic Charter is the strengthening of civil society groups within OAS Member States".

- "A serious financial obstacle remains: there is not enough funding available in the OAS to implement costly programs and procedures. If pro-democracy states within the OAS are serious about the importance of the Democratic Charter, they will need to reinforce their rhetorical commitment to the words of the Charter with significant financial commitments to OAS institutions and democracy assistance programs directed at OAS Member States".

C) By Maxwell A. Cameron[188]:

- "Does the Charter reinforce (that is, strengthen or give greater force to) 'OAS instruments for the active defence of representative democracy! as required by the Declaration of Québec City?

187. As indicated before, her paper was entitled "Carrots and Sticks for Democracy in the OAS: Comparison with the East European Experience", at p. 45-60.

188. As indicated before, his paper was entitled "*Strengthening Checks and Balances: Democracy Defence and Promotion in the Americas"*, at p. 106-111.

Does it provide the tools necessary for responding to the problem of democratically elected leaders who behave undemocratically? Can it be used not merely in response to crises, but as part of a more proactive and flexible response that builds on recent OAS experience in democracy defence and promotion?

- "Latin America has made significant strides toward democracy in recent decades, and the greatest challenge facing the newly emerging democracies is less to avoid a return to authoritarianism than to restrain democratically elected leaders from acting undemocratically. Although there is little tolerance for overt military rule in the international community and little appetite for it among domestic political forces, there are few restraints on popularly elected leaders who choose to ignore their own constitutions and ride roughshod over other deliberative institutions".

- "Guillermo O'Donnell coined the term "horizontal accountability" to focus attention on the network of "state agencies that are authorized and willing to oversee, control, redress, and if need be sanction unlawful actions by other state agencies". The concept is closely linked to the separation of powers, an essential feature of the constitutional state that underpins liberal democracy. Whereas the doctrine of the separation of powers, as articulated by Montesquieu and the Federalists, holds that the branches of government should be divided into executive, legislative and judicial offices, each with a corresponding function, separate and exclusive membership, and minimal encroachment by one branch upon the other, horizontal accountability encompasses a wider range of oversight agencies, including "ombudsmen, accounting offices, 'fiscalias' and the like". Horizontal accountability can be distinguished from the vertical accountability in which citizens hold rulers accountable through elections".

- "In Latin America, vertical accountability is well institutionalized, while horizontal accountability is not (…). When mechanisms of horizontal accountability are deficient, one branch of government may encroach upon the jurisdiction and competence of another. In presidential self-coups, or autogolpes, presidents may suspend the constitution, fire the Supreme Court, close Congress, and rule by decree until a plebiscite or a new election is held to ratify a new regime with wider executive powers. In less extreme cases, presidents may stack courts, abdicate their authority over the military in cases of human rights violations, abuse executive decree authority, refuse to accept legislative oversight, limit freedom of the press, or use public resources to undermine the development of political parties and local governments".

- "Since elections in Latin America are embraced enthusiastically, but the democracies of the region lack the checks and balances inherent in the constitutional state based on the separation of powers, it may be useful to clarify the connection between democratic regimes and other constitutional features of a democratic system, like the separation of powers".

- "A constitution in which all three branches of government are fused into a single agency is inimical to self-government, as was repeatedly emphasized by Montesquieu and the Federalists. (…) it follows from the doctrine of the separation of powers that elected officials cannot arbitrarily dismiss or ignore the rulings of judicial bodies. Less tolerable still is the meddling by military officers in the competence of civilian authorities. Finally, the separation of powers provides the organizational guarantees necessary to ensure that state power is not used to repress regime opponents or steal elections".

- "In a democratic regime, legislative and executive offices are filled by means of free and fair elections. Such regimes can be threatened or undermined, short of the forceful overthrow of a democratically elected government, when its constitutional underpinnings are eroded by repeated violations of the separation of powers. Yet the international community cannot adequately respond to crises involving undemocratic behavior by elected leaders and oppositions unless attention is focused systematically on the connection between democratic regimes and the constitutional order. The essence of this connection is that democracy, in its many forms, embodies the principle that those in power must provide reasons for their actions and defend them against criticism. Elections are one mechanism to ensure that those in power are held accountable, and they are absolutely necessary under the conditions of modern, large-scale political communities. The separation of powers is equally necessary because it provides the legal and constitutional conditions necessary for the practice of horizontal accountability".

- "In light of this experience, and guided by theories of horizontal accountability, I argue that the phrase "unconstitutional alteration or interruption of the democratic order" should be understood to encompass the following situations:

1. Arbitrary or illegal termination of the tenure in office of any democratically elected official by any other elected or non-elected official;
2. Arbitrary or illegal appointment, removal, or interference in the appointment or deliberations of members of the judiciary or electoral bodies;
3. Interference by non-elected officials, such as military officers, in the jurisdiction of elected officials;
4. Use of public office to silence, harass, or disrupt the normal and legal activities of members of the political opposition, the press, or civil society;
5. Failure to hold elections that meet generally accepted international standards of freedom and fairness. All but the final point concern the constitutional separation of powers.

The first point indicates that presidential self-coups count as unconstitutional interruptions of the democratic order; the second point covers court stacking or meddling in the judiciary by the executive; the third point affirms civilian supremacy over the military and challenges, among other things, military courts with jurisdiction over civilians; the fourth point protects regime opponents and civil society from the abuse of power by democratically elected governments; and the fifth point addresses the need for integrity in the core formal institution of modern democracy".

- "By seeking to make the meaning of "unconstitutional alterations of the constitutional regime" more explicit, it is not my intention to suggest that the determinations of such an alteration are ever cut-and-dried, nor that such determinations are a matter of technical or expert judgment. The Charter is careful to stipulate that it is only concerned with alterations in the constitutional order that "seriously impairs the democratic order". The determination as to whether a violation impairs the democratic order requires political judgment, and cannot be resolved a priori. However, political judgments can be improved by access to the best available evidence".

- "There are serious problems with the decision-making process outlined by the Charter in its articles 17-22 concerning procedures for application. The Charter can only be applied when the Secretary General or the Permanent Council of the OAS determines that a situation has arisen in a country "that may affect the development of its democratic political institutional process", yet such a determination cannot be made unless, "with prior consent of the government concerned", the Secretary General can visit a country and make a report. In other words, a government that does not want the Charter to be applied can simply refuse to invite the Secretary General to make an assessment. The OAS is a club of states loath to criticize one another. A more inclusive process of civil society consultation could stimulate the OAS to address problems when Member States are reticent by monitoring events, reporting on them when their threaten to impair democracy, and lobbying their respective governments to address the problem through the OAS where appropriate".

- "The Democratic Charter did not arise de novo – it systematizes existing instruments and commitments to the collective defence of democracy. As a synopsis of the consensus on democracy in the Americas it is an incomplete document. There is what might be called a deeper jurisprudence that underpins the Charter, which remains unstated, largely because it involves contested understandings of sovereignty, democracy, and constitutionalism. Although the Charter is not a strong statement of formal legal obligations, it can be a living document that accumulates experience to develop a repertoire of tools and strategies for both managing and averting future crises. The Charter makes no mention of "dialogue tables", for example, even though they were used successfully in Peru and may yet play a critical role in Venezuela in the future. Yet this idea has clearly become a part of the toolkit used by the OAS in crisis situations".

II

On March 11, 2005, a seminar was held at the Palacio San Martín in Buenos Aires, on the subject of "Democracy and Summits of the Americas". One of its panels dealt specifically with the

Inter-American Democratic Charter. Here are a few extracts of a paper presented on that occasion by Jennifer McCoy on "The Vulnerability of Democracy"[189]:

- "The difficulty of governing in the face of these vulnerabilities has produced some undesirable, if understandable, reactions affecting the democratic system. These responses include attempts 1) to remove accountability by conjoining powers of the state, rather that respecting separation of powers; 2) to curtail political protest and freedom of speech rather than enable it; 3) to exclude challengers rather than encouraging competition of ideas and political proposals; and 4) to privilege security concerns over fundamental civil liberties protected by international treaties. These four reactions affecting democracy are taken with the purpose of retaining power, at least to the end of a term, and maintaining some semblance of governability".

- [We have seen examples of a] "(…) tendency toward conjoining powers by using a majority in Congress to appoint or remove members of courts or electoral authorities in such a way as to give advantage to one political force and thus removing the possibility of these institutions serving as checks on the executive branch". [Prof. McCoy gives other examples of countries where "one-party domination of election commissions" has been an issue, and another where "the legislature has approved reforms usurping on executive power"; she further mentions "the tendency in the continent to change the constitution to allow for immediate re-election of the president and to apply the law retroactively to include the executive who has promoted the law"].

- "Governments in the region seem to view the Democratic Charter as a punitive instrument, rather than a constructive one. Its preventative potential has not been realized. The charter commits nations to help one another when our democratic institutions are threatened either by actors in civil society or outside the law, by governments closing political space to their citizens, or by one branch of government usurping the prerogatives of another branch. The charter can be a punitive instrument, providing for sanctions when a serious alteration or interruption of the democratic order occurs. It is also a preventative instrument, providing for technical assistance and political encouragement to prevent democratic erosions early on. We should work together to realize the Charter's potential for preventing democratic crises".

- "Implementing the charter depends on the political will of governments. The willingness to use the charter proactively to warn about early erosions and help prevent their transformation into full-blown crises is hampered by fears that once it is applied in one country, the charter may next be applied to other governments. Currently, the OAS Secretary General cannot even make a visit to evaluate a country at risk without an invitation from the government. Such invitations are rare. If a threatened government fears that it will be seen as weak if it calls for assistance under the charter, it will not do so. If the government itself is the threat to democratic rights, it will be loath to invite an external evaluation".

- "(…) we also need to develop a set of graduated, automatic responses to help us overcome the inertia and paralysis of political will that result from uncertain standards and the need to reach a consensus de novo on each alleged violation".

III

By far the most provocative piece written recently on the Inter-American democratic Charter was penned by Prof. Thomas Legler under the title "The Inter-American Democratic Charter: Rhetoric or Reality", often quoted in the preceding pages. A few additional extracts follow:

- "It would seem that after the initial enthusiasm that led to the creation of the Inter-American Democratic Charter, OAS Member States find themselves at an impasse in terms of applying it. What explains that impasse? On the surface it would appear that the answer has to do with design flaws (…), the confusing situation on the ground in many countries in political crisis, or the shifting regional democracy problematic. Nonetheless, if hemispheric leaders are basically unwilling to invoke the Democratic Charter, textual modifications will not in the end enhance its implementation. (…) a combination of the clash of democratic, multilateral, and sovereignty norms and geopolitical tensions (…) have contributed to the Charter's less than spectacular debut."

189 The full text of Prof. McCoy, of the Department of Political Science at Georgia State University Atlanta, can be found on the Carter Center website at <http://www.cartercenter.org/news/documents/doc2043.html>.

- "(…) the Democratic Charter, although an admirable document on paper, has been formally invoked in defense of democracy only sparingly. Crisis prevention remains a glaring deficiency. (…) Countering authoritarian backsliding (…) continues to be an elusive aim".

- "The practical implication of the juxtaposition of democracy and sovereignty norms in the inter-American system is that the OAS's scope for action is largely limited to elections monitoring and soft forms of intervention, such as dialogue facilitation, that obtain the consent of the host government. Effectively, the still-strong sovereign constraints in place narrow the type of democracy that the OAS can promote to 'electoralism". (…) Member States impede its ability to do very much in between elections on sovereignty grounds".

- "(…) the clash of democracy and sovereignty norms unfolds against a backdrop of evolving norms of multilateralism in tension. Traditionally, Member States have upheld an interstate multilateral matrix characterized by 'executive sovereignty', that is, externally recognized supreme authority of heads of state and government, as well as their diplomatic representatives".

- "(…) the democracy issue area threatens to open up traditional multilateralism at the OAS to the participation and influence of nonstate actors. Just as the sovereignty of the ruler has yielded historically to democratic, popular sovereignty in many countries, state-centric club multilateralism is under pressure to become more inclusive. Issues such as authoritarian backsliding by incumbent elected leaders, the very leaders privileged by executive sovereignty, threaten to transform diplomacy in a more complex, networked direction, as the citizens whose democratic rights are threatened turn abroad for support (…)".

- [At the Fort-Lauderdale General Assembly] "The idea of establishing benchmarks for Democratic Charter violations that trigger automatic diplomatic responses simply ran against the grain of traditional inter-American diplomacy".

- "The geopolitical context compounds any attempts to strengthen the Democratic Charter in another important way. That is, the paradigm of representative democracy itself enshrined in the Democratic Charter may be under threat from a rival vision."

- "(…) textual improvements will not of themselves guarantee that OAS Member States will invoke the Democratic Charter when democracy is threatened. There are two interconnected sets of constraints that hamper the use of the Democratic Charter as it was originally envisioned. On the one hand, there is an ongoing clash of democracy, multilateralism and sovereignty norms that effectively limits the OAS's scope for pro-democracy action. On the other hand, the OAS has been held hostage, so to speak, by geopolitical tensions (…). It is not impossible that a more conducive environment for putting the Democratic Charter's principles into practice could reemerge in the future. (…) Until norms and national interests are once again favorably aligned, making the Democratic Charter a 'living document' will continue to be an elusive goal."

IV

On March 13-14, 2007, a conference was held in Ottawa on "Canada and the Americas: Defining Re-engagement"; here are a few excerpts of a paper presented on that occasion by Maxwell Cameron (see above) and Catherine Hecth presented a paper[190] on "Canada's Engagement with Democracies in the Americas**",** and in which the challenges to the Inter-American Democratic Charter are discussed.

- "A review of the past two decades suggests that, although democracy remains the preferred system of government, many voters are dissatisfied with the performance of elected governments. The record of progress in reducing poverty and inequality has also been disappointing. (…) we suggest that democracy support in the Americas should reflect several key lessons of the past two decades. In particular, we emphasize continued bilateral support and multilateral initiatives in response to requests expressed from the region; and for formal institutional mechanisms that ensure elections are meaningful expressions of the sovereignty of the people, that power is expressed in accordance with the rule of law, and that economic growth and social policies deliver equitable benefits in the diverse states of the Americas".

190. Again as indicated earlier, this paper can be found in **Canadian Foreign Policy**, v. 14, n. 3 (2008); that entire issue was devoted to papers presented at that conference.

- "Over the last decade, the growth in the number of democracies has leveled out. Evidence shows that many countries are sliding back to non-democratic forms of government. While progress is being made in some countries, in others democracy is up against very significant obstacles and its fragility is increasingly apparent. Economic development and good governance do not necessarily result in a transition to democracy".

- [one of major trends in the Western Hemisphere:] "the growing pro-sovereignty mood that challenges perceived intentions for intervention in domestic affairs created by the Inter-American Democratic Charter. This suggests the need to avoid talking about the Charter as if it were a punitive instrument, and to develop a more proactive and constructive set of practices around the Charter".

- "(…) the challenge of democracy support in the inter-American system has shifted from averting coups to preventing more subtle erosions in the quality of democratic governance and encouraging institutional development"

- "While the Inter-American Democratic Charter was clearly designed to incorporate lessons from the crisis in Peru and similar crises of the 1990s, it did not foresee the possibility that similar outcomes – the concentration of executive power, the erosion of checks and balances, the persistent violations of the rule of law – might occur within a more or less constitutional framework, or might even be given legitimacy by constitutional change. Yet this is exactly what has occurred in a number of countries in Latin America. The proliferation of leaders promising a new constitutional order suggests a deep yearning for more just and inclusive political arrangements – however disproportionate the focus on achieving such results by means of constitutional change may be".

- "The analytical challenge [for democracy support in the inter-American system] is to go beyond a narrow definition of electoral democracy to include broader issues of the rule of law and social inclusion".

- "Upholding the rule of law is a challenge in any democracy and in none is the reconciliation of law and democracy ever complete. Supporting the rule of law is not the same as demanding law and order. It would be naïve to believe that the solution to the development of the rule of law lies solely in better enforcement of existing laws: the struggles over constitutional rules that we observe in parts of contemporary Latin America are struggles over what the law means and how it should apply in ethnically diverse and highly unequal societies".

- "No country, therefore, should presume to have solved the problem of the rule of law in a way that can be exported elsewhere, yet there are constitutional principles that deserve defence in any context, just as there are political, civil, social, and economic rights that nowhere should be abrogated with impunity. Fragile democracies tend to lack a consensus within civil society around constitutional essentials, and this enables constitutional reform processes that ride roughshod over basic principles of justice and right. The removal of elected members of congress by the president, violation of judicial independence, undue interference of the military in civilian affairs, or the disruption of the normal activities of political opposition, civil society, and the media, are violations of what the Inter-American Democratic Charter (Chapter 1, article 1) calls the right to democracy, even when undertaken by elected leaders with a popular mandate, – especially if the effect of such measures is to undermine the conditions necessary for the conduct of free and fair elections, the procedural core of any democratic regime".

- "The political challenges posed by the third stage in inter-American democracy support concern whether the IADC may be used in more flexible, proactive, and non-punitive ways. The inter-American community should not wait for crises to erupt before drawing on the Democratic Charter to mobilize political will around positive, constructive solutions to underlying problems in upholding democratic rule of law. Support for democracy and the rule of law should be firm on basic principles, yet flexible about the practices and institutions through which they are actualized. Political and legal systems evolve under diverse conditions, and facilitating supportive social conditions may be as important as getting the institutions 'right'".

- "A 'democracy' that cannot pass the test of upholding judicial independence cannot be described as 'constitutional'. Yet the defence of constitutional aspects of democracy is complicated by the reluctance of members of the OAS to interfere in one another's internal affairs. The Charter has served as a useful instrument at the disposal of the OAS in moments of democratic breakdown (…) but the international community is virtually immobilized whenever a democratically elected leader wins

public support for his or her actions by plebiscitary means, regardless of the effect of these actions on quality or stability of democracy".

3. The Struggle against Discrimination and Intolerance in the Americas

Documents

CJI/doc.324/09	The Struggle against Discrimination and Intolerance in the Americas: significant achievements (presented by Dr. Hyacinth Evadne Lindsay)
CJI/doc.330/09	The Struggle against Discrimination and Intolerance in the Americas: corrective measures (presented by Dr. Hyacinth Evadne Lindsay)

At its thirty-fifth regular session (Fort Lauderdale, June 2005), the General Assembly, by resolution AG/RES. 2126 (XXXV-O/05), "Prevention of Racism and All Forms of Discrimination and Intolerance and Consideration of the Preparation of a Draft Inter-American Convention", instructed the Permanent Council to establish a working group in charge of receiving inputs from, *inter alia*, the Inter-American Juridical Committee, with a view to the working group's preparation of a draft convention in this subject matter.

The Working Group of the Committee on Juridical and Political Affairs held its first meeting on September 23, 2005, and has been meeting regularly since then.

On January 5, 2007, the Office of International Law sent to the members of the Inter-American Juridical Committee a consolidated text prepared by that Office, containing the original preliminary draft with the comments received to date from Member States. At the request of the Juridical Committee Chairman, on 7 February 2007 the Office of International Law forwarded to CJI members the written comments submitted by various delegations during 2005-06 (i.e. before a draft convention had been prepared). As could be expected, these comments were thus general in nature and did not refer to the draft per se.

At the 70th regular session of the Inter-American Juridical Committee (San Salvador, February-March 2007), Dr. Jaime Aparicio, rapporteur of this topic, said that the examination of the documents distributed to the Juridical Committee members made it clear to him that the Committee should lend its expertise in this area, but that the draft itself was too general in nature, and its scope and objectives needed to be better defined. With this in mind, he recommended to the Juridical Committee not to enter into an analysis of the draft itself, but rather contribute to the process through general observations. He added that it would also be necessary to define the complementary nature of the new convention, and to clearly set out its limits to assure that it would not trespass on other areas of the inter-American system.

After considering all these views, the Inter-American Juridical Committee approved resolution CJI/RES. 124 (LXX-O/07), "The struggle against discrimination and intolerance in the Americas", by which it reiterated its concern for the persistence of acts of discrimination and intolerance and the appearance of new forms of the same. It stressed the need to remain united and seek greater cooperation among States in order to eradicate such acts. Through this resolution, the Juridical Committee also adopted document CJI/doc.258/07, "Inter-American Juridical Committee Report on the 'Preliminary Draft Inter-American Convention against racism and all forms of discrimination and intolerance'", by which it hoped to contribute to the negotiations undertaken by the Working Group, and decided to remit it and the resolution to the Chairlady of the Working Group. It also decided to maintain this topic on its agenda under the heading "The Struggle against Discrimination and Intolerance in the Americas", with Drs. Jaime Aparicio, Ricardo Seitenfus and Hyacinth Evadne Lindsay as co-rapporteurs. The resolution was adopted with Dr. Galo Leoro Franco abstaining. Dr. Jean-Paul Hubert registered an explanation of vote, now classified as document CJI/doc.261/07, "Explanation of Vote: the struggle against discrimination and intolerance in the Americas".

On 21 March 2007, the Office of International Law delivered to the Chairlady of the Working Group the note of the Chairman of the Juridical Committee, Dr. Jean-Paul Hubert, by which he remitted to her the resolution, the document adopted by the Committee, and Dr. Jean-Paul Hubert's explanation of vote.

On 6 July 2007, the Office of International Law distributed to the members of the Inter-American Juridical Committee document CP/CAJP -2357/06 rev.7, "Preliminary Draft Inter-American Convention against Racism and All Forms of Discrimination and Intolerance", which includes the observations and comments made by the OAS Member States during the Working Group's efforts leading to the thirty-seventh regular session of the General Assembly.

During the Inter-American Juridical Committee's 71st regular session (Rio de Janeiro, Brazil, August 2007), Dr. Jaime Aparicio suggested that this item should remain on the Juridical Committee's agenda and that the Committee itself stay abreast of the work being done by the Organization's political bodies, as it had as yet received no response to the document it had approved.

During the 72nd regular session of the Inter-American Juridical Committee (Rio de Janeiro, Brazil, March 2008), Dr. Dante Negro, Director of the Department of International Law stated that said Department had transmitted document CAJP/GT/RDI-57/07 corr.2, "Draft Inter-American Convention against Racism and All Forms of Discrimination and Intolerance (Consolidated Document)", in the first week of February, gathering the results of the work carried out by the Working Group on the subject. He recalled that this document had been drafted 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 had incorporated a large number of contributions, including those of the Juridical Committee itself and those from civil society. He added that on February 12, the Working Group, based on the consolidated document, had resumed its work. He recalled that the Juridical Committee had already made a statement on the draft convention, but that it had still not issued its opinion on the consolidated document.

At Dr. Mauricio Herdocia's request, discussions on this matter took place during the current regular session, the text of which was included in Minutes No. 9.

At the 73rd regular session of the Inter-American Juridical Committee (Rio de Janeiro August 2008), Dr. Hyacinth Lindsay, rapporteur of the subject, presented report CJI/doc.312/08, "The Struggle against Discrimination and Intolerance," that refers to the various types of discrimination and intolerance in the Hemisphere, and covers countless situations, including discrimination based on language, race, gender, religion, sexual orientation, age, life style and ethnic and cultural characteristics, among others. She also mentioned regional and international instruments in this area that spell out measures and policies States should implement to combat discrimination and intolerance.

On November 20, 2008, the working group in charge of preparing a draft convention against racism and all forms of discrimination and intolerance held the special meeting referred to earlier by the Director of the Department of International Law. The final report of that meeting was prepared by the Department and distributed to the members of the Inter-American Juridical Committee on February 10, 2009. Further, on February 12, 2009, the Department of International Law distributed the text of the draft convention, that reflects the most recent advances in the negotiations of the working group.

During the 74th regular session of the Inter-American Juridical Committee (Bogota, Colombia, March 2009), Dr. Dante Negro gave a brief report on advances on the issue of discrimination and intolerance and on the draft inter-American convention being negotiated in the working group of the Committee on Juridical and Political Affairs. In this regard, he stated that in August, the rapporteur on the subject presented a report, and that on November 20, a special meeting of that working group was held. Its final report, prepared by the Department of International Law, was distributed to the members of the Committee on February 10, 2009. He indicated that two days later, the last version of the draft convention reflecting the status of negotiations on the draft to date was distributed. Dr. Negro indicated that no further developments on the text were expected prior to the upcoming General Assembly.

He also reported that the Department of International Law had begun implementing two projects on the subject. The first, very broad in scope, was related to the subject of indigenous peoples. He reported on the decision by the Secretary General that the Department was to be responsible for coordinating all efforts in this area by the Organization, including those of the office of rapporteur in the Inter-American Commission on Human Rights and the Summits Process. In this regard, in the first two months of the year, the Department advocated development of a program that would comprise all of the specific projects being

carried out in the different areas of the General Secretariat, with a view to developing a comprehensive objective that would justify all of these projects and would bring them together into a general approach or perspective on the part of the Organization. The Department has assumed responsibility for participation of representatives of indigenous peoples in the different processes, such as preparations for the Summits, the General Assembly, and the working group that is currently negotiating the draft declaration on the subject. Once drafting of the program is finalized, implementation of more specific projects in the areas of empowerment of indigenous peoples, dissemination of the subject, and self-management will begin, all with the financial support of the Spanish Fund and the German GTZ. The other area where the Department of International Law has begun implementation of a specific project, with the assistance of CIDA-Canada, is related to the subject of Afro-descendents. Although the Department does not have sufficient funds to implement a comprehensive program, as it does in the case of indigenous peoples, the intention is to develop one to procure the necessary funds, while at the same time it implements a smaller-scale project. For the time being, the project being implemented is focusing on producing a report with international standards on protection of Afro-descendents, with a view to guiding civil society on better negotiating strategies for achieving new standards. To date, the Department participated in a meeting with civil society in January in the Dominican Republic, where not only was the referenced report presented, but also guidelines on the best way for civil society to participate in OAS activities were discussed. That meeting concluded with the drafting of a document of recommendations on Afro-descendents that will be submitted to the next Summit of the Americas. The Department is planning to support similar meetings prior to the next Summit and General Assembly, so that civil society can organize and present more specific recommendations for the two processes. Another area of development has to do with the possibility of allowing greater participation of Afro-descendents in activities of the Department, such as the International Law Course and the International Law Seminars, where there is a fund for a specialist to address the topic, as well as participation of up to four additional scholarships for the Caribbean. Dr. Dante Negro stressed that although the project was rather limited in its application, the concept for the short run was to design a program similar to the one for the indigenous peoples, and then to seek the relevant financing.

Dr. Hyacinth Lindsay, rapporteur on the subject, presented her report in this area, entitled “Struggle against Discrimination and Intolerance in the Americas: Significant Progress” (CJI/doc.324/09). In her paper, Dr. Lindsay mentioned global developments, as indicated in the report of the 2001 World Conference against Racism, Discrimination, Xenophobia and Related Intolerance, and highlighted national legislation that incorporates into domestic law international standards for protection of human rights and elimination of racial discrimination. Another aspect of developments in combating racism and discrimination referred to by Dr. Lindsay is the fact that many Member States are signatories of conventions against discrimination. Their Constitutions confirm principles of equality, they have adopted legislation to criminalize racism, and they have developed anti-discriminatory public policies as well. She also highlighted the major influence of various international organizations in preparing and implementing programs to raise awareness of the human rights of all citizens, and in affirming the importance of their cultural identity. She indicated, however, that despite the efforts made, some problems persist among Afro-descendent peoples in the Americas and the world, as they face social injustices ranging from unequal employment opportunities and wages, sexual harassment, and inequality in job advancement, among others. More recently, the technological illiteracy of these groups has hampered their assimilation in society. Finally, she presented the plan of action approved by the Coalition of Latin American and Caribbean Cities against Racism, Discrimination, and Xenophobia, which proposes ten points to be taken into account in implementing anti-racist policies.

The other members expressed their full support for Dr. Lindsay’s report, as it offered very specific points for addressing the subject that will enable the Inter-American Juridical Committee to make an effective contribution in this area.

Next, Dr. Dante Negro reported on the status of discussions on the subject in the Permanent Council. First he pointed to the fact that this is one of the subjects on which the Committee on Juridical and Political Affairs has formed a working group, to analyze a draft convention on the subject of racism, and

discrimination and intolerance in general. He recalled that according to the Committee's opinion issued in past years, it was unnecessary to adopt a new convention on racism and/or discrimination in the inter-American system. However, Member States are currently working on a draft convention, which has heightened political importance, since the issue is on the inter-American legal agenda. Finally, he gave his view that the Inter-American Juridical Committee should not remain on the sidelines of these discussions, and that it could make solid contributions of a technical and legal nature in view of the questions that have arisen within the working group, which can be found in the report of the special session on the subject.

He said that despite the fact that other organs in the system have already provided legal opinions on this draft convention, he believed that the view of the Judicial Committee was important, not from a general perspective, but on the issues that really merit a legal interpretation. He mentioned that the draft contains other aspects not solely limited to human rights, but extending to public policy issues, implementation of domestic legislation, and development prospects, on which the Inter-American Juridical Committee could issue an authorized opinion. On this point, he suggested the idea of forming a working group to examine the subject. To this end, he offered to send to members of the Inter-American Juridical Committee some additional papers, including a presentation by Dr. Ariel Urisky, a former member of the IACHR's Executive Secretariat, and a document drawn up by the Inter-American Institute of Human Rights. Both contain a very specific evaluation of the draft convention. Afterwards, he will send the document resulting from the Durban Review Conference, to be held in Geneva next April, covering the eight years since adoption of the Durban Declaration and Plan of Action on racism, discrimination, and xenophobia. Finally, Dr. Negro promised to contact the Permanent Mission of Brazil to the OAS, chair of the CAJP working group, to convey the Committee's continued interest in the subject.

After Dr. Dante Negro's comments, the Juridical Committee decided to set up a working group, comprising Drs. Hyacinth Lindsay, Mauricio Herdocia, Freddy Castillo, and Fabián Novak, with a view to presenting a report at the August 2009 session.

On April 1, 2009, the Department of International Law sent revision 11 of the draft convention to the members of the Inter-American Juridical Committee. It reflects the status of negotiations to date, and includes a comparative table showing the different proposals of Member States, and the contributions to the draft made by the Inter-American Institute of Human Rights and by Mr. Dulitzky, former assistant executive secretary of the Inter-American Commission of Human Rights. Moreover, on May 15, 2009, the Department of International Law sent the final document from the Durban Review Conference held in April 2009.

At the thirty-ninth regular meeting of the OAS General Assembly (San Pedro Sula, June 2009), by Resolution AG/RES. 2515(XXIX-O/09), he requested the Inter-American Juridical Committee to continue sending its contributions to the group in charge of drafting a convention on the subject.

During the 75th regular session of the Inter-American Juridical Committee (Rio de Janeiro, Brazil, August 2009), Dr. Hyacinth E. Lindsay presented her report (CJI/doc.330/09) titled "The Struggle against Discrimination and Intolerance in the Americas: Corrective Measures." This document deals with the efforts of the international community and of domestic lawmakers over the past 50 years, through the enactment of constitutional provisions, domestic laws, and inter-state treaties and through the creation of specific agencies tasked with fighting discrimination. In spite of this, obstacles remain, and she spoke of certain basic aspects of differences still to be overcome, such as discrimination between men and women and against people with disabilities and cultural differences such as language use, all of which are factors that warrant determined action in fighting inequalities. She thus emphasized the efforts taken under the ten-point Plan of Action for implementing municipal policies, adopted by the Coalition of Latin American and Caribbean Cities against Racism, Discrimination, and Xenophobia.

The Chairman remarked that a new meeting was to be held under the aegis of the OAS, and that it was important for the Committee to present a contribution to the Working Group, as requested by the General Assembly.

Dr. João Clemente Baena Soares underscored the connection between this topic and those of tolerance and respect, which are essential factors in democracy. He also urged the Committee to step up its

actions targeting the Hemisphere's education systems, since aspects not accepted by education cannot be implemented through legislation.

Dr. Novak recalled that at the previous meeting, in Bogotá, the Committee established a working group comprising Drs. Herdocia, Castillo, the rapporteur, and himself, to draw up a set of proposals for the draft convention being prepared for the Working Group of the OAS's Committee on Juridical and Political Affairs. He added that he had prepared a preliminary document with his comments and recommendations on that draft convention, which he submitted for consideration by the other members of the Working Group on June 17, 2009, and that with the observations and contributions of the Working Group's other members, the final document would be presented for consideration by the CJI during the present session.

Dr. Jean-Michel Arrighi, Secretary for Legal Affairs, noted that the Committee will have two documents which should be conveyed to the CAJP's Working Group. Once the Committee has adopted its comments on the draft Convention, those remarks should also be forwarded.

The Chairman said he thought it was very appropriate for the members' context documents, the result of extensive research and reflection, to be sent. In connection with this, he also referred to Dr. Jean-Paul Hubert's reports on democracy, which should be made available to the Organization's agencies that work with that topic, and he recommended that the Secretariat for Legal Affairs do so.

A working group for this topic, comprising Drs. Lindsay, Herdocia, Castillo, and Novak, was established and asked to submit its comments on the draft articles of the Convention being studied by the CAJP.

On August 13, 2009, Dr. Fabián Novak submitted a preliminary report on behalf of the Working Group, containing its preliminary observations on the draft Inter-American Convention against Racism and All Forms of Discrimination and Intolerance, to be forwarded to the Working Group of the CAJP. It offered comments on formal aspects of the Preamble, which comprises a series of statements that could be improved, suggesting that the text use more appropriate terminology. It also underscored the distinction made in the draft convention between racism and other forms of discrimination. In the view of the Committee's working group, the single concept of discrimination, which is much broader, could be used. However, it appears that the CAJP's Working Group wants to emphasize racism over the concept of discrimination. If that is the case, it is difficult to understand why they only define racism and fail to define other forms of discrimination, an area where efforts to attain comprehensive protection would be warranted.

Regarding the substance of the draft, the following considerations were offered:

Article 1 gives an extensive list of the reasons why discrimination can arise, but fails to include certain criteria set out in the International Convention on the Elimination of All Forms of Racial Discrimination or in the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families that, in its opinion, should be taken into account. This article also confuses the concept of racism with that of racial discrimination, when established doctrine makes a clear distinction between them: racism as an ideology, and racial discrimination as a concrete practice. Regarding the topic of intolerance, also addressed by Article 1, the working group shares the criticisms made by the Canadian delegation: the criterion is so broad that there is a risk of attacking dissent, which is a characteristic of any democratic system.

Article 3 should preserve the recognition of the possibilities of discrimination at both the individual and collective levels. The delegations of Argentina and Canada have proposed deleting them, but the CJI's working group believes that the distinction is correct and should be maintained, since discrimination can arise with respect not only to an individual, but also against a given social group.

Article 5 touches on a very delicate area by involving other rights that must also be protected, such as freedom of expression. The recommendation of the CJI's working group is that more precise language should be used in the article, since it currently uses concepts that are somewhat vague and subjective to prohibit the dissemination of ideas that promote hatred and violence. The working group thinks that such a prohibition could be implemented whenever such dissemination promotes or incites hatred and violence, either directly or indirectly.

Article 11 also warrants a degree of attention in requiring the member states to adopt legislative measures to revert the burden of proof. In this way, it is enshrining a general reversion of the burden of proof, requiring the accused to prove the adoption of procedures and practices that ensure equitable and nondiscriminatory treatment. Although the international practice of admitting contrary evidence does exist in criminal proceedings, it is not, however, admitted in other areas, such as administrative, labor, and civil law. In addition, the working group also supports Mexico's proposal of not limiting equality to access to justice, but rather to extend the concept of equality to equitable treatment within proceedings themselves.

Regarding Article 13, the CJI working group agreed with the comments made by the delegations of Peru and Costa Rica, in that the objectives of the studies that the states parties are to carry out into situations of discrimination arising in their countries are not made clear. The mandate extended to the states is for them to study any situations of discrimination that may arise in this area. It does not explain the purpose of those studies. The CJI's working group thinks the studies should be intended to help devise public policies, national plans, or action strategies for eliminating all discriminatory practices.

In addition, the Committee's working group thought it was unnecessary to create an Inter-American Committee for the Prevention, Elimination, and Sanction of Racism and all forms of discrimination and intolerance, in order to assess the situation in the member states; those functions could be assumed by the Inter-American Commission on Human Rights. If the member states insist on the creation of a committee, the working group recommends that reference be made to the Committee on the Rights of Persons with Disabilities, which is the model on which this draft is based. It should also be a technical, autonomous, and independent body, not a political one. Finally, the working group suggests clearly defining the competence and powers of that committee, which should allow for participation by civil society.

It concluded by supporting the possibility of setting out, in the draft convention, prerogatives whereby the Inter-American Court of Human Rights would be empowered to issue advisory opinions, at the request of the member states and the competent agencies of the OAS, as it does under the Convention of Belém do Pará. It also supported the interpretation on the competence of the Court to hear complaints regarding the observance of the Convention, which could be recognized or extended to each of the Organization's member states, irrespective of whether or not they have accepted the Court's jurisdiction.

Dr. Villalta (Chairmadam *ad hoc* of the Juridical Committee) thanked Dr. Novak for his presentation and noted that at its most recent session, the General Assembly had insisted on the preparation of a Convention against all forms of discrimination, intolerance, and racism. She then gave the floor to the members, particularly those involved with the working group, to share their opinions on the use to be made of the document submitted by Dr. Novak.

Dr. João Clemente Baena Soares agreed with the rapporteur that the creation of an Inter-American Committee, as proposed in the draft convention, was unnecessary. Experience told him that the creation of new agencies can lead to budgetary problems and even diminish the importance of the topic. He also supported the proposal of assigning those tasks to the Inter-American Commission on Human Rights.

Dr. Novak noted that the original stance of the CJI working group was against the creation of another committee. However, given the states' undeniable interest in creating one, the CJI working group proposes a formula that would not affect the question of its creation; in other words: "if such a committee is created, it should have certain characteristics, such as being a technical and autonomous body, etc." If this new body is to be created, the Juridical Committee could improve the regulatory conditions applicable to it, since at present it is not an autonomous, independent, or technical agency.

Dr. Hubert again stated his position on this issue, opposing the adoption of a new international instrument, since there was already in existence a universal convention that had been adopted by most of the American States. He said that given the density of the document and the complexity of the issue, he would prefer to defer the final position until the Lima meeting.

Dr. Castillo supported Dr. Novak's comments and agreed with deferring the final decision until the Lima session, in light of Dr. Baena Soares' remarks on the creation of such a committee of this kind, and he recommended that the Committee work more closely on the alternatives for supporting the Inter-

American Commission on Human Rights, to enable it to assume the role assigned to this hypothetical committee. Above all, he emphasized language issue, with the use of terms based on unclear concepts.

Dr. David P. Stewart also congratulated Dr. Novak for the precision of his presentation and inquired about the current state of discussions within the negotiation group, which seemed to be far from a final decision, which would allow the Juridical Committee to delay its analysis of the draft convention until the March session. Regarding the characteristics of the committee – independence, autonomy, and technical in nature – he asked whether it would be empowered to receive individual petitions. If so, he believed it would be duplicating unnecessarily one of the functions of the Inter-American Commission on Human Rights. He also inquired about the suggestions of giving the Inter-American Court of Human Rights consultative competence, allowing the member states to ask the Court to offer its interpretation regarding the treaty, but not to resolve individual consultations.

Dr. Novak clarified that the draft convention already gave certain powers to the Inter-American Court of Human Rights, but that there was something of a dispute between certain states regarding whether the powers set out in the draft should be maintained in the final text. Nevertheless, the CJI working group agreed with the majority opinion that the Inter-American Court should have consultative competence as regards the provisions of this instrument and also when discrepancies or controversies arise in connection with its meaning and scope, as was the case with the Convention of Belém do Pará. The project allows the Court to hear complaints alleging breaches of the Convention, and the CJI working group is of the opinion that such access could be expanded to include all the states that adhere to the Convention against Racism and Discrimination, without restricting it to those that have recognized the Court's contentious jurisdiction.

Dr. Negro gave a brief overview of the topic's development within the Organization, noting that one of the most disputed issues was that of its scope of application. At one point the idea was to restrict the draft to the question of racial discrimination alone, and at the suggestion of Brazil, it was extended to all forms of discrimination and intolerance. The CAJP's Working Group had made reasonably swift progress, but it was unlikely that it would be able to submit a final document to the next General Assembly. Another topic to be discussed is that of follow-up – in other words, the question of a committee versus the jurisdiction of the Court and the IACHR.

He summarized the views of the member states that defended the creation of a committee in the following terms:

The Committee would not duplicate functions already performed by the Court and the IACHR, with the latter beginning to act chiefly when a human rights violation has already occurred.

The Committee's function would be to offer the Convention's states parties a forum for exchanging information, practices, ideas, and for making joint progress with the implementation of the Convention, and so there would therefore be no duplication of functions.

One problem is to avoid what has happened with the Committee on the Rights of Persons with Disabilities, which serves as an example for both the supporters and opponents of the committee's creation. Among the opponents, one problem that arose was the failure to determine the nature of that Committee's members on a timely basis. Thus, some states parties appointed government officials as their representatives, while the interpretation of other countries was that independent experts should be chosen. That situation has hindered the determination of the Committee's functions. For that reason, agreement exists on the importance of the CJI's decision regarding the creation of such a committee, regardless of whether it is in favor or not, because the characteristics and functions of the new committee could then be dealt with.

The Chairmadam *ad hoc* then asked Dr. Negro what the CAJP Working Group's expectations from the Juridical Committee were.

Dr. Negro explained that the Working Group was hoping for legal opinions or recommendations on the text that had been distributed among the members, it having already received contributions from the Inter-American Institute of Human Rights and from independent experts, including the IACHR itself, which had already expressed its opinion. The CJI's opinion would be totally neutral, a technically juridical

guide to be taken into consideration in the draft. In addition it would be a magnificent opportunity for the CJI to give a statement on the text that would not be final but would be technical and appropriately broad. Finally, he promised to inform all the members about developments with the topic.

Dr. Herdocia corroborated the comments made about the draft Convention, in particular on the question of creating a committee versus the Inter-American Court, and he supported the formula proposed by Dr. Novak. However, he thought that the CJI should not express an opinion regarding whether or not a committee should be established. Instead, it should say that were such a committee to be created, it must be technical in nature and made up of independent experts, and it should also emphasize that the functions assigned to it may not duplicate or affect the conventional jurisdiction already assigned to the other agencies of the inter-American system, such as the IACHR and the Court. In light of Dr. Negro's comments, he thought that Dr. Novak and the working group could incorporate the remarks made at this meeting and distribute the preliminary document among all members, to enable them to reflect on it and present a more final version in Lima.

Dr. Baena Soares said that the Juridical Committee must not take the creation of a committee as a fait accompli and must clearly indicate its position against the creation of another body; however, if so decided by the member states, the formula proposed by Dr. Novak would be applied.

Dr. Hubert asked Dr. Negro to inform the CAJP Working Group that the Juridical Committee was examining the topic and would present its comments soon.

In turn, Dr. Jorge Palacios Treviño expressed his opposition to the creation of another body.

The Chair *ad hoc* gave a summary of the day's discussions and concluded that Dr. Novak would incorporate the comments made into the document for it to be sent to the members, who would study it prior to making a final decision at the Lima meeting.

The following documents were presented by Dr. Hyacinth Lindsay:

CJI/doc.324/09

THE STRUGGLE AGAINST DISCRIMINATION AND INTOLERANCE IN THE AMERICAS: SIGNIFICANT ACHIEVEMENTS

(presented by Dr. Hyacinth Evadne Lindsay)

A report on the World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance begins with an acknowledgement of the progress made by the international community in the struggle against discrimination during the last fifty years, since the adoption in 1948 of the Universal Declaration of Human Rights. Reference is made to the enactment of national and international laws and numerous international human rights instruments, particularly a treaty to ban racial discrimination. The defeat of apartheid in South Africa is cited in the report as a significant example of that progress. The result of the recent Presidential elections in the United States is also a timely reminder of such progress.

The report points to the role of technology in bringing people closer together, but also includes a warning that racial discrimination, xenophobia and other forms of intolerance continue to ravage societies. It also points to the risks carried by globalization that can lead to exclusion and increased inequality, very often along racial and ethnic lines, the emergence of horrors such as "ethnic cleansing" in recent years and the spread of ideas of racial superiority to new media like the internet. The complex nature of racial discrimination and ethnic violence is described in the report as presenting a greater challenge to the international community which requires new tools to deal with racism. [191]

While one may agree with the statements in the report that the struggle is far from over and that "the dream of a world free of racial hatred and bias remains only half fulfilled", the aim of this presentation is to focus on the successes and the ongoing efforts of the international community,

1. World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance.

individual States and individuals to overcome the challenges and obstacles which may be encountered along the way.

The continuing efforts by national and international organizations in confronting the problems provide convincing evidence that, as the struggle continues, there is much to celebrate in relation to each milestone of positive achievement. Anti-discrimination laws and conventions provide examples of the use of law as a powerful tool for achieving success in the struggle.

The principle of equality of all citizens is enshrined in the constitutions of all the States. Many States are signatories to conventions against discrimination, have enacted anti-discrimination laws, including laws that address some of the problems confronting the Afro-descendant population such as land rights and social inequality[192].

Examples are laws relating to:

- equal pay for men and women
- equal opportunity in employment
- sexual harassment
- pregnancy discrimination
- discriminatory hiring
- wrongful denial of promotion

The emergence of national Human Rights Organizations is a notable factor in advancing the struggle against discrimination in all its manifestations. These organizations have instituted programs designed to raise public awareness of the importance of human rights for all, regardless of social status, wealth or any position of privilege or lack of such attributes. The National Institutions' statement to the World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance in 2001 is a noteworthy example. That statement included:

- A call for strategies, policies and programs for persons and groups subject to multiple discrimination or whose experience with racism, racial discrimination, xenophobia and related intolerance is compounded or aggravated by other forms of discrimination, including discrimination based on gender or other status.
- A recognition that political will of States is indispensable to effectively combat racism and related intolerance and that States have primary responsibility to adopt and rigorously implement adequate criminal, civil and administrative measures to condemn racist acts, prohibit discrimination and provide victims with effective resources.
- A reference to the vital importance of national institutions and other relevant specialised institutions in combating racism, racial discrimination , xenophobia and related intolerance.[193]

The contributions of organizations such as NADI, UNIFEM and UNDP to the struggle are worthy of mention. They facilitated a seminar in Buenos Aires concerning immigrant women in Argentina. The participants drafted policies to fight racism and xenophobia, to help in eradicating prejudice and to improve their assimilation in the local community.[194]

States in the Americas have signalled their intention to be active participants in the struggle by participation in hemispheric agreements such as the Declaration of Mar del Plata: Fourth Summit of the Americas. Under Article 1, the Heads of State reaffirm their commitment to "…fight poverty inequality, hunger and social exclusion..."[195]

Article 23 sets out the intention of the States to combat gender based discrimination in the work place, promote equal opportunities to eliminate existing disparities between men and women in the working world through an integrated approach that incorporates gender perspective in labour practices, including the promotion of more opportunities for business ownership by women.

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192. Document entitled Inter-American Dialogue-Constitutional Provisions and Legal Actions Related to Discrimination and Afro-Descendant Populations in Latin America. www.iac.race.org.

193. National Institutions Statement to the World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance, adopted in Durban, South Africa, 2001.

194. Article by Cecilia Lipszyc, national coordinator of Argentine Institute against Discrimination (NADI) in conversation with IPS.

195. States Declaration of Mar del Plata: Fourth Summit of the Americas, Nov 5, 2005.

Under Article 24, the States:

- Reaffirm their strong commitment to confronting the scourge of racism, discrimination and intolerance in their societies
- Recognize the obligation of all levels of government and the wider society to fight the problems and the vital role of the Inter-American system in analyzing the social, economic and political obstacles faced by marginalised groups and identifying practical steps, including best practices, on how to combat racism and discrimination.
- Express support for OAS Resolution AG/RES. 2126 (XXXV-O/05) whereby a Working Group was established in charge of, *inter alia,* the preparation of a Draft Inter-American Convention Against Racism and all Forms of Discrimination and intolerance.
- Recall their commitment to fully implement their obligations under the United Nations Convention on the Elimination of All Forms of Racial Discrimination.

Each step forward in the struggle against discrimination serves to inspire confidence and hope in persons who have not yet experienced full liberation. A report published in a newspaper outside of the Region concerning young black citizens in a Central American State describes the flickering of "a quiet cultural and civil rights movement", which is regarded by the author as "a part of a slow but dramatic shift in consciousness among blacks in that State and throughout Latin America", whose action are described as "pushing for more rights and to reclaim their cultural identity". The writer also refers to statistics which show that blacks in the region are more likely to be born into poverty, to die young, to read poorly and to live in substandard housing.

The writer notes the peaceful nature of the movement which he describes as "something akin to the civil rights movement in the United States without the lynchings, bombings and mass arrests." A young man involved in the movement appeared to be expressing hope for the future by saying "For years it was just so much easier to not 'be' black, to call yourself something else, but the key to our future is to strengthen our identity, to say we are black and we are proud"[196].

The report also recognizes the efforts of Latin American governments which are described as "finally listening" and beginning to address racial inequities that have simmered since slavery. The movement is described as being even more significant having regard to World Bank estimates that the black population numbers in Latin America to be anywhere from 80 to 150 million, in sharp contrast to 40.2 million in the USA.[197]

Other signs of progress are demonstrated by policies instituted by the Government of Brazil in relation to a constitutional provision, which criminalizes racist acts, legislation which grants land rights to traditional rural communities which are occupied by descendants of runaway slaves, and the enactment of a law in 2003 to require the teaching of Afro-Brazilian history in schools. An official publication in 2008 proudly asserts that "Brazil has proven to be a laboratory for public policies on ways to promote racial equality." Other policies reflecting the promotion of racial equality in Brazil include the creation of the Special Secretariat for Policies to Promote Racial Equality (SEPPIR), which is headed by a Cabinet Minister, the Gender and Race program which combines educational initiatives, labour and dispute mediation with affirmative action to achieve equal treatment in labour relations, and programs to ensure entry of Afro-Brazilians in public universities.

Colombia has also introduced policies which benefit Afro-Colombians. Seats in the House of Representatives are assigned to Afro-Colombians and it was the first Latin American State to institute policies for their benefit.

Other signs of progress in the struggle against discrimination in the Region include the following:

- The success of activists in Colombia in winning legislation legally recognizing blacks and their history;
- The formation on non-political groups in Cuba to tackle race issues, including the Martin Luther King Movement for Civil Rights;

196. Article entitled "A Rising Voice: Afro-Latin Americans" Miami Herald.com
197. *Ibid*.

- The activities of some blacks in the Dominican Republic in fighting State authorities for the right to be categorized as "black" on their passports.
- Most Latin American and Caribbean States have signed the United Nations Convention on the Elimination of Racial Discrimination (CERD). Agencies have been created in these States to promote racial equality and appropriate constitutional amendments, include clearer references to the multi-cultural character of the populations.

The Coalition of Latin American and Caribbean Cities against Racism, Discrimination and Xenophobia which was formed in 2004, provides convincing evidence of the commitment of States to the ideals of non-discrimination and the achievement of equality for all citizens. The coalition was born out of a recognition that racism, discrimination and xenophobia:

- Raise barriers against the development of certain individuals or groups;
- Pose serious threats to peaceful co-existence and exchange between communities that share the same space;
- Imperil democratic and participatory citizenship;
- Demand regular updating of anti-racist strategy and policies together with coordination at the international, regional and local levels.

The coalition comprises a network of cities interested in sharing experience in order to improve policies to fight racism, discrimination and xenophobia. The ultimate objective is to involve the cities in a common struggle against these problems. The Latin American and Caribbean Coalition of Cities Against Racism, Discrimination and Xenophobia was launched in October 2006, at the Ibero-American Summit of Local Governments in Montevideo, attended by more than 100 representatives. 50 Municipalities have joined in the initiative and more than 150 have joined an existing network of cities.[198]

The ten point Plan of Action includes ten commitments covering areas within the competence of city authorities, i.e. education, housing, employment and cultural and sport activities. The signatory cities undertake to integrate the Plan of Action in their municipal strategies and policies and to involve various actors within civil society in its implementation.

Appropriate suggestions are given for implementation of each action The ten points are as follows:

1. Make racism and discrimination visible by documenting both and implementing municipal policies to combat both;
2. Create or strengthen municipal legislation relative to racism and discrimination;
3. Commitment and surveillance against racism and discrimination;
4. The city is to operate as an active creator, promoter and advocate for labour equity;
5. Provide equitable access to housing basic services and other habitat related conditions;
6. Guarantee full information and participation in public management;
7. Fight racism, discrimination or xenophobia through formal and informal educational actions involving reinforcement of measures against discrimination;
8. Promote inter-cultural and religious dialogue, safeguard diversity in particular indigenous Afro-American and Afro-Caribbean cultures;
9. Institute initiatives for protection of vulnerable children, in particular Afro-descendant and indigenous children;
10. Eradicate discriminatory practices due to health, gender, ethnic, racial, sexual orientation and disability reasons[199].

The problems of discrimination and intolerance are not insurmountable. The achievement of success in any case provides inspiration for continuing success in the future.

Resistance against intolerance can pave the way to success by the application of the UNESCO Declaration on the Principles of Tolerance stated below.

198. Coalition of Latin American and Caribbean Cities against Racism, Discrimination and Xenophobia. Available at: www.unesco.org/shs/citizensagainstracism .
199. Coalition of Latin American and Caribbean Cities against Racism, Discrimination and Xenophobia: www.unesco.org./shs/citiesagainstracism

Tolerance is respect, acceptance and appreciation of the rich diversity of our world's cultures, our forms of expression and ways of being human. Tolerance is harmony in difference. It is fostered by knowledge, openness, communication and freedom of thought, conscience and belief.

Tolerance is being yourself without imposing your views on others. It is not giving in or giving up. Above all it is an active attitude prompted by recognition of the universal human right and fundamental freedoms of others. The practice of tolerance does not mean toleration of social injustice or the abandonment or weakening of one's conscience.

CJI/doc.330/09

THE STRUGGLE AGAINST DISCRIMINATION AND INTOLERANCE IN THE AMERICAS: CORRECTIVE MEASURES

(presented by Dr. Hyacinth Evadne Lindsay)

The principle of equality and non-discrimination are described in a publication as a "cornerstone of democracy and indeed, they imbue and inspire the whole human rights concept. Since the beginning of human rights discourse in the Minorities Treaties era after World War I, these principles have been to its fore, having a prominent place in all the major human rights instruments since then".[1]

I. DISCRIMINATION ON THE GROUND OF LANGUAGE

The writer emphasizes the importance of the prohibition of discrimination on the ground of language and refers to the fact that various human rights instruments over the years have enumerated certain grounds on which discrimination is prohibited and that the prohibition of discrimination on the ground of language has, from the start of the human rights debate, been fundamental to the concept of the promotion of the principle of equality. One can readily agree with the assertion that "language is so much more than words. An individual's language is the means whereby they understand and conceptualize the world around them and whereby they have a meaningful communication with their fellow beings". Any deprivation of the right to use one's own language is viewed as a deprivation of one of the basic characteristics by which persons define themselves while discrimination on the ground of language is described as discrimination against what can be considered to be "at the core of the human being – the vehicle of reasoning and communication".[2] This is cited as the reason why language rights are protected in various Constitutions and legislation as well as regional and international human rights instruments under the principles of non-discrimination and equality.

The United States of America, Canada and the United Kingdom are cited as countries where the matter of equality and non-discrimination relating to language has been considered in depth. These countries have to deal with many different language situations and have employed varying approaches in doing so. It is also noted that a country can protect language rights even when there is no legislative or constitutional provision for such protection. The USA is cited as an example of this type of protection as individuals can claim that language discrimination indirectly affects them because of their race or national origin.[3]

But the writer sounds a note of caution by stating that the interpretation of the concepts of non-discrimination and equality and the extent to which these concepts have been useful in relation to linguistic rights vary from court to court and different jurisdictions, resulting in uncertainty in the field of language rights.

In treating with the concepts of equality and non-discrimination, the writer addresses the relationship between equal treatment and identical treatment. The writer contends that for true equality to exist, it is the end result that is important, e. g. the equal application of a State's linguistic policy regarding the use of the State's official language may appear to be a policy of equality, imposing the

1. HIGGINS, Noelle. **The Right to Equality and Non-Discrimination With Regard to Language**. Galway: National University of Ireland, March 2003, v.10, n.1. Noelle Higgins, BA MA, LLM, Law professor.
2. *Ibidem.*
3. *Ibidem.*

same obligations on, and giving the same opportunities to all citizens but this would not result in de facto equality if the official language is not the mother tongue of a segment of the population. This policy could therefore effectively discriminate against that segment of the population. It is suggested that a State must therefore take into account the differences between citizens when implementing a language policy. The writer concludes that true equality involves recognizing differences and treating different groups differently so that they will eventually end up on the same footing.[4]

II. PAY DISCRIMINATION

The signing of the Lilly Ledbetter Fair Pay Act in the United States of America is another significant step forward in the struggle against pay discrimination against women. Ms Ledbetter worked for 19 years at Goodyear Tire, overtime and double shifts, being paid less than her male coworkers and withstanding degrading treatment. She challenged the pay discrimination through a hostile appellate process that reversed decades of law that would have protected her. The report states that Ms Ledbetter, a broad coalition of organizations and many concerned Members of Congress worked successfully to undo what is been described as the Supreme Court's injustice for other workers. In the words of the Legislative Counsel 1 "The Lilly Ledbetter Fair Pay Act struck a powerful blow for justice not just for her, but for anyone who has been victimized by wage discrimination". Despite this victory the struggle continues. As Ms Ledbetter pointed out at the signing of the Act "I wish I could tell you, however, that we established a new and groundbreaking antidiscrimination law. I wish I could tell you that we protected new sectors of employees, removed unfair limitations on remedies for our workers, or created new protections for a new workforce. But I can't. We fought for a restoration of rights … It was a vitally important fight - one that gives all employees their day in court as long as their employer continues to discriminate against them … but a fight to just preserve the rights we had already won early in civil rights laws".

A significant feature of the report was the description of the consequences of pay discrimination which are described as "severe and predictable", forcing single mother households and families dependent on two wage-earners to live on less than they rightfully deserve while simultaneously reducing women's retirement earnings. In short, unfair pay disparities perpetuate women's economic dependence and deprive them of economic opportunity and equal protection of the laws ... moreover women tend to be hurt first and worst during economic downturns". The Act was described as "another critical weapon in the battle against sex discrimination in the workplace…. The Lilly Ledbetter Fair Pay Act struck a powerful blow for justice not just for her but for anyone who has been victimized by wage discrimination.... With a stroke of the pen -actually several pens - President Obama made today a good day for all employees who - regardless of gender, age or disability- are illegally receiving smaller paychecks than their colleagues". The final victory in this struggle may be achieved when, as the President observed "There is more to be done. The Lilly Ledbetter Fair Pay Act restored rights lost in the civil rights roll back of recent years. The next step is to amend the Equal Pay Act- to close, once and for all, the pay gap between men and women and allow employees to finally bring home every dollar they rightfully earn".[5]

Because of the myriad forms of discrimination, the battle against it is waged on many fronts. Discrimination may mean different things to different people, depending on the grounds on which they perceive themselves as victims, whether race, religion, nationality, sexual preference, etc. However, support in the fight is provided by various international instruments such as the Universal Declaration of Human Rights and the Internal Covenant on Civil and Political Rights. The Universal Declaration of Human Rights establishes that religious freedom is a fundamental human right whereby everyone has the right to freedom of thought, conscience and religion, the freedom to change his religion or belief, to manifest his religion alone or in community with others, in public or in private, in teaching, practice worship and observance.

The chairman of the National Council for the Prevention of Discrimination in Mexico recently described the fight against all forms of discrimination as "one of the most important tasks that any democratic society can undertake". In replying to his rhetorical question "why?" He said: "Because

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4. *Ibidem, par. 3.*
5. VAGINS, Deborah. **A step towards fair pay with a stroke of a pen**. Published in AMERICAN CIVIL LIBERTIES UNION (ACLU) Blog of Rights Because Freedom Can't Blog Itself: women's rights, 29 January 2009. Original publisher in DailyKos. Available at: <http://blog.aclu.org/2009/01/29/a-step-towards-fair-pay-with-a-stroke-of-a-pen>.

discrimination is the kind of inequality that prevents numerous people and groups in society from enjoying rights and opportunities. A society that discriminates and excludes cannot be considered democratic". He underscores the human rights concept by quoting Article 7 of the Universal Declaration of Human Rights which establishes that "All [human beings] are equal before the law and are entitled without any discrimination in violation to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination", and points out that in this context discrimination is taken to mean unfair limitation on people's fundamental freedoms and protections, on their participation in society and politics, and on a social welfare system that meets their needs.

He further elaborated on the topic by referring to other international agreements which define nondiscrimination as a human right. Specifying that discrimination limits or denies the rights and opportunities of the people who experience it. The examples cited are the U.N. International Convention on the Elimination of All Forms of Racial Discrimination, the U.N. Convention on the Elimination of All Forms of Discrimination against Women and the OAS Inter-American Convention for the Elimination of All Forms of Discrimination against Persons with Disabilities.

He mentions the following facts concerning action taken by Mexico:

- Mexico's Constitution mandates nondiscrimination and therefore the Constitution itself imparts a fundamental regard for human rights to [Mexico's] laws and obligates the country to comply with the requirements set by international agreements. He acknowledges that the same can be said for every democratic country in Latin America, each of which has signed the Universal Declaration of Human Rights and the anti-discrimination conventions mentioned previously.
- Article 1 of Mexico's Constitution prohibits the government and civil society from discriminating against women, people with disabilities, religious minorities, ethnic groups or those with unconventional beliefs.
- Mexico's Federal Discrimination Prevention and Elimination Act develop the spirit of the Constitution in light of international legislation. The State is obliged to promote and implement compensatory measures designed to reverse the social conditions that allow discrimination to continue against women, the disable, children, the elderly and indigenous groups.

He describes the harmful effects of discriminatory practices on a society, as such practices define the character of public and private institutions and leave a mark on a country's political and popular culture. He mentions also that such practices impose a significant financial burden on a country, cause further damage to the social fabric and create an inertia that convinces the victims of discrimination that such practices are both natural and deserved. He further elaborates on the negative effects of discrimination which represent indifference and omission, abandonment and exclusion. He warns that a society discriminates when:

- it provides efficient service only to people with normal abilities;
- it established as a model for normality or social success, a group of attributes that only very few people can achieve;
- it ignores the special needs of the least fortunate;
- it gives up on creating habitable, friendly environments and atmospheres for people;
- it persists in reproducing the social environments that have allowed discrimination to flourish.

Having identified the harmful effects of discrimination, the Chairman recommends possible solutions as follows:

Given the seriousness and extent of this pernicious phenomenon, the fight against discrimination must be based on one fundamental criterion: the absolute inviolability of an individual's rights and dignity. In a democratic society, this means that the State must guarantee equal treatment for all, either by its own direct action or through the supervision and encouragement it provides to actions taken by individuals. The State must also guarantee compensation and favourable treatment to all people as needed, in order to remedy and underserved social disadvantage.

The Chairman also outlined his view of the nature of the task to be undertaken in the fight against discrimination by stating that the fight against discrimination cannot be blind to underserved

differences in condition or to the need to compensate those who, because they belong to a vulnerable group can only assert themselves in society if certain special opportunities are made available to them. He suggests that fighting discrimination means broadening our idea of equality. In what appears to be a recommendation for redressing the balance in relation to groups that historically were victims of discrimination, he recommends that, in addition to equality under the law, there should be what he describes as "the real equality of opportunities that enables us to accept as legitimate both affirmative action and compensatory measures. He ends with the exhortation that can be heeded by all when he said "A society whose goals include justice and equality must promote a consistent, systematic policy of real equality of opportunity for all people and groups that are victims of discrimination".

The recent enactment of the American Recovery and Reinvestment Act (the stimulus package) is a significant step in the campaign to achieve equality in educational opportunities for minority students. This prompted a response by the American Civil Liberties Union in expressing its approval of the $13 billion set aside to help states close the achievement gap between students in poor and minority communities and their more fortunate counterparts. This decision was viewed as leveling the playing field for all students and meeting the country's treaty obligations under the Convention on the Elimination of All Forms of Racial Discrimination (CERD). The article describes the results of the last CERD review of US compliance with the Treaty as "less than stellar" in that racial segregation was "alive and well" in the public schools.

Another significant recommendation was the incorporation of innovative human rights education programs including the observation that, having regard to fact that America's economy was global, and the importance of good relations with other countries, it was important to teach students about the human rights values shared by the USA and many other countries. The ACLU concluded that the goals of closing the achievement gap and implementing human rights programs would be "an incredibly sound investment in the future".[6]

1. No discrimination

It has been noted that discrimination is not the same as differentiation or distinction. Accordingly, the recognition of differences or distinctions made between groups are not necessarily discriminatory but have the potential to be discriminatory. This can occur when certain characteristics are present, (named an X factor) and described as follows: "It is widely accept that not all distinctions are necessarily discriminatory. Equality and the right to non-discrimination require that individuals be protected against unreasonable or unacceptable different treatment. How a court of law is to decide whether a particular distinction is acceptable or not is a difficult task, as it involves a balancing act between the interests and priorities of the government-normally mirroring those of the majority group controlling the state machinery and the interests and rights of the individuals affected".[7]

6. ITO, Suzanne. **Stimulus funds: mind the gap**. Published in ACLU (AMERICAN CIVIL LIBERTIES UNION) Blog of Rights Because Freedom Can't Blog Itself: human rights, 25 February 2009. Available at: < http://blog.aclu.org/?s=Stimulus+Funds%3A+Mind+the+Gap+>
7. DE VARENNES, 1996, p. 55.

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

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

a. Consumer protection: applicable law, jurisdiction and monetary restitution (conventions and model laws);

b. Secured transactions: electronic registries for the implementation of the Model Inter-American Law on Secured Transactions.

In said resolution the Permanent Council is instructed to establish a methodology for the preparation of the Inter-American instruments to be considered by CIDIP-VII; to set a date and place; and that, when it considers future topics for upcoming CIDIPs, it include, among others, the topic of an Inter-American Convention on International Jurisdiction. It also requests the Inter-American Juridical Committee to present its comments and observations on the topics for the final agenda of CIDIP-VII. In addition, by AG/RES. 2069 (XXXV-O/05) "Observations and Recommendations on the Annual Report of the Inter-American Juridical Committee," the General Assembly requests the Committee to collaborate in preparations for the next CIDIP-VII.

During its 67th regular session (Rio de Janeiro, August, 2005), the Inter-American Juridical Committee adopted resolution CJI/RES. 100 (LXVII-O/05) "Seventh Inter-American Specialized Conference on Private International Law," which it requested the rapporteurs of the theme to participate in a coordinated manner in the consultation mechanisms that come to be established for the purpose of developing the themes proposed for the CIDIP-VII, and principally at the meeting of experts convoked for that purpose. It was also requested that the rapporteurs keep the Inter-American Juridical Committee informed of progress in the discussion of the themes, as well as a report on the matter to be presented during the 68th regular session of the Juridical Committee or before that date if the themes are appropriately developed.

At the 68th regular session of the Inter-American Juridical Committee (Washington, D.C., United States of America, March 2006), Dr. Ana Elizabeth Villalta, the rapporteuse for this topic, presented report CJI/doc.209/06, "Seventh Specialized Conference on International Private Law (CIDIP-VII)". On the subject of consumer protection, the rapport use mentioned that there are three proposals: one from Brazil regarding an Applicable Law Convention for certain Contracts and Consumer Relations; one from the United States regarding a Model Law on Monetary Restitution dealing with the availability of dispute resolution and redress measures for consumers, along with three Model Law annexes: one on Claims for Minor Amounts, one on Electronic Arbitration for Crossborder Claims, and one on Governmental Restitution; and one from Canada regarding a Convention on Jurisdiction and model legislation on jurisdiction and uniformly applicable legal provisions in consumer contracts. With respect to the Brazilian proposal, Dr. Villalta mentioned that the draft Convention attempts to overcome the lack of sufficient protection for consumers under current private international law in the Americas and she reminded the Committee that the idea was to determine what law best serves consumer interests. As for Canada's proposal on jurisdiction, Dr. Villalta mentioned that aimed to establish rules governing electronic commerce and ways to protect consumers engaging in transborder transactions via the Internet, by determining the competent court and applicable law. Finally, as regards the United States proposal, the rapporteurs explained that the aim of the Model Law on Monetary Restitution is to find novel and practical ways of redressing economic damage to consumers.

On the second theme of CIDIP-VII, Dr. Villalta said the idea was to establish a new registry system for implementation of the Model Inter-American Law on Secured Transactions. The three components in this proposal are: the creation of standard registration forms; the drafting of guidelines for secured transaction registries; and the drafting of guidelines for electronic interconnection between registries in different jurisdictions.

During this regular session, the Inter-American Juridical Committee adopted resolution CJI/RES.104 (LXVIII-O/06), "Seventh Inter-American Specialized Conference on Private International Law," which approved document CJI/doc.209/06 presented by the co-rapporteuse; requests the rapporteurs for this area to take part, in a coordinated manner and as representatives of the Inter-American Juridical Committee, in any consultation mechanisms that may be established with a view to discussing topics put forward for CIDIP-VII; requests the rapporteurs to keep the Juridical Committee informed of progress made in the discussion of the topics; and requests that they present a new report to the Committee with observations and comments on the CIDIP-VII agenda at the next regular session.

At its thirty-sixth regular session (Santo Domingo, June 2006), the OAS General Assembly adopted resolution AG/RES. 2218 (XXXVI-O/06) in which it asked the Inter-American Juridical Committee to cooperate in the preparations for CIDIP-VII and encouraged the rapporteurs for this topic to participate in the consultation mechanisms to be established for work on the topics proposed for that Conference.

During the 69th regular session of the Inter-American Juridical Committee (Rio de Janeiro, August 2006), adopted resolution CJI/RES.115 (LXIX-O/06), "Seventh Specialized Inter-American Conference on Private International Law (CIDIP-VII)," in which it reiterated its support for the CIDIP process as the best possible forum for codifying and harmonizing private international law in the hemisphere and, specifically, the need to draft, under the aegis of CIDIP-VII, inter-American instruments governing consumer protection and electronic registries for secured transactions. It also reiterated its support for the rapporteurs' participation in the preparations for CIDIP-VII and asked them to continue to participate, representing the Inter-American Juridical Committee, in the mechanisms that existed for the drafting of inter-American instruments on consumer protection and electronic registries for secured transactions, emphasizing the reports of the Juridical Committee on those two topics. It finally resolved to draw up new texts, comments, and questions for the CIDIP-VII internet discussion forum, in order to encourage dialogue toward the production of instruments for implementation in all the Organization's member states.

The First Meeting of Experts for CIDIP-VII took place in Porto Alegre, Brazil, from December 2 to 4, 2006, and dealt with consumer protection. Discussion at the meeting focused on the three instruments proposed in this area:

At the 70th regular session of the Inter-American Juridical Committee (San Salvador, February-March 2007), at which Dr. Ana Elizabeth Villalta was present in representation of the government of El Salvador, the Director of the International Legal Affairs Office of the OAS, Dr. Jean-Michel Arrighi, presented a report on the Porto Alegre meeting. He indicated that two documents were examined at length in said meeting, namely the Brazilian proposal and the United States' proposal for a model law. Due to time constraints, the Canadian proposal could not be discussed at length. Upon continuation, the Committee on Political and Juridical Affairs held a meeting during which these three proposals were elaborated upon by their respective coordinators: the representative of Brazil, the delegates of the State Department and Federal Trade Commission of the USA, and the representative of Canada.

The Inter-American Juridical Committee approved resolution CJI/RES.122 (LXX-O/07), "Seventh Inter-American Specialized Conference on International Private Law (CIDIP-VII)", by which it expressed satisfaction with the progress made in negotiations on the drafting of instruments to facilitate the implementation of consumer protection measures and safeguards, especially during the First Meeting of the Group of Experts; reaffirmed its desire to help meet the goals set by the Member States for the successful celebration of a CIDIP-VII on the subject of consumer protection, and renewed the mandate given to the co-rapporteurs to represent the Juridical Committee in preparations of CIDIP-VII and report back to it.

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. Pérez spoke of two major steps forward taken in the CIDIP process: the need for legislative drafting skills, instead of skills in drafting treaties, and the treatment of matters related to justice. Considering the nature and substance of the instruments to be negotiated during this new phase in the CIDIP process, the Inter-American Juridical Committee must play a different role that is in line with the new needs.

Dr. Antonio Pérez also offered a number of general comments about the methodology used on the negotiations of CIDIP-VII. He first of all noted the Secretariat's innovation in allowing nongovernmental experts to make comments on instrument proposals. However, he noted that the lack of general discussions among the member states on unresolved issues prevented a real agreement from being reached on the goals of the CIDIP process and tended to undermine the importance of those topics that truly needed to be discussed, debated, and resolved. He added that the three proposals presented by Brazil, the United States, and Canada did not succeed in providing an effective response in the area of international trade and crossborder contracts for consumer goods.

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, Dr. Jean-Paul Hubert, 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.

Dr. Villalta asked whether it would be appropriate to adopt a resolution reaffirming the Committee's willingness to assist with the preparatory work for CIDIP-VII, since the Committee had received no mandates in that regard since 2006.

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.

During the 74th regular session of the Inter-American Juridical Committee, (Bogotá, Colombia, March 2009), Dr. Dante Negro indicated that the political organs of the OAS had done no further work on CIDIP-VII, but that with the assistance of Fondo Espana, the Department had begun implementing a project to establish a network of central authorities on inter-American conventions on the family and children, and specifically with regard to adoption of minors, international restitution of minors, and alimony obligations. He pointed out that the idea was to establish the same procedure as the one already in place for extradition and mutual judicial assistance, including provision for secure mail for the competent authorities in this area and development of training workshops on use of the system in the states parties to those conventions.

The rapporteur on the subject, Dr. Ana Elizabeth Villalta, referred to the history of this issue, and underlined the current impasse involving three proposals under discussion, put forward by Brazil (on the applicable law), the United States (on monetary compensation or redress), and Canada (on jurisdiction). She reported that the states are still in negotiations, but that no further progress has been reported to date. She explained that this was the reason why no reports could be presented during this session, since the outcome of these negotiations is still pending. She voiced her concern over the delay in holding CIDIP-VII, since seven years have already elapsed since the last CIDIP, thereby jeopardizing the entire codification process. She reiterated that despite all the efforts made to reconcile the three proposals at the meetings of experts, the Porto Alegre meeting, and the Forum organized by the Department of International Law, progress has been slow. She pointed out that The Hague Conference on Private International Law recently reviewed four conventions, with the participation of Member States and observers. She further indicated that SICA held a conference on the Apostille Convention and its relation to free trade agreements. In conclusion, she expressed her interest in retaining the office of rapporteur on the subject, and proposed that Dr. David Stewart be appointed as co-rapporteur.

Dr. David Stewart agreed with Dr. Villalta's conclusions to the effect that the current situation does not give much room for any action by the Juridical Committee. He stated that they would have to wait for the outcome of the negotiations among the countries, and that at that point in time, the Committee could resume the active role it had been playing in the process for codification of private international law. In his opinion, the subject of electronic registries is of key importance due to its economic repercussions. Although it is highly technical, it is one of the areas in which the Committee could be involved. He also mentioned that he was very honored by Dr. Villalta's invitation to participate as co-rapporteur on the subject.

Finally, the Inter-American Juridical Committee elected Dr. David Stewart as co-rapporteur on the subject.

During the 75th regular session of the Inter-American Juridical Committee (Rio de Janeiro, Brazil, August 2009), Dr. Ana Elizabeth Villalta reported that negotiations for CIDIP-VII's two topics – consumer protection and secured transactions – were progressing separately. Regarding consumer protection, she noted that there had been no progress with the proposals presented by Brazil, Canada, and

the United States, nor was there a date set for the next CIDIP, and for those reasons she was submitting no report to this session.

In his capacity as co-rapporteur for the second CIDIP-VII topic, secured transactions, Dr. David Stewart reported that work had concluded with the formal approval of documents by the CAJP and the Permanent Council. He added that the CIDIP would take place in October 2009 in Washington, D.C., for the final approval of the work on secured transactions.

Dr. Dante Negro spoke of the General Assembly resolution ordering the establishment of a working group focused on consumer protection and comprising government officials and representatives of the interested member states. The CAJP would be setting that group up during the first week of September 2009. That did not prevent any Committee member from attending the working meetings. He added that the General Assembly resolution itself established a deadline for the working group to submit a report to the Assembly. He agreed to keep both rapporteurs informed about possible dates for meetings of the Working Group so that one of the rapporteurs based in Washington, D.C., could attend those events.

On the topic of consumer protection, Dr. Jean-Michel Arrighi announced that in addition to the CIDIP, there was a nonjuridical project underway under the aegis of the OAS. Similar to the networks on criminal and family matters, the Secretariat for Legal Affairs was creating a network of national authorities with competence over consumer protection for rapid exchanges of information with a view to creating a database of legislation. He noted that the CJI has played a key role in past CIDIPs, by making full use of its initiative authority to propose private international law topics. He stressed that the representatives of the foreign ministries who discuss those issues within the CAJP are much more focused on topics of public international law, and that this opens up the possibility of the Committee making proposals in the field of private international law.

Dr. Mauricio Herdocia Sacasa noted his support for Dr. Negro's proposal for one of the rapporteurs to participate actively and directly within the CAJP Working Group and thereby reaffirm the IAJC's direct and major impact on the development and codification of private international law. The motion was seconded by Dr. Castillo and Dr. Villalta.

Dr. Guillermo Fernández de Soto suggested including the situation of alternative dispute solving methods on the Committee's agenda with a view to the upcoming CIDIP, which was approved for consideration at the March session.

It should be noted that a discussion took place on the contents of the agenda, in which it was decided to keep the topic of private international law on it. Dr. Arrighi also asked the rapporteurs to bear in mind the documents prepared by Dr. João Grandino Rodas on the basis of a survey among the Hemisphere's professors of private international law, which represent an important source of information on the problems of greatest concern to the jurists working in that field.

5. Implementation of International Humanitarian Law in the OAS Member States

Documents

CJI/doc. 328/09	War crimes in international humanitarian law (presented by Dr. Jorge Palacios Treviño)
CJI/doc.322/09	Implementation of humanitarian International law in the Member States of the OAS (presented by Dr. Jorge Palacios Treviño)

At its thirty-seventh regular session (Panama, June 2007), the General Assembly adopted resolution AG/RES. 2293 (XXXVII-O/07), "Promotion and Respect for International Humanitarian Law", wherein it instructed the Inter-American Juridical Committee to prepare and propose model laws supporting efforts to implement treaty obligations concerning international humanitarian law, on the basis of priority topics identified in consultation with the Member States and the International Committee of the Red Cross, and to present a progress report on this matter prior to the thirty-eighth regular session of the General Assembly.

At the Inter-American Juridical Committee's 71st regular session (Rio de Janeiro, August 2007), Dr. Dante Negro, Director of the Office of International Law, recalled that the Committee on Juridical and Political Affairs currently had this topic under study. He remarked that in the last three years, the topic had taken on great importance because of the mandates instructing the CAJP to hold special meetings to collaborate with the International Committee of the Red Cross and the Office of International Law (OIL). He said that last year, the Office was given a mandate to conduct a course on international humanitarian law, targeted at the personnel of the Permanent Missions and the OAS General Secretariat, all in an attempt to explain concepts and more broadly disseminate the topic within the Organization. Dr. Negro also noted that the mandate given to the Juridical Committee was basically to propose model laws, devoting particular attention to the operative part of the resolution which states that the model laws should be proposed "on the basis of priority topics identified in consultation with the Member States and the International Commission of the Red Cross."

He suggested that the Inter-American Juridical Committee might prepare a letter or questionnaire for the member states to ascertain what they consider to be the priority topics in the realm of international humanitarian law. The document prepared by the Office of International Law was circulated. Its title was "Implementation of International Humanitarian Law in OAS Member States: Preparation and presentation of model laws" (ODI/doc.08/07), which was based on informal conversations with the Red Cross and on the priority issues that had been raised in other General Assembly resolutions that did not necessary directly concern the issue of international humanitarian law but that were related to it, such as the International Criminal Court, terrorism, antipersonnel landmines, illicit weapons trafficking, and others.

Dr. Dante Negro also reported on a recent Seminar of Red Cross Committees, held in Mexico City, which discussed the topic of international humanitarian law. Dr. Negro suggested that the Committee might invite a member of the Red Cross to attend a session, in order to hold a working meeting. As for the implementation of model laws on the subject, Dr. Negro indicated that in informal talks that the Red Cross had expressed its interest in the topic of disappeared persons. He thought, however, that other topics might come up in direct dialogue between the Red Cross and the Juridical Committee.

The Inter-American Juridical Committee named the following as rapporteurs for the topic: Drs. Ana Elizabeth Villalta Vizcarra, Ricardo Seitenfus and Jorge Palacios Trevino.

Prior to the session, the Office of International Law sent a verbal note to the OAS permanent missions to support the Committee's work in preparing model laws on priority topics defined in consultation with the member states and with the International Committee of the Red Cross. In turn, the rapporteur for this topic, Dr. Jorge Palacios, met with representatives of the Red Cross to discharge that mandate and to identify areas in which model laws could be prepared.

During the 72nd regular session of the Inter-American Juridical Committee (Rio de Janeiro, Brazil, March 2008), Dr. Dante Negro reported that further to the activity that had begun the previous year, the

Department of International Law along with the International Committee of the Red Cross had organized a second course on the topic, directed towards staff of the permanent missions and of the OAS General Secretariat. He also placed at the Committee's disposal a publication issued by the Red Cross titled "Participation of American States in International Humanitarian Law Treaties and their National Implementation – 2007 Report".[1]

Dr. Jorge Palacios expressed his regret over the lack of responses of member states to the questionnaire on international humanitarian law, which are important for compliance with the General Assembly's mandate. He said that perhaps at the time it would be more convenient for the Juridical Committee to deal with crimes against humanity and other crimes whose typification is not applicable in times of war, more than on war crimes themselves.

The Chair of the Inter-American Juridical Committee, Dr. Jean-Paul Hubert, agreed that the mandate of the General Assembly was very vague and that greater precision regarding its scope was necessary in order to be able to produce something useful. In turn, Dr. Dante Negro noted the low number of responses received from the member states and proposed sending the missions a reminder. That note was sent on April 22, 2008.

At this regular session, the Inter-American Juridical Committee received the visit of Dr. Anton Camen of the International Committee of the Red Cross, who spoke about the IAJC's work, in conjunction with other international organizations, in drafting model laws, among which he referred to the laws on antipersonnel mines, the use of 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, contains a summary of progress to date with the implementation of international humanitarian law treaties in individual countries' laws.

He emphasized that one of the challenges for states that have adopted the Rome Statute is the problem of punishment of crime vis-à-vis international humanitarian law obligations because of the inconsistency among the definitions in the different instruments on the subject. He also observed that few states have applied the provisions of the Geneva Conventions of 1949 and their 1977 protocols.

The Geneva Conventions define war crimes in 12 types, while the Rome Statute defines 70 war crimes; they do not coincide, which causes great confusion among legislators. The problem is worsened in that the Rome Statute does not include some crimes that are defined by the Geneva Conventions. He cited the example of Argentina, which was able to surmount this difficulty when it reformed its Criminal Code by including in it three crimes that are not defined in the Rome Statute but that are included in the Geneva Conventions.

Another obstacle mentioned by Dr. Camen lies in the fact that when the Rome Statute defines a crime that is similar to one already defined by the Geneva Conventions, but adds conditions such as "clearly excessive," with respect to attacks injuring civil population. This expression, Dr. Camen said, could eventually provide room for a national judge to apply a certain interpretation and end up not punishing the perpetrator of the crime. Another important issue to be considered mentioned by Dr. Camen is the responsibility of superior officers – civilian or military – for delicts committed by subordinates, when measures were not taken to avoid them, prevent them, or when assistance has been rendered in the commission of the crime. This crime is identified by the Geneva Conventions, but the Rome Statute draws a difference between military and civilian superior officers, and is more permissive regarding civilian superiors. This aspect deserves considerable discussion among legislators.

The issue of the protection of cultural property and the duty to punish certain violations under the 1999 Protocol to the 1954 Convention on this matter is another aspect related to humanitarian law. An example of this would be the use of cultural property to support military actions. This same consideration can be given to the use of chemical weapons and anti-personnel mines, he added.

1. Available at http://www.icrc.org/Web/Eng/siteeng0.nsf/html/t107.

Dr. Camen added that 18 States of the Americas, with the exception of the Caribbean States, Venezuela, and Mexico, have established inter-ministerial committees on humanitarian law, which have promoted the implementation of humanitarian law treaties. These committees are linked to ministries of foreign affairs, or of defense, and in other cases include the Supreme Court, or the executive branch itself. Sometimes the universities are included, but these are governmental institutions. He said that his office is ready to provide the Juridical Committee with the list of international committees in the OAS Member States. This list was sent to the members of the Juridical Committee through the Department of International Law on March 19, 2008.

Dr. Jorge Palacios and Dr. Elizabeth Villalta, co-rapporteurs on the topic, considered that it was indispensable to receive the responses of the States to the questionnaire, in order to learn of their preferences and to be able to make progress in this matter.

Finally, the Inter-American Juridical Committee decided to adopt resolution CJI/RES. 141 (LXXII-O/08), "Implementation of International Humanitarian Law in OAS Member States", in which it reiterates the note sent to the OAS Member States requesting the priority topics on which to prepare and propose model laws in accordance with resolution AG/RES. 2293 (XXXVII-O/07), suggesting as possible sources of information, where available, the national inter-ministerial committees on humanitarian laws, and requesting the co-rapporteurs to submit a progress report in this matter when they have received responses from the Member States of the OAS.

The thirty-eighth regular session of the OAS General Assembly (Medellin, June 2008) issued resolutions AG/RES. 2414 (XXXVIII-O/08) and AG/RES. 2433 (XXXVIII-O/08), requesting the Inter-American Juridical Committee to continue drafting and proposing model laws in support of efforts undertaken to implement obligations derived from treaties on international humanitarian law, based on priorities defined in consultation with Member States and with the International Committee of the Red Cross. To this end, Member States were urged to submit a list of priority issues as soon as possible to the Inter-American Juridical Committee, so that it can fulfill its mandate.

On June 16, 2008, the Secretariat distributed among the members of the Inter-American Juridical Committee a note sent by the Permanent Mission of Ecuador to the OAS in which it identifies the definition of war crimes as a priority topic, and attaches a copy of a law on the use and protection of the Red Cross and the Red Crescent emblems.

Likewise, on July 1, 2008, the Department of International Law sent to the members of the Inter-American Juridical Committee the Final Report on the special session organized by said Department in the framework 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, rapporteur on the subject, reported that he had prepared a preliminary document on this matter (document CJI/doc.304/08), entitled "Implementation of International Humanitarian Law in OAS Member States: preliminary document," in which he highlighted the items that required further attention.

Dr. Dante Negro clarified that the General Assembly issued its mandate to the Inter-American Juridical Committee in 2007, but there was no discussion at all at the special session. At present, he indicated that the Committee on Juridical and Political Affairs is making every effort to urge countries to express their preferences with regard to the Juridical Committee's mandate, but there have been no responses so far.

In view of the different comments made by members, the Chairman of the Juridical Committee concluded that, in view of the fact that no responses have been received, it could request the rapporteur to draw up a general report, which should also answer the questions that have been raised, such as the issue of ranking or precedence, the criteria for harmonization, and the applicable rules or provisions, among others, and at the same time propose a guide on principles for interpretation and harmonization of laws. If deemed relevant, the report could also suggest a meeting of government experts to provide more information to be considered in this process.

On February 25, 2009, the Final Report of the December 2008 Special Session of the Committee on Juridical and Political Affairs on International Humanitarian Law, prepared by the Department of International Law, was distributed to the members of Inter-American Juridical Committee.

During the 74th regular session of the Inter-American Juridical Committee (Bogota, March 2009), Dr. Dante Negro recalled that the General Assembly had requested the Committee to continue drafting and proposing model laws in support of efforts made to comply with obligations derived from international humanitarian law treaties, on the basis of the priorities determined in consultation with Member States and with the International Committee of the Red Cross. To this end, he urged Member States to send to the Inter-American Juridical Committee as soon as possible a list containing these priority subjects, so that the Committee can fulfill its mandate. On this point, Dr. Negro pointed out that the rapporteur on the subject, Dr. Jorge Palacios, had presented a report in August 2008, and then presented another report at this session. He further reported that in December 2008, the Department of International Law organized a special session of the Committee on Juridical and Political Affairs on the subject, and that it also organized a course on the subject for the third consecutive year, this time focusing on cluster bombs and private security firms. He indicated that this course would be published shortly. He also noted that, at the invitation of the International Committee of the Red Cross, in October he participated in a meeting of the national committees of Andean countries in Quito. He took that opportunity to speak of the work of the OAS in this area, and especially the studies of the Inter-American Juridical Committee. He indicated that the Committee should keep in mind that these national committees can be an excellent source of information for the future work of the Committee. Finally, he pointed out that he met last week with Red Cross officials in Washington, and that, after consulting with the rapporteur on the subject, he arranged for the participation in this session of a representative of the Red Cross Office in Bogota, to assist the Committee in its work in this area.

The rapporteur on the subject, Dr. Jorge Palacios, presented his report on "Implementation of International Humanitarian Law in the OAS Member States," document CJI/doc.322/09. This verbal presentation appears in record No.2 of the minutes of this session.

Dr. Mauricio Herdocia supported the report of the rapporteur, in that he agreed that the Inter-American Juridical Committee should approach the subject more from the standpoint of reconciling the Geneva Conventions and the Rome Statute, than from the standpoint of finding contradictions between them, since as the rapporteur rightly said, the Rome Statute does not claim to replace the Conventions but rather to supplement them, whenever the national jurisdiction fails, with the application of an instrument to prevent impunity. He recalled that the United Nations International Law Commission tried to define war crimes, which clearly involve the concept of *jus cogens* since they violate the peremptory norms of international law. However, this category of peremptory norms has its own method for establishment and substitution; it is governed by the Vienna Convention on the Law of Treaties, and can only be derogated by another peremptory norm, which did not occur in this case. He pointed out that, as indicated in various Red Cross documents, the differences between the Geneva Conventions and the Statute are not questioned, mainly in the case of the definition of war crimes, but these differences should be interpreted using a harmonious, complementary, and conciliatory criterion, which keeps the basic unity and coherence of international law, dealing primarily with peremptory norms, which protect the fundamental interests of humanity. Thus the two legal instruments (Geneva and Rome) cannot be construed as at odds with each other, and much less so as derogating each other, but rather from the standpoint of closely interacting, and mutually enriching and influencing each other.

Dr. Fabián Novak thanked the rapporteur for the report, and echoed the position taken by Drs. Palacios and Herdocia, since in his view, the Rome Statute neither derogated nor could derogate the 1949 Geneva Conventions. In the first place, he pointed out, there was no explicit derogation, but, in the second place, neither can one accept technically a tacit derogation, since three concurrent factors must be present in that case: a) identity of material between these treaties; b) opposition between the clauses in the two; and c) identity of parties. Since this last requirement is not met, in view of the fact that the Geneva Conventions and the Rome Statute do not have the same states parties, there can be no tacit derogation.

Moreover, with a view to contributing to the Juridical Committee's study, he mentioned the experience of the Andean countries, and particularly Peru and its legislation to implement international humanitarian law. In this regard, he believed that the rapporteur could suggest that implementation necessarily comprises the following five broad aspects:

1. Definition of international crimes, a complex element in view of the contradictions between the instruments under discussion;
2. Use of conventional or unconventional weapons, and of course weapons prohibited by international law;
3. Protection of emblems, both of the Red Cross and national emblems;
4. Domestic judicial remedies: the obligation of states should not be understood as confined to transferring the crimes defined in conventions to their domestic legislation, but states are also required to create domestic procedural mechanisms to prosecute and ensure the application and enforcement of laws against those crimes in their territory;
5. Establishment of dissemination mechanisms that go beyond transferring international norms to domestic laws; but, once legislation is approved, states have the obligation to disseminate it among the legal operators of the State.

Dr. Novak added that when a national legislature makes international humanitarian law part of the domestic body of law, it should serve three basic purposes: prevention, i.e., the legislation should play a deterrent role; unconditionality, or avoiding the bad practice adopted by some States to make compliance subject to reciprocity; and third, effectiveness, i.e., domestic procedural mechanisms must be put in place to apply and enforce the rules and principles of international humanitarian law.

He added that the transfer of international humanitarian law into the national body of law should also take into account the interpretation criteria that govern this branch of law. In the first place, there is the criterion of *pro homine,* according to which if any doubts should arise regarding the scope of that international law when incorporating it into domestic law, the principle should be to seek the greatest protection for human beings. Secondly, account should be taken of the criterion of dynamic or evolutive interpretation, i.e., the norm should be applied in observance of the current scope and not the interpretation at the time it was legislated. Finally, there is the criterion of negative interpretation, which states that in the case of international humanitarian law, the argument that what is not prohibited is permitted cannot be used.

Finally, Dr. Novak suggested that the Inter-American Juridical Committee take into account the approaches proposed for development of this topic.

Dr. João Baena Soares stressed the importance not only of using a questionnaire on this point, but also of providing as complete information as possible, that will be conducive to reflection, and include more information so that states can take the initiative.

Dr. Ana Elizabeth Villalta seconded the views of the previous speakers, and emphasized that the letter to be sent by the Inter-American Juridical Committee should not only be broad and reflective, but it should also be addressed to the official in charge of implementing treaties, since she had never received the Committee's questionnaire as Director of the Legal Department of El Salvador.

Dr. David Stewart inquired into the objective of the General Assembly's mandate, whether it was to find out how states have implemented the Geneva Conventions, or to learn of the status of national legislation, or to promote implementation of the conventions, all functions that fall under the purview of the Red Cross in his opinion. He suggested that the Juridical Committee should become versed in the national legislation of Member States before preparing model legislation.

Dr. Dante Negro clarified that the idea is that the Inter-American Juridical Committee propose model legislation on various aspects of international humanitarian law. The General Assembly's mandate was directed both to the Committee and to Member States, so that they could set the priorities, but no positive reaction has so far been received.

Dr. Jean-Paul Hubert emphasized the educational aspects of the report presented by the rapporteur, primarily for those who do not have complete information on the subjects discussed in the Permanent

Council. He recalled that in other areas, the Committee has been instructed to draw up model laws, but that after discussing them, it had reached the conclusion instead to present guidelines or principles, which were well received. This is an alternative that could be used in handling this material.

Dr. Jorge Palacios concluded that the work of the Inter-American Juridical Committee is to help states to legislate. In the case in point, there is the ICRC's suggestion on war crimes in the document entitled "Repression of War Crimes in National Criminal Law in the Member States," which proposes 22 elements for each crime. As for the Statute, the elements were drafted by the states themselves, and they are required to be adopted in their domestic legislation pursuant to Article 9 of the Statute.

Finally, the Inter-American Juridical Committee decided to set up a working group to draft a new basic reference document.

At the thirty-ninth regular session of the OAS General Assembly (San Pedro Sula, June 2009), in resolutions AG/RES. 2515 (XXIX-O/09) and AG/RES. 2507(XXIX-O/09), it requested the Inter-American Juridical Committee to continue preparing model laws in support of efforts undertaken by Member States in implementing obligations derived from treaties in international humanitarian law, based on priorities defined in consultation with Member States and the International Committee of the Red Cross. To this end, it urged Member States to send to the Committee, by the end of November 2009 at the latest, a list containing these priorities, so that the Committee can fulfill this mandate and report on the advances made to the General Assembly at its 40th session.

During the 75th regular session of the Inter-American Juridical Committee (Rio de Janeiro, Brazil, August 2009), the rapporteur, Dr. Jorge Palacios, reminded the members of his two reports on this topic, particularly the reference made to internal armed conflicts and war crimes (CJI/doc.304/08 and CJI/doc.322/09). In summary, he said that internal armed conflicts were not covered by the concept of international humanitarian law, but by that of human rights. With reference to war crimes, he reminded the meeting that at the March 2009 session he had submitted a detailed explanation in document CJI/doc.322/09, "Implementation of international humanitarian law in the OAS member states."

On that occasion he made reference to document CJI/doc.328/09, "War crimes in international humanitarian law," in which he offered a number of clarifications regarding war crimes under international humanitarian law and also explained the conflict that existed between the four Geneva Conventions and their additional protocols and the terms of the Statute of the International Criminal Court.

He reminded the members that the International Committee of the Red Cross had said that "it is vital that the states parties to the Rome Statute adapt their criminal law to the Rome Statute so that they can punish, domestically, crimes over which the International Criminal Court has jurisdiction when such a case arises." The ICRC also recommended that in incorporating war crimes into their domestic laws, states should ensure that the definitions of those crimes contain all the elements whereby they are defined in international criminal law. He emphasized the ICRC's recommendation to avoid "adding conditions which would have the effect of excluding actions defined as war crimes under those treaties" (the Geneva Conventions and Additional Protocol I), and he went on to say that "restricting the scope of the criminal definitions" was inadmissible, since the ICRC fears that the crimes set out in the Geneva could go unpunished if the Rome legislation, adopted at a later date, were to modify the provisions applicable to Geneva.

The Rapporteur added that the Rome Statute must not modify the legislation applicable to the Geneva Conventions; instead, states must incorporate both sets of legislation into their domestic law, as alternative provisions, so that if a state party does not wish to or cannot enforce the Rome legislation, the International Criminal Court can at least still prosecute the serious crimes provided for in the Rome Statute, which would be the only possibility for the Court's intervention.

As he saw it, the new resolution adopted by the OAS General Assembly contains a specific mandate that must be implemented in order to report on progress to the 40th regular session of the General Assembly.

Dr. Mauricio Herdocia reminded the members that this is a complex issue, in that it entails identifying similarities and differences between two sets of legislation. He said that the Committee had previously noted that in this case – between the Geneva Conventions and the Rome Treaty – the standard provisions governing the succession of treaties could not be applied. The right technique, as the Committee's opined, is to adopt a harmonious and systematic interpretation that would allow the criminal definitions to complement each other. In this regard, he spoke of the work undertaken by the Red Cross, for example in Nicaragua, where the new Criminal Code already includes both sets of provisions. He thus agreed with the rapporteur that the ICRC had made significant progress as regards model laws. At the same time, in connection with the International Criminal Court, the practical guide of principles follows the notion that in incorporating them into their domestic law, states must take into account both the Rome Statute and the Geneva Conventions.

Dr. Herdocia believed that the most recent General Assembly resolution gives the Juridical Committee a new mandate in connection with the International Criminal Court, by asking it to draft model legislation covering the crimes defined in the Rome Statute, including war crimes, a topic on which Dr. Palacios has already produced excellent work. He therefore proposed working in conjunction with Dr. Palacios, taking advantage of the fact that he was almost finished with the entry into force of the Rome Statute complementary legislation and the proposals made by the ICRC, to present model legislation on war crimes at the next session.

Dr. Ana Elizabeth Villalta asked about internal armed conflicts not being covered by international humanitarian law, but noting that the conflicts in El Salvador that lasted more than a decade were determined to be internal but were protected by international humanitarian law, according to the Geneva Protocols.

Dr. Palacios clarified that that was the position of the Committee of the Red Cross: not to apply international humanitarian law to internal armed conflicts that do not entail great violence, such as disturbances and riots that are unorganized and not international in scope. IHL does not apply to them, but they are protected by human rights.

He also spoke of a note from the Mexican Foreign Ministry forwarded to him by the Secretariat for Legal Affairs, asking the Committee to present draft laws on the protection of cultural assets at times of armed conflict, and on the use and protection of the Red Cross symbol. In the final report of the CAJP's special meeting, the representative of Mexico stated that his country had recently enacted specific legislation to protect the Red Cross symbol, and that it was finalizing legislation to protect cultural assets at times of armed conflict. Clearly confusion exists about this and the matter should be clarified.

Dr. João Clemente Baena Soares remarked on the question of internal violence and other internal conflicts, in terms of the escalation of violence until it becomes a civil war; that topic represents an evolution of the Committee's agenda and, consequently, there would be a new exercise dealing with the adoption of model legislation for war crimes, and for that reason he expressed his agreement with Dr Herdocia's proposal.

Dr. Dante Negro reminded the meeting that the General Assembly had set the end of November 2009 as the deadline for the member states to make recommendations on the matters related to international humanitarian law that the Juridical Committee should study. He noted that Mexico was the only state to have submitted a concrete request regarding the protection of cultural assets and of the Red Cross symbol, and that enabled the Committee to make progress with structuring its work.

The documents referred to are included below:

CJI/doc.322/09

IMPLEMENTATION OF INTERNATIONAL HUMANITARIAN LAW IN THE OAS MEMBER STATES

(presented by Dr. Jorge Palacios Treviño)

INTRODUCTION

The General Assembly of the Organization of American States (OAS) adopted Resolution AG/RES. 2293 (XXXVII-O/07), which calls on the Inter-American Juridical Committee (CJI) to draft and propose model laws to support the efforts undertaken to implement treaty obligations derived from international humanitarian law (IHL), based on priority topics identified through consultation with the OAS Member States and the International Committee of the Red Cross (ICRC). The aforementioned Resolution was adopted inasmuch as some States in the Americas have found it difficult to include in their legislation the elements that constitute a particular codified offense, since those elements are not always the same in the various IHL treaties.

IHL is comprised primarily of customary international rules and the following international treaties: the Geneva Convention for the Amelioration of the condition of the wounded and sick in armed forces in the field; the Geneva Convention for the amelioration of the condition of the wounded, sick and shipwrecked members of armed forces at sea; the Geneva Convention relative to the treatment of prisoners of war; the Geneva Convention relative to the protection of civilian persons in time of war, all dated August 12, 1949; Additional Protocol I relating to the protection of victims of international armed conflicts; Additional Protocol II relating to the protection of victims of non-international armed conflicts, both dated June 8, 1977; the Rome Statute, dated July 17, 1998, which established the International Criminal Court (ICC) to ensure punishment of the most serious international offenses, given that, as stated in its Preamble, the Court has "jurisdiction over the most serious crimes of concern to the international community as a whole," and for which the ICC is afforded jurisdiction over persons complementary to national criminal jurisdictions; and the Elements of Crimes in the Rome Statute, approved by a majority of two thirds of the members of the Assembly of the States Parties to the Statute, as stipulated in Article 9 therein. IHL is also comprised of the conventions that protect cultural property. These include, among others, the 1954 Hague Convention for the Protection of Cultural Property in the Event of War and its 1954 and 1999 protocols.

The primary objective of IHL is to protect civilians during times of armed conflict; that is, persons who do not take part or have ceased to take part in the hostilities. For that purpose, it contains provisions that demand humane treatment for wounded combatants and prisoners of war. Another objective of IHL is to mitigate the more atrocious manifestations of armed conflict and, to that end, it proposes to limit the methods and means of waging war and to regulate the use and possession of certain weapons, inasmuch as the Parties in an armed conflict do not have an unlimited right to select the methods and means of waging war. Hence, Article 35, Paragraph 2 of Additional Protocol I prohibits. "...the use of arms, bullets, materials and methods of warfare of the kind that might cause superfluous harm or unnecessary suffering." In that respect, Article 8.2, b) of the Rome Statute contains the following prohibitions, among others: the use of poison or poisonous weapons, asphyxiating, toxic or similar gases or all analogous liquids, materials or devices, bullets that expand or flatten easily in the human body, such as bullets with a hard envelope that does not entirely cover the core or is pierced with incisions.

On the other hand, IHL ascribes individual criminal liability and, since the end of the First World War, the Treaty of Versailles provided for the establishment of *ad hoc* tribunals to prosecute persons accused of having committed acts that violate the laws and uses of warfare, although none were defined and, in contrast, with the consent of the Allies, trials described as symbolic were carried out to punish certain persons accused of those crimes. After the Second World War, tribunals were set up to prosecute individuals for crimes against peace, war crimes and crimes against humanity, and trials were carried out in Germany and other countries, by means of military tribunals such as the ones at Nuremberg and in the Far East. IHL also ascribes criminal liability to persons who exercise authority over subordinates who might have committed a war crime. Additional Protocol I of the Geneva Conventions refers to this individual criminal liability, as does the Rome Statute, which established the ICC. The Criminal Court created under the Rome Statute is complementary to national

criminal jurisdictions over war crimes (The ICC also has complementary jurisdiction over crimes against humanity, but they are not addressed in this paper).

Another objective of IHL is to protect cultural property.

IHL applies to both international and non-international armed conflicts. International armed conflicts are "cases of declared war or of any other armed conflict that might arise between two or more of the High Contracting Parties (to the Geneva Conventions), even if the state of war is not recognized by one of them" (Article 2 common to the four Geneva Conventions). The following also are considered to be international armed conflicts: "cases of total or partial occupation of the territory of one of the High Contracting Parties, even if said occupation meets with no armed resistance" (Article 2 common to the four Geneva Conventions); "armed conflicts in which a people fight against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination, as enshrined in the United Nations Charter and in the Declaration on the Principles of International Law concerning Friendly Relations and Co-operation among States, in accordance with the Charter of the United Nations" (Article 1.4 of Additional Protocol I). Non-international armed conflicts are those that "take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or organized armed groups which, "under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations." (Article 1, Section 1 of Additional Protocol II).

The American States afford great importance to IHL, as is made clear by the fact that the 35 States in the American region are Parties to the four Geneva Conventions of 1949; 34 of them are Parties to Additional Protocol I, 33 of them are Parties to Additional Protocol II; 23 of these States also are Parties to the Rome Statute, and it is known that other States in the region could become Parties to the Statute in the near future.

In response to the consultation undertaken with the States in the region, pursuant to the mandate from the OAS General Assembly, only two American States replied. One of those States mentioned two topics as being priorities: the implementation of rules applicable to internal armed conflicts and the use and possession of firearms within the country, as well as the establishment of general parameters at the international level. The other American State cited the typification of war crimes as a priority topic.

The ICRC, which is an institution made up of private persons and authorized by the 1949 Geneva Conventions to carry out activities of a humanitarian nature, presented the document "Repression of War Crimes in the National Criminal Legislation of the American States," dated March 2008, referred to hereinafter as "Repression...".

For its part, the OAS Office of International Law presented a document entitled "Implementation of International Humanitarian Law in the OAS Member States: Preparation and Presentation of Model Laws, July 2007," which contains useful information on the topic.

INTERNAL ARMED CONFLICTS

On the subject of internal armed conflicts, it begins by warning that IHL does not apply to situations of internal disturbances or tensions or to other acts of a similar nature, inasmuch as IHL now in force does not apply to situations that do not reach the intensity of an armed conflict, as described in Article 1, Section 2 of Additional Protocol II to the Geneva Conventions concerning protection for the victims of non-international armed conflicts and Article 8, Paragraph 2, Sections d) and f) of the Rome Statute, which states: "The present Protocol does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature, which are not armed conflicts." Consequently, the Government of each State is considered responsible for re-establishing law and order through any means permitted by International Law.

International law on human rights applies to the situations described above, which are entirely internal in nature. The ICRC Regional Delegate for Argentina, Brazil, Chile, Paraguay and Uruguay indicated as much at the special session of the Committee on Juridical and Political Affairs concerning current topics in IHL, held on January 25, 2008. In support of what is stated herein, the relevant paragraphs of that address are the following, as quoted below:

> "… these situations of "internal violence", which cannot be classified as 'armed conflict,' are below the threshold of IHL application. The standards of International Law on human rights that regulate the use of force by agents of the State apply to these situations. These standards of human rights could be classified as a variety of "humanitarian

principles" since, in terms of the defense of life and human dignity, they are found in the law on human rights and in IHL.

(...)

ICRC intervention in situations of internal violence is motivated by three factors:

1. the extent of the humanitarian consequences;

2. the added value of ICRC action as an institution, based on its experience, on its capacity, as well as its *modus operandi* as a neutral, impartial and independent organization; and

3. acceptance by the authorities

(...)

… in a situation of 'armed conflict,' be it international or non-international, the humanitarian action of the ICRC is backed by the mandate given to our institution by the international community through the Geneva Conventions and their Additional Protocols, which are the fundamental basis of IHL. In a situation of 'internal violence' where the provisions of IHL do not apply as such, the 'right of humanitarian initiative' is made clear by the Statutes of the Red Cross and Red Crescent Movement. Although the mandate entrusted to the ICRC to perform a humanitarian role in this context is less legalist than the mandate granted in the Geneva Conventions, it is important to point out that the Statutes of the Movement also express the will of the States. Those Statutes have been adopted within the framework of an international conference that brings together, every four years, the members of the Movement and the contracting States of the Geneva Conventions, and that guides our humanitarian action (that of the Red Cross).

Once the gravity derived from a situation of 'internal violence' has been identified and an agreement has been reached with the pertinent authorities to carry out humanitarian action, the ICRC uses mutatis mutandis the same mode of action that is applied in the context of an armed conflict.

In Latin America, the ICRC's humanitarian response to 'internal violence' follows two parallel patterns: one could be termed 'preventive,' the other, 'operative'.

The activities performed in the field of prevention include cooperation programs with law enforcement and are intended to revise and adapt all operational and educational guidelines on every issue concerning the rules on human rights applicable to the use of force. Another preventive field involves making high school students conscious of topics and situations that can prompt reflection on violence and its consequences.

In the operational field, examples of activities include the following:

- bilateral dialogue with the authorities on the consequences that can be derived from an inadequate or disproportionate use of force, the idea being to monitor detention conditions and treatment;

(…)

- support for prison authorities to improve the way detention facilities are managed; and/or
- the execution of medical-social programs conducted by the national Red Cross organizations in areas affected by situations of violence."[2]

With respect to the implementation of international standards on firearms, the following treaties exist:

- The Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, adopted in Geneva on October 10, 1980 and its Protocols;

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2. ORGANIZATION OF AMERICAN STATES. Permanent Council. Committee on Juridical and Political Affairs. **Final Report**: Special meeting of the Committee on Juridical and Political Affairs on current topics in international humanitarian law. Washington, D.C., January 25, 2008. CP/CAJP-2649/08, p. 46-47.

- The Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-traps and Other Artifacts, as amended on March 3, 1996, (Protocol II, as amended on May 3, 1996), attached to the 1980 Convention, adopted in Geneva on May 2, 1996;
- Additional Protocol to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects (Protocol IV), which prohibits laser weapons (Blinders), adopted in Vienna on October 13, 1995;
- Amendment to Article 1 of the aforementioned Convention, dated December 21, 2001 and adopted in Geneva on December 21, 2001;
- Convention on Prohibition of the Use, Stockpiling, Production and Transfer of Anti-personnel Mines and on their Destruction, adopted in Oslo, Norway on September 18, 1997;
- Convention on Cluster Bombs, which prohibits the manufacture, stockpiling, sale and use of these weapons, signed on December 3, 2008 in Oslo, Norway.

WAR CRIMES

War crimes are the only international crimes that have been cited as a priority topic. Consequently, there is no reference herein to other crimes of concern to the international community, such as crimes against humanity.

With respect to war crimes, it is considered relevant to begin by specifying that war crimes, in terms of IHL, are only those committed in the context of international armed conflicts. This concept includes conflicts that, under certain conditions and with specific purposes, take place within the territory of a State and are referred to in Article 2 common to the four Geneva Conventions of 1949, as well as Article 1, Section 4 of Additional Protocol I of 1977. The introduction to this study alludes to these conflicts.

IHL defines war crimes as "grave breaches of the laws and customs of war"; for their part, the 1949 Geneva Conventions stipulate that grave breaches are those committed "against persons or property protected by the provisions of the pertinent Geneva Convention."

In addition to customary IHL, Article 2 common to the four Geneva Conventions applies to war crimes, as do articles 1, 130 and 147, respectively, of said Conventions, Additional Protocol I of 1977, particularly articles 1, 11 and 85, and the 1998 Rome Statute, which established the ICC and the Elements of War Crimes that assist the ICC in the interpretation and application of the provisions on war crimes contained in said Statute.

In response to the consultation, the ICRC affirmed that "States Parties to the Rome Statute must adjust their criminal law to that treaty, so as to punish internally those crimes that fall within the Court's jurisdiction, when a case is presented"; ("Repression …" p. 4). It also recommends that, when including war crimes in national legislation, the States must make sure the definitions of those crimes have all the same constituent elements provided by International Law. However, at the same time, it advises the States not to "add conditions that would have the effect of excluding conduct classified as war crimes pursuant to said treaties" (the 1949 Geneva Conventions and their Additional Protocol I) ("Repression…", p. 9), and indicates that national criminal legislation must make it possible for all acts that correspond to war crimes, as defined in the Geneva Conventions and in Additional Protocol I, to be punished, without it being admissible to "restrict the scope of the concepts that characterize the nature of criminal behavior; in other words, conditions cannot be added that would effectively exclude the qualifying conditions for war crimes, according to said treaties." ("Repression...." p. 9).

In this respect, the ICRC points out the following differences that exist, among others, between 1949 Geneva Conventions, particularly Additional Protocol I of 1977, and the Rome Statute. The Rome Statue codifies a series of war crimes that do not always correspond to a grave infraction in the sense of the Geneva legislation. Some of the crimes enumerated in Additional Protocol I do not appear in the Rome Statute, and that Statute mentions crimes that resemble certain grave infractions of Protocol I, but with elements that are more restrictive. In other words, the Rome Statute demands higher qualifying conditions to constitute a crime and, therefore, does not punish all the criminal conduct that Protocol I obliges States to punish. Consequently, the ICRC recommends that States Parties to the Rome Statute adjust their criminal law to this treaty, but adds: " Adaptation of criminal

law to the Rome Statute cannot undermine the obligations established in the Geneva Conventions and their Additional Protocol I; it is rather a question of harmonizing the regime established in these last two treaties with that stipulated by the Statute... the rules of the Statute can strengthen but not debilitate the edifice thus erected, with regard to the definition of war crimes, as well as the rules on criminal liabilities and the exercise of criminal action" ("Repression…" p. 4), since it considers that the American States (23 are Parties to the Statute) have assumed a commitment under international law to punish war crimes pursuant to the system established by the Geneva Conventions and Additional Protocol I. The ICRC also notes that, although the articles in the Rome Statute "do not explicitly oblige the States to punish crimes that fall within the competence of the ICC...it assumes as much, since the complementary mechanism it provides for depends on the possibility of the States punishing those crimes at the national level " ("Repression…" p. 4).

On this point, it is noted that experience shows, in many cases, that the judicial systems of a State do not exist after an armed conflict or are in no condition to judge these grave crimes. Hence, the ICC has been created to do so, since failing to punish them affects not only the State that has jurisdiction, but also the international community, inasmuch as they constitute "a threat to the peace, security and the well-being of humanity," as stated in the Preamble to the Rome Statute. Article 1 of the Statute also indicates "the ICC shall be complementary to national criminal jurisdictions" and Article 5 explicitly confirms the ICC's complementary jurisdiction over "the most serious crimes of concern to the international community as a whole," including war crimes, if a State "is unwilling to prosecute or is genuinely unable to do so" as allowed, in the form of exceptions for this and other cases, by Section 1, Article 17 of the Rome Statute:

With regard to paragraph 10 of the Preamble and Article 1, the Court shall determine that a case is inadmissible where:

a) The matter is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or genuinely unable to carry out the investigation or prosecution;

b) The matter has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness of the State to prosecute or a genuine inability to do so;

c) The person concerned has been tried already for conduct which is the subject of the complaint, and a trial by the Court is not permitted under Article 20, Paragraph 3 (this article refers to the concept of "*res judicata*" and its exceptions);

d) The matter is not of sufficient gravity to justify further action by the Court.

The foregoing confirms that the ICC's jurisdiction over the crimes accounted for in the Rome Statute is complementary and supplementary to the Geneva legislation. In addition to Article 17, other articles of the Statute, such as articles 4, 13 and 14, confirm the authority of the ICC to review the actions of the national courts of a State Party concerning a crime accounted for in the Geneva legislation, as well as in the Rome Statute, or only in the latter, and to take over the case, if appropriate, in accordance with the Statute and the Elements of Crimes, inasmuch as the final paragraph of Article 1 in the Rome Statute stipulates that "the jurisdiction and functioning of the Court shall be governed by the provisions of this Statute," and the Rome Statute determines, in Article 21, that the ICC, when judging a crime, shall first apply the Rome Statute, the Elements of Crimes and the Rules of Procedure and Evidence, since the Elements of Crimes, pursuant to the provisions set forth in Section 1, Article 9 of the Rome Statute, "shall assist the Court in the interpretation and application of articles 6, 7 and 8," which refer respectively to the crime of genocide, crimes against humanity and war crimes.

"Therefore, the effectiveness of the Court rests on the successful insertion of the Rome Statute into internal law as concerns the management of national procedures, as well as cooperation with the Court" (BROOMHALL, Bruce. **Corte Penal Internacional: una guía para su implementación nacional.** Asociación Internacional de Derecho Penal, 1999**,** p. 118). As one can see, the quote does not mention the Elements of War Crimes contained in the Rome Statute, inasmuch as they were drawn up and approved by the States Parties to the Statute in August 2002.

Because the international treaties on the subject; namely, the Geneva Conventions, Additional Protocol I and the Rome Statute, do not always contain the same elements to define the same codified offense, the ICRC proposes 22 articles that contain the juridical suppositions that define the codified

offense. In this respect, the ICRC explains that "the Geneva Conventions of 1949 established a system whose strict application will make it impossible for war criminals to avoid being tried before the courts of their own country or in any other State. Hence, the Geneva Conventions establish universal competence to punish such crimes, which is strengthened by the fact that 194 States are Parties to those Conventions and have agreed to apply their provisions. In effect, articles 49, 50, 129 and 146 of the four Geneva Conventions, respectively, accept no limit on the nationality of the perpetrators or the victims, nor with respect to the place where the crimes were committed. Consequently, they differ from jurisdiction based on the territory, the active subject (the suspect's nationality) or the passive subject (the victim's nationality), or the national interest of the State. In other words, no link to the forum of the crime is required, if not for the interest of all that war crimes are punished" ("Repression…," p. 17). Or, what is the same, universal jurisdiction allows a State to prosecute any perpetrator of a war crime, regardless of his/her nationality, the victim's nationality or the place where the crime was committed.

At this point, it should be noted that the Secretary General of the United Nations recommended the Security Council "urge the member States to adopt national laws to prosecute persons responsible for genocide, crimes against humanity and war crimes. The member States must proceed to prosecute persons who are under their authority, or in their territory, for grave ,infractions of international humanitarian law, by virtue of the principle of universal jurisdiction, and submit a respective report to the Security Council (Security Council, S/1999/957, 8 September 1999, Report by the Secretary General to the Security Council on the Protection of Civilians in Armed Conflicts, Paragraph 6" ("Repression…", p. 23). The Inter-American Commission on Human Rights, for its part, recommended to the OAS Member States, on April 16, 1999, that they adopt the necessary measures to invoke and exercise universal jurisdiction over individuals for crimes that fall within the jurisdiction of the ICC: genocide, crimes against humanity and war crimes.

The ICRC is correct when is says the Geneva legislation establishes a universal jurisdiction to punish war crimes and its application makes it impossible for criminals to avoid being prosecuted in their own State. However, it also is important to remember, as noted earlier, that experience shows many serious war crimes have gone unpunished because of the difficulty the States where these crimes are committed have in punishing them. This is precisely why the ICC was created.

In accordance with what has been said up to now, the following is the situation with respect to punishment for war crimes:

If a State is Party to the Geneva Conventions of 1949 and to Additional Protocol I, but is not Party to the Rome Statute, and a war crime accounted for in one of these Conventions or in Protocol I is committed within its jurisdiction, and the State in question does not punish that crime "because it is unwilling or genuinely unable to do so," that infraction shall go unpunished, even though it also is accounted for in the Rome Statute, unless another State wishes to punish it based on the universal jurisdiction all States have with respect to crimes of this type. In any case, the ICRC is interested in the States that are Parties to the Geneva legislation, and may or may not be Parties to the Rome Statute, maintaining said legislation intact, since that implies "making sure that criminal legislation, as a minimum and mandatory requirement, punishes the war crimes defined by the Geneva Conventions and its Additional Protocol I" (the ICRC document "Repression…", p. 4).

In contrast, if a war crime is committed in a State that is Party to the Geneva treaties and to the Rome Statute, or only to the latter, that State has the jurisdiction to judge the crime and to punish it, if such be the case. Similarly, any other State that is Party to those treaties is authorized to that effect, based on universal jurisdiction, but if none of those States punishes the crime, or it is not punished correctly, the case may be taken over by the ICC, provided the crime falls within the provisions set forth in Article 17 of the Rome Statute.

As to the situation described in the previous paragraph, the ICRC notes that crimes accounted for in the Geneva legislation and whose legal suppositions do not reach the threshold of the serious crimes that fall within the ICC's complementary jurisdiction will go unpunished if the Rome Statute amends or annuls the Geneva legislation (Repression…, p. 4). As a matter of fact, the general rule on treaty law relative to "the application of successive treaties on the same subject" stipulates that "the earlier treaty applies only to the extent that its provisions are compatible with those of the subsequent treaty", as ruled in Section 3, Article 30 of the 1969 Vienna Convention on the Law of Treaties.

It is considered logical to suppose that the aforementioned principle could be applied by virtue of the fact that the Geneva Conventions, Additional Protocol I and the Rome Statute are successive treaties on the same subject. However, in the case in question, there is a situation that can qualify as unprecedented: a war crime, if serious, falls within the jurisdiction of two forums; one is the national court established by each Party State to judge the crimes that fall within its jurisdiction; the other is the ICC, which was created in the Rome Statute, by the collective will of the States. Accordingly, the consideration is that the rule whereby "the last law repeals the first" does not apply in this case, when taking into account the aim of the international community of States, which is to create a special instance or forum to punish not all crimes, but the most serious ones.

The reasoning outlined below can justify the creation of the ICC. The States Parties to the Geneva legislation have made a commitment to judge war crimes. However, some war crimes are so serious that the States will find it difficult, in many cases, to punish them with their own resources and, for that reason, a special tribunal or a complementary or supplementary instance; that is, the ICC, will be established to punish those crimes in the event the State with jurisdiction cannot or is unwilling to do so. However, the ICC will not take over all the war crimes contained in the Geneva treaties, only the serious war crimes of concern to the international community," particularly when they are committed as part of a plan or policy, or as part of the commission of war crimes on a large scale," in accordance with the provisions of Article 8 of the Rome Statute, which - as stated in the third paragraph of the Preamble to the Rome Statute - "constitute a threat to the peace, security and well-being of the world." Accordingly, the international community is entitled and duty bound to concern itself with those crimes and to punish them, if such be the case, so as to prevent them from going unpunished, regardless of whether the States continue to have priority jurisdiction over judgment of all war crimes, even the most serious ones, pursuant to what is provided for in the Geneva legislation and the Rome Statute, and as inferred as well by the fact that, when the ICC was established, there was no mention that it would replace the States in their duty to punish the crimes accounted for in the Geneva Conventions or in the Rome Statute, since the ICC only takes on a serious crime if the State with jurisdiction "is unwilling or unable to investigate or prosecute the case," as was noted earlier.

The creation of the ICC as an instance complementary to the jurisdiction exercised by the States Parties to the Rome Statute also would explain why it is only in the Preamble and not in the articles that the Statute obliges the States Parties to exercise their penal jurisdiction against those responsible for international crimes, since, on the one hand, the State with jurisdiction might not be in a position to exercise that jurisdiction and, on the other, the ICC can, in any case, always take on a serious war crime if a State that is Party to the Statute fails to judge the case or does so incorrectly.

The elements the ICRC suggests for war crimes in the 22 proposed articles included in the aforementioned document "Repression of War Crimes..." represent an attempt to harmonize the Geneva regime with the Rome regime; consequently, they do not include all the elements of the war crimes defined in compliance with Article 9 of the Rome Statute, which "shall assist the Court in the interpretation and application" of war crimes, in accordance with the provisions of Article 9 of the Rome Statute.

In response to the foregoing and considering the provisions of the 1949 Conventions, Additional Protocol I and the Rome Statute, it can be concluded that the States Parties to these international treaties might include in their national legislation, as alternatives, on the one hand, the elements of the crimes accounted for in the Geneva legislation, using the 22 articles that are proposed by the ICRC and included in the aforementioned document "Repression of War Crimes..." and, on the other, the Elements of War Crimes, which are referred to in Article 9 of the Rome Statutes and were approved by the members of the assembly of the States Parties to that Statute. In other words, both the Geneva legislation and the Rome Statute are simultaneously in force in a State that is a Party to those international treaties. Consequently, that State is obliged to apply one legislation or the other, depending on the juridical suppositions that appear.

As to including the IHL treaties in national criminal law, the consideration is that it must be done, on the one hand, pursuant to the procedure established for that purpose in the internal legislation of a State, whether it involves converting the treaties into law or adding them directly to their legislation, and, on the other hand, in accordance with the pertinent rules of International Law included in the 1969 Vienna Convention on the Law of Treaties for the States Parties to that agreement.

Due to the difficulties some States have encountered when attempting in include the IHL treaties in their legislation, it is important to mention the simple and quick procedure - although for that

very reason imperfect - some States have followed to make the crimes specified in treaties a part of their legislation. It consists of adding an article to their Penal Code with a text that resembles the following: "If a crime is committed that is not provided for in this Code, but is provided for in an international treaty the State is obliged to observe, the treaty shall apply, taking into consideration the pertinent provisions of the internal penal code."

For its part, the ICRC, in the document "Repression of War Crimes in the Criminal Legislation of the American States" refers to this procedure in the following terms: "It also is conceivable to proceed via a global imputation of war crimes to national law through a remission of the treaties and customary international law."

CJI/doc.328/09

WAR CRIMES IN INTERNATIONAL HUMANITARIAN LAW

(presented by Dr. Jorge Palacios Treviño)

International Humanitarian Law (IHL) is mainly composed of international consuetudinary law and the following international treaties:

I. The Geneva Convention for the amelioration of the condition of the wounded and sick in armed forces in the field;

II. The Geneva Convention for the amelioration of the condition of the wounded, sick and shipwrecked members of armed forces at sea;

III. The Geneva Convention relative to the treatment of prisoners of war;

IV. The Geneva Convention relative to the protection of civilian persons in time of war, all of them dated August 12, 1949;

V. The Additional Protocol I to the Geneva Conventions, relating to the protection of victims of international armed conflicts;

VI. The Additional Protocol II to such Conventions relating to the protection of victims of non-international armed conflicts, both of June 8, 1977;

VII. The Rome Statute, of July 17, 1998, which established the International Criminal Court (ICC) that "shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern" and is therefore empowered to exercise complementary jurisdiction to national criminal jurisdictions over persons and, finally, the Hague Convention for the Protection of Cultural Property in the event of Armed Conflict of 1954, and the 1954 and 1999 Protocols.[3]

The main purpose of IHL is to protect civilians in the event of armed conflict, that is to say, provide protection to individuals not involved in hostilities, as well as those who are no longer involved, for example, wounded combatants and war prisoners, for whom the IHL claims humanitarian treatment. Similarly, the purpose of the IHL is to ameliorate the most atrocious manifestations of armed conflict and to that end it proposes to limit the methods and means of making war as well as to regulate the possession and use of certain arms, based on the principle that Parties to an armed conflict do not have unlimited rights regarding the choice of the methods and means of making war, which is why Item 2 of Article 35 of the aforementioned Additional Protocol I prohibits "…..to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering"; on the other hand, item b) of Article 8.2 of the Rome Statute contains the following prohibitions, among others: employing poison or poisoned weapons, employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices; bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or has incisions. Another purpose of IHL is to protect cultural property in the event of armed conflict.

3. Besides having competence as regards war crimes, the ICC also attends to crimes of lese-humanity, these being crimes committed both during periods of peace and in wartime and by State and non-State agents. No reference to such crimes is made herein.

At present, the IHL considers individuals criminally liable and in this regard they are reminded that also in the Versailles Treaty, adopted at the end of the First World War, the setting up of *ad hoc* tribunals was determined in order to prosecute persons accused of committing acts infringing laws and uses of war, and although on that occasion no tribunal was established, processes were instead initiated to penalize some persons accused of these crimes. Similarly, after the Second World War, courts were established to prosecute individuals for crimes against peace, for war crimes and for crimes of lese-humanity. In this aspect, mention can be made of the judicial prosecutions by military courts in Germany, the Nuremberg trials, and trials conducted in other countries such as the Far-East courts. In addition, the IHL considers criminally liable persons with authority over subordinates who engage in war crimes. To this criminal individual liability refer both the Additional Protocol I to the Geneva Conventions as well as the Rome Statute that established the ICC.

We must make it clear that IHL applies both in the event of international armed conflicts as well as non-international armed conflicts but not to domestic armed conflicts.

International armed conflicts are:

- "Cases of declared war or any other armed conflict which arise between two or more of the High Contracting Parties [to the Geneva Conventions], even if the state of war is not recognized by one of them" (Article 2 of all 4 Geneva Conventions);

- "Cases of partial or total occupation of the territory of a High Contracting Party, even if the occupation meets with no armed resistance" (Article 2 of the 4 Geneva Conventions);

- "Armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning friendly relations and co-operation among States in accordance with the Charter of the United Nations (Article 1.4 of Additional Protocol I).

In conformity with the provisions of item 1 of Article 1 of Additional Protocol II, non-international armed conflicts are those "which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol".

American States grant important relevance to the IHL, as the 35 states of the American region are Parties to the 4 1949 Geneva Conventions; 34 to the Additional Protocol I (the United States of America is not a party), and 33 to the Additional Protocol II (the United States of America and Mexico are not parties); 23 of those States are also parties to the Rome Statute and it has been informed that other States in the regional could become Parties to the Statute in the near future.

As said above, the IHL does not apply to domestic armed conflicts, that is, to situations of internal disturbances and tensions and to other acts of a similar nature but without the intensity of an armed conflict, as established by Item 2 of Article 1 of the Additional Protocol II to the Geneva Conventions relating to the protection of victims of non-international armed conflicts, and also by items d) and f) of paragraph 2 of Article 8 of the Rome Statute, which reads that it "…does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature… It applies to armed conflicts…". Consequently, we must conclude that it is up to the Government of each State to reinstate public order by any means permitted in International Law.

In addition to the situations above, which are eminently of a domestic nature, the International Law of Human Rights applies, and in this regard we may cite the words used on January 25, 2008 during the special session of the OAS Committee on Juridical and Political Affairs, the Regional Delegate of the International Committee of the Red Cross (hereinafter the ICRC) for Argentina, Brazil, Chile, Paraguay and Uruguay:

… situations of 'domestic violence' - which can not be described as 'armed conflict' - are below the threshold of the application of IHL. For these conflicts there is the Human Rights International Law, that regulates the use of force by state agents. We could classify these norms on human rights as a form of "humanitarian principles" because, as regards the defense of life and human dignity, they can be found both in the norms on human rights and in the IHL…

(…)

ICRC intervention is motivated by three factors:

1. the extent of the humanitarian consequences;

2. the added value of work from the institution, based on its experience and ability as well as its "modus operandi" as a neutral, impartial and independent organization; and

3. acceptance by the authorities.

(…)

… in a situation of "armed conflict", whether international or non-international, the humanitarian action of the ICRC has the backing of the mandate granted to our institution by the international community through the Geneva Conventions and their Additional Protocols, as the essential basis of the IHL.

In situations of "internal violence", where the provisions of IHL are not applied, the "Humanitarian Law Initiative" can be inherited from the Statutes of the Movement of the Red Cross and Red Crescent. Although this mandate granted to the ICRC to perform a humanitarian role in this context is less legalistic than that granted to the Geneva Conventions, it should be highlighted that the statutes of the Red Cross Movement also express the wish of the States. These statutes were adopted in the framework of an international conference which every four years gathers together the members of the Movement with the Party States to the Geneva Conventions and which guide our humanitarian (Red Cross) activities.

Once the gravity derived from the situation of "domestic violence" has been determined, and the agreement of the authorities to carry out a humanitarian operation has been achieved, the ICRC "mutatis mutandis" uses the same mode of action that would be applied in a context of armed conflict.

In Latin America the humanitarian response of the ICRC vis-à-vis "internal violence" follows two parallel patterns: one could be denominated "preventive' and the other "operative".

The activities performed in the preventive field comprise cooperation programs with security forces and have the purpose of revising and fine-tuning all the operational or educational guidelines as regards the rules of human rights applicable to the use of force. Another preventive field refers to sensitivization of students at the high-school level on themes and situations that might give rise to thoughts on violence and its consequences.

The operational field, for example, comprises the following activities:

- bilateral dialogue with authorities on the consequences that might stem from the inadequate or disproportionate use of force with the aim of monitoring conditions of arrest and treatment;

(…)

- support to prison authorities to improve the management of imprisonment sites; and/or
- development of medical-social programs conducted by the Red Cross National Societies in areas affected by situations of violence".[4]

Article 1 of the Rome Statute determines that the International Criminal Court shall have the "power to exercise its jurisdiction over persons for the most serious crimes of international concern, … and shall be complementary to national criminal jurisdictions". On the other hand, Article 5 of the Statute specifies that: "The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole … with respect to the following crimes:" crimes of lese-humanity, including genocide, war crimes and the crime of aggression. In the latter case, the understanding is that the ICC shall exercise jurisdiction once a definition is adopted, and Article 8 of the Rome Statute establishes that the ICC shall "have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes".

4. Organización de los Estados Americanos. Consejo Permanente. Comisión de Asuntos Jurídicos y Políticos. **Informe final: sesión especial de la Comisión de Asuntos Jurídicos y Políticos sobre temas de actualidad del Derecho Internacional Humanitario**, Washington, D.C., 25 enero 2008. CP/CAJP-2649/08, p.46-47. Document available only in Spanish. (Non-official translation).

What, then, are war crimes? In accordance with the above, war crimes are serious infringements against the laws and customs of war, committed against persons or property protected by IHL norms in case of international or non-international armed conflict.

Some such crimes are: willful killing (for example, attacking a person knowing that he/she is out of combat due to sickness or injuries); torture, inhuman treatment; biological experiments; willfully causing great suffering; seriously jeopardizing physical integrity or health; attacking civilian populations or civilians; compelling protected persons to serve in the forces of the enemy; depriving a person of his/her right to a fair and regular trial; the taking of hostages; the destruction and seizure of property not justified by military needs and conducted illicitly and arbitrarily on a large scale.[5]

In the aforementioned document the ICRC establishes that it is "essential that States Parties to the Rome Statute harmonize their criminal legislation with the Statute so that they can penalize internally crimes under the jurisdiction of the Court in each case".[6] It further recommends that when States incorporate war crimes to the domestic legislation, they must ensure that the definitions of such crimes contain all the constitutive elements provided by International Law, but at the same time warns that they should try not to "add conditions whose effect would be the exclusion of conduct classified as war crimes according to those treaties"[7] (the 1949 Geneva Treaties and the Additional Protocol I) and expresses that "the domestic criminal legislation should allow the punishment any acts corresponding to war crimes, such as defined in the Geneva Conventions and Additional Protocol I, while it is not admissible to limit the scope of criminal types. For example, no conditions should be added whose effect would be to exclude conducts defined as war crimes according to those treaties".[8]

The reason for the ICRC warning is that some differences exist between the 1949 Geneva Conventions (especially Additional Protocol I of 1977), and the Rome Statute. These differences include the following: the Rome Statute codifies a number of war crimes that do not always correspond to a serious infringement in the sense given by the Geneva legislation; Additional Protocol I lists some crimes that are not mentioned in the Statute, while at the same time mentioning some crimes that are similar to certain serious infringements in Additional Protocol I, but with more restrictive elements, namely, that the Statute demands higher qualifying conditions for a crime to exist and for that reason does not penalize all criminal conduct that States should penalize according to Additional Protocol I; consequently, ICRC´s concern is that States that are Parties to the Geneva Conventions and the Rome Statute might amend their criminal legislation in order to harmonize it to the Statute, which is of a later date, while at the same time fearing non-compliance of the norms included in the Geneva legislation, which is why it advises that "the harmonization of criminal law vis-à-vis the Rome Statute must not undermine the obligations arising from the Geneva Conventions and Protocol I. It is rather a question of harmonizing the regime established in these two instruments with that of the Statute … the rules of the Statute must strengthen rather than weaken the architecture erected to define war crimes and whatever concerns the rules on criminal responsibility and the exercise of criminal prosecution"[9], since it considers that the 23 American States, besides being Parties to the Geneva legislation, also belong to the Rome Statute, and have committed themselves by international law to punish war crimes according to the system established by the Geneva Convention and Protocol I.

In this regard the ICRC explains that "The Geneva Conventions of 1949 established a system whose strict application will make it impossible for war criminals to escape being judged by the courts

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5. These infractions are referred to in article 2 of all 4 Geneva Conventions; articles 50, 51, 130 and 147, respectively, of said Conventions; Additional Protocol I of 1977, especially articles 1, 11 and 85.
6. Presentación del doctor Antón Camen ante la Comisión de Asuntos Jurídicos y Políticos (Washington, D.C., 28 de enero de 2008): CP/CAJP/INF.84/08, 12 febrero 2008. **Presentaciones: sesión de trabajo sobre la Corte Penal Internacional.** p.1. See also COMITÉ INTERNACIONAL DE LA CRUZ ROJA. **Represión de los crímenes de guerra en la legislación penal nacional de los Estados americanos**. Marzo 2008. p.4. Documents available only in Spanish. (Non-official translation).
7. COMITÉ INTERNACIONAL DE LA CRUZ ROJA. **Represión de los crímenes de guerra en la legislación penal nacional de los Estados americanos**. March 2008, p.9, III, 2º §. Document available only in Spanish. (non-official translation).
8. COMITÉ INTERNACIONAL DE LA CRUZ ROJA. **Represión de los crímenes de guerra en la legislación penal nacional de los Estados americanos**. March 2008, p.9, III, 2º §. Document available only in Spanish (non-official translation).
9. See note 4 above, p. 2 and 4, respectively.

of their own country or in any other State"[10], because the Geneva Conventions 1949 establish a universal jurisdiction to punish this type of crime, reinforced by the fact that 194 States are Parties to said Conventions and have committed themselves to applying their provisions. "As a matter of fact, articles 49, 50, 129 and 146 of the 4 Geneva Conventions, respectively, accept no limit as to the nationality of the authors or victims, nor concerning the place where the crimes were committed. So they differ from jurisdiction based on territoriality, active personality (nationality of the suspect) or passive personality (nationality of the victim), or the national interest of the State. In other words, no requirement is required as to any link with the place of the crime, only the interest of all that war crimes be punished".[11] That is to say, universal jurisdiction allows a State to persecute and punish any author of a war crime regardless of their nationality, that of the victim, and the place where the crime was committed.

At this point it bears recalling that the General Secretary of the United Nations recommended the Security Council to "urge Member States to adopt national legislations for the prosecution of individuals responsible for genocide, crimes against humanity and war crimes. Member States should initiate prosecution of persons under their authority or on their territory for grave breaches of international humanitarian law on the basis of the principle of universal jurisdiction and report thereon to the Security Council" (Security Council, S/1999/957, 8 September 1999, Report of the General Secretary to the Security Council on Protection of Civilians in Armed Conflicts, p. 19). In turn, on 16 April 1999 the Inter-American Committee on Human Rights recommended Member States of the OAS to adopt the necessary measures to invoke and exercise universal jurisdiction in the case of individuals who commit crimes that are the competence of the ICC: genocide, crimes of lese-humanity and war crimes.

The ICRC is right in claiming that the Rome Statute should not modify Geneva legislation, especially when it demands higher conditions than the latter to configure a crime, since in these cases the crimes contained in the Geneva legislation would not be punished, and adds that although the Rome Statute "does not explicitly oblige the States to punish crimes of the competence of the Court. But it does presuppose it, since the mechanism of complementarity it foresees depends on the States being able to punish such crimes in the national sphere".[12] Indeed, as has already been said, articles 1 and 5 of the Rome Statute recognize that the Party States to the Geneva Conventions have original jurisdiction on crimes contained in said Conventions on prescribing that the jurisdiction of the ICC is complementary to that of the States, since the competence of the ICC can only be exercised when a State "is unwilling or unable genuinely to carry out the investigation or prosecution" as provided in item 1 of article 17 of the Rome Statute, which states:

Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where:

(a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;

(b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;

(c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3;

(d) The case is not of sufficient gravity to justify further action by the Court.

That is to say, only when the situations are different from those referred to in the transcribed article will the ICC have jurisdiction over the matters listed, and the fact that the article is drafted in the form of exceptions confirms the priority jurisdiction that States have in these matters. The exceptional situations referred to in article 17 are precisely those that led the international community of States to

10. COMITÉ INTERNACIONAL DE LA CRUZ ROJA. **Represión de los crímenes de guerra en la legislación penal nacional de los Estados americanos**. Marzo 2008, p.17, 1º §. Document available only in Spanish (non-official translation).
11. *Idem*, p.17, 2º §.
12. COMITÉ INTERNACIONAL DE LA CRUZ ROJA. **Represión de los crímenes de guerra en la legislación penal nacional de los Estados americanos**. Marzo 2008, p.4, 2º §. Document available only in Spanish (non-official translation).

set up the ICC, since occasionally - and especially as a consequence of armed conflict - the judicial apparatus of a State disappears or is in unable to judge these crimes or else the State authorities lack the necessary elements to try those responsible, and even in other cases because the very authorities who are to try the crimes are responsible for committing them, which is precisely why the ICC was set up, since these grave crimes, if left unpunished, not only affect the State of jurisdiction but also the international community, insofar as they "threaten the peace, security and well-being of the world".[13]

Besides article 17, other articles such as 4, 13 and 14 of the Statute confirm the competence of the ICC to review the action of the courts of a Party State in a crime envisaged in the Geneva legislation and the Rome Statute, and to deal with the case if this proceeds in accordance with the provisions in the Statute and the Elements of Crimes, since article 21 of the Statute orders that the ICC, on judging a crime, should apply "in the first place, this [Rome] Statute, Elements of Crimes…" because these, according to what is established in item 1 of article 9 of the Statute, "shall assist the Court in the interpretation of articles 6, 7 and 8" of this Statute, which refer respectively to the crime of genocide, crimes of lese-humanity and war crimes.

"The effectiveness of the Court thus depends on the successful inclusion of the Rome Statute in internal law both with regard to conducting national procedures and cooperating with the Court". (Bruce Broomhall, in the book Corte Penal Internacional).[14]

According to what has been expressed so far, the situation of war crimes is as follows:

> If a State is Party to the Geneva Conventions of 1949 and Additional Protocol I but is not Party to the Rome Statute, and a war crime envisioned in one of the Conventions or in Additional Protocol I is committed in its jurisdiction, and the State in question fails to punish it because it "is not willing or unable genuinely to carry out the investigation or prosecution", this infraction shall remain unpunished although this is also provided for in the Rome Statute, unless some other State wishes to punish it on the grounds of the universal jurisdiction that all States have for this type of crime, as established in the Geneva Conventions. In any case, the ICRC is concerned that the Party States to the Geneva legislation, whether Parties or not to the Rome Statute, should conserve said legislation intact, since this means "ascertaining that their criminal legislation allows, as the indispensable and obligatory minimum, punishing war crimes as defined by the Geneva Conventions and their Additional Protocol I".[15]

On the other hand, if a war crime is committed in a State that is Party to the Geneva Conventions and to the Rome Statute, this State has jurisdiction to judge and punish this crime. Likewise, any other Party State to these Conventions has such competence based on universal jurisdiction, but if none of these States punishes it or fails to punish it in due measure, the ICC may deal with the crime if it lies within the scope covered by article 17 of the Rome Statute transcribed above.

In respect to the situation presented in the previous paragraph, the ICRC, as stated above, fears that the crimes envisaged in the Geneva legislation whose juridical assumptions fall short of the grave crimes that belong to the complementary jurisdiction of the ICC, remain unpunished if the Rome Statute modifies or annuls the Geneva legislation. Indeed, the general rule of law of treaties relating to "application of successive treaties relating to the same subject-matters" provides that "when a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail", contained in item 3 of article 30 of the Vienna Convention on the Law of Treaties of 1969.

There is some reason for thinking that the above-mentioned principle could apply because both the Geneva Conventions and Additional Protocol I and the Rome Statute are successive treaties on the

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13. Rome Statute of the International Criminal Court, Preamble.
14. BROOMHALL, Bruce. **Corte Penal Internacional: una guía para su implementación nacional.** International Association of Criminal Law, 1999, p. 118. As can be seen, the quotation fails to mention the Elements of War Crimes contained in the Rome Statute, since the Elements were only drawn up and approved by the Party States in the Statute in August 2002).
15. COMITÉ INTERNACIONAL DE LA CRUZ ROJA. **Represión de los crímenes de guerra en la legislación penal nacional de los Estados americanos**. Marzo 2008, p. 4, 3º §. Document available only in Spanish (non-official translation).

same matter; however, in the case under examination there is a situation that could be called unique, namely that if a war crime is serious it belongs to the competence of two law courts: one the national tribunal that each Party State establishes to judge the crimes committed within their jurisdiction, and the other the ICC, created by the collective will of States in the Rome Statute, which considers that the "posterior law derogates anterior law" principle of law does not apply in this case if the proposition of the international community of States is taken into consideration: to create an instance or special forum to punish not all war crimes but certainly the most serious, as provided for in article 8 of the ICC: "For the purpose of this Statute, 'war crimes' means: (a) grave breaches of the Geneva Conventions of 12 August 1949". Some of these crimes have already been mentioned.

The reason for drawing the conclusion that the general principle of law - posterior law derogates anterior law – does not apply in the case in question is that this principle applies when only one court intervenes but not when there are two courts created by different subjects and different methods, as in the case of the ICC. The reasoning behind creating the ICC is that the Party States to the Geneva legislation pledged to judge war crimes but some of these crimes are so serious that it will be very difficult for States to be able to punish them with their own resources because, as said earlier, some courts may have disappeared during the conflict while in others the same authorities who should judge the crimes are the guilty parties, which is why a special tribunal is set up, in other words a complementary or additional instance, in the case of the ICC, for the purpose of punishing some of these crimes if the authorities of the State of jurisdiction cannot or are unwilling to do so, but the ICC cannot deal with all the war crimes contained in the Geneva treaties because it was set up not to substitute the courts of the Member States of the Rome Statute but rather to deal with the most serious crimes of principal concern to the international community. Accordingly, article 8 of the Rome Statute, which refers to war crimes, states: "in particular when committed as part of a plan or policy or as part of the large-scale commission of such crimes", which – according to the third paragraph of the preamble of the Rome Statute - "threaten the peace, security and well-being of the world". The international community, through the ICC, has the right and duty to attend to and punish these crimes regardless of whether the States continue to have priority jurisdiction to judge all war crimes, including the most serious if they so wish and are able to do so, in accordance with what is set forth in the Geneva legislation and the Rome Statute. On setting up the ICC, it was never said that this would substitute the States in their duty to punish the crimes envisioned in the Geneva Conventions or the Rome Statute, for the ICC only deals with a crime that is serious if the State of jurisdiction "is unwilling or unable genuinely to carry out the investigation or prosecution". The Rome Statute created the ICC, as stated in article 1, to "exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this Statute, and shall be complementary to national criminal jurisdictions", that is, the Statute does not impose on the States that are party to it the obligation to punish such crimes, since in the Preamble, and not in the text proper, it only "recalls" that "it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes" without specifying which international crimes are referred to, nor does it impose on the States the obligation to judge in their State courts crimes contained in the Statute, since, as said before, the State of jurisdiction may not be able or willing to judge a serious crime.

From what has been expressed so far, it can be concluded that the Party States, bearing in mind what is set forth in the 1949 Conventions, Additional Protocol I and the Rome Statute, should include in their national legislations - as alternatives - on the one hand the elements of the crimes of the Geneva legislation, and on the other hand the elements of war crimes referred to in article 9 of the Rome Statute which were approved by the members of the assembly of the Party States to the Statute. That is to say, the Rome Statute does not replace or modify the Geneva legislation and so the latter, like the Rome version, would be in effect at the same time in a State that is Party to the Conventions of Geneva and the Rome Statute, and the State could judge the crimes dealt with in all international treaties, but if it does not judge a crime provided for in the Roma Statute, then the ICC will do so.

As far as including the IHL treaties in national criminal law is concerned, it is considered that this should be done, on the one hand, according to the procedure established by the internal law of a State in this regard, either by changing the treaties into laws or by including them directly in its legislation, and on the other hand in accordance with the pertinent rules of International Law, including the corresponding provisions of the Vienna Convention on the Law of Treaties of 1969, for the States that are Party to this treaty.

Due to the difficulty felt by some States in including the IHL treaties in their legislation, it is appropriate to refer to the simple and swift - albeit imperfect - procedure adopted by some States to insert the crimes provided for in treaties into their own legislations, which consists in including in their Criminal Code an article with a text similar to the following: "If a crime is committed that is not included in this Code but in an international treaty that the State is obliged to respect, the treaty will be applied, taking into account the pertinent provisions of internal criminal law".

In turn, in the document mentioned above: "Repression of war crimes in the criminal legislation of American States", the ICRC refers to this procedure in the following terms: "Another procedure would be an overall accusation of war crimes in the national law by referral to treaties and international customary law".[16]

16. COMITÉ INTERNACIONAL DE LA CRUZ ROJA. **Represión de los crímenes de guerra en la legislación penal nacional de los Estados americanos**. Marzo 2008, p.28, "Conclusión". Document available only in Spanish (non-official translation).

6. Migratory topics: follow-up of the Opinions of the Inter-American Juridical Committee

Document

CJI/doc.329/09 Migratory topics: follow-up of the opinions of the Inter-American Juridical Committee
(presented by Dr. Ana Elizabeth Villalta Vizcarra)

At the 70th regular session of the Inter-American Juridical Committee (San Salvador, El Salvador, February-March 2007), Dr. Jorge Palacios proposed to add this topic to the agenda. After a presentation by Dr. Dante Negro, Director of the OAS Office of International Law, on the evolution of this topic within the OAS system, the Inter-American Juridical Committee passed resolution CJI/RES.127 (LXX-O/07), *The legal situation of migrant workers and their families in the international law*," by which the topic is to be placed on the IAJC agenda and Drs. Jorge Palacios, Ana Elizabeth Villalta, Ricardo Seitenfus and Galo Leoro appointed co-rapporteurs.

On 9 July 2007, the Office of International Law distributed among the members of the Inter.-American Juridical Committee a document drafted by that Office ODI/doc.06/07, *The role of the OAS in protecting the human rights of migrants*, and reported that much broader information on the theme could be found on its web site www.oas.org/dil.

During the Inter-American Juridical Committee's 71st regular session (Rio de Janeiro, Brazil, August 2007), Dr. Dante Negro gave a presentation on the topic, pointing out that three years earlier, the OAS General Assembly had approved the "Inter-American Program for the Promotion and Protection of the Human Rights of Migrants, Including Migrant Workers and Their Families". He reported that on the basis of that program, a series of special meetings had been held and that the reports from those meetings had already been circulated among the members of the Committee. He went on to point out that the program had also been used as the basis for the Secretary General's work program, with a timetable for its full completion. Dr. Negro suggested that the members should consult the web page of the Office of International Law on migrant workers. It features those documents in greater detail, as well as the immigration laws of 16 Latin American countries. Dr. Negro reported that the Office had plans to include, sometime in the future, the laws of the Caribbean countries.

Dr. Jorge Palacios Treviño presented his preliminary report, titled "The legal status of migrant workers and their families in international law" (CJI/doc.266/07).

The co-rapporteuse for the topic, Dr. Ana Elizabeth Villalta Vizcarra, then presented the report titled "The legal status of migrant workers and their families in international law" (CJI/doc.269/07), and pointed out that the document had taken into account the "Inter-American Program for the Promotion and Protection of the Human Rights of Migrants, Including Migrant Workers and Their Families", two resolutions adopted by the General Assembly, and the "Advisory Opinions of the Inter-American Court of Human Rights".

Based on all these discussions, the Inter-American Juridical Committee approved resolution CJI/RES. 131 (LXXI-O/07), "The Legal Status of Migrant Workers and Their Families in International Law", wherein it takes note of the reports presented by the rapporteurs and requests that they present a combined report prior to the next regular session, which they are to send to the General Secretariat.

During 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 for that week the Department, in coordinated fashion with the International Organization for Migration, and within the Committee on Juridical and Political Affairs' purview, was organizing a course on the topic directed towards the staff of the permanent missions and of the General Secretariat with the purpose of studying the topic in greater depth. He also reported that the Department of International Law had prepared a file including the Inter-American Program on the topic, approved by the General Assembly, the outcomes of all the specialized sessions of the Committee, the Secretary General's work plan, and a database on national legislation of the member States; pending remained the inclusion of the legislation of the Caribbean countries, which were still unavailable.

The Chair of the Inter-American Juridical Committee made reference to developments in the Committee regarding the topic, based on the Annotated Agenda. He also noted the reports presented during the current 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, by Dr. Ana Elizabeth Villalta, "Primer or Manual on the Rights of Migrant Workers and their Families, (CJI/doc.289/08 corr.1). The rapporteurs presented their respective reports and after exchanging views with the other members, decided they could unite the documents in a single text and submit it to the Committee's consideration.

The Inter-American Juridical Committee passed resolution CJI/RES.139 (LXXII-O/08), "The legal status of migrant workers and their families in international law," in which it thanks the rapporteurs for the consolidated document CJI/doc.292/08, "Primer or Manual on the Rights of Migrant Workers and Their Families," approves the document and forwards 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, as a way of furthering respect for and promotion of the rights of migrant workers and their families.

On March 24, 2008, the Department of International Law forwarded this document and the accompanying resolution to the Permanent Council of the OAS.

During the 73rd regular session of the Inter-American Juridical Committee (Rio de Janeiro, August 2008), the working group made up of Drs. Ricardo Seitenfus, Mauricio Herdocia Sacasa and Ana Elizabeth Villalta Vizcarra presented the draft resolution entitled "Opinion of the Inter-American Juridical Committee on the Directive on Return approved by the Parliament of the European Union", document CJI/doc.311/08, which was unanimously adopted as resolution CJI/RES. 150 (LXXIII-O/08).

On September 10, 2008, the OAS Permanent Council took note of this resolution, which was forwarded to the Special Committee on Migratory Affairs, for its consideration. The next day a press communiqué on the resolution in question was issued.

During the 74th regular session of the Inter-American Juridical Committee (Bogota, March 2009), the Chairman, Dr. Jaime Aparicio, recalled that the decision was made in this session to group under migratory issues the evaluation and follow-up on the Committee's opinions, regarding both the European Directive and the primer or manual on the human rights of migrant workers.

During the 75th regular session of the Inter-American Juridical Committee (Rio de Janeiro, Brazil, August 2009), Dr. Ana Elizabeth Villalta Vizcarra reminded the members that the General Assembly in San Pedro Sula, in the preamble to resolution AG/RES. 2502 (XXXIX-O/09), "The human rights of all migrant workers and their families," took on board resolution CJI/RES. 150 (LXXIII-O/08), "Opinion of the Inter-American Juridical Committee on the Return Directive adopted by the European Parliament," adopted by the Committee on August 8, 2008. At the same time, no news had been received about the fate of the Primer.

Dr. Villalta said that the Bogotá meeting had resolved to follow-up on the Committee's opinions but had not reached consensus on the best way to disseminate them: whether the Committee's work would be published solely on the web page or at academic forums, whether the rapporteurs can attend meetings of the Organization's political bodies – ultimately, the use that is to be made of the juridical opinions issued by the Committee. She stressed the deadline for submitting reports, since on past occasions, opinions had been presented to agencies when they no longer needed them. At this session, Dr. Villalta presented document CJI/doc.329/09, "Migration Topics: Follow-up on the opinions of the Inter-American Juridical Committee."

Regarding the dissemination of the Primer, Dr. Palacios reported that the Ibero-American University had not only published it in its yearbook, but also as an independent document to be used by Jesuits working in countries' borderlands.

The Chairman noted that he had recently been invited to speak on migration issues at a meeting attended by Permanent Representatives of the member states to the OAS, ambassadors from European observer states, and NGO representatives. On that occasion, he was able to see that not all the participants

were aware of the Committee's work, and he was asked to supply information about the Primer. He said that the resolution on the return directive contained extremely solid juridical principles, and noted that it reaffirmed that migrant status could not per se be considered a crime. He felt that the participation of the Juridical Committee's members at OAS sessions dealing with topics on the Committee's agenda was important and, consequently, efforts would be made to make use of Dr. Stewart's presence in Washington to ramp up even further the Committee's participation at such events.

Dr. Dante Negro repeated that the work referred to by the rapporteur had been sent to the CAJP, and that efforts had also been made to include them on the web page. However, he explained that merely sending a report to the political bodies was not itself enough, and that there was a need for greater participation by the rapporteurs at meetings dealing with their respective topics. In this context, he said that dissemination efforts should be undertaken by both the members and the Secretariat. Dr. Arrighi agreed with that opinion, and urged the members to pursue dissemination in their own countries – not only regarding the Committee's work, but also in connection with the Course on International Law. Speaking next, Dr. Novak remarked that it was also the task of the OAS's officers to suggest that the Organization's agencies consider the participation of the Committee on topics under study in which the Committee could make a real contribution.

The Chairman summarized the comments made by the members and asked whether it would be appropriate to combine the topic of refugees with migrant-related issues; this proposal was not adopted and the topics remained separate, since the question of refugees arose from a specific General Assembly mandate and both of them deserved their own treatment. Finally, he urged the members to carry out appropriate follow-up.

The following section contains the document prepared by Dr. Ana Elizabeth Villalta Vizcarra:

CJI/doc.329/09

MIGRATION TOPICS:
FOLLOW-UP ON THE OPINIONS OF THE
INTER-AMERICAN JURIDICAL COMMITTEE

(presented by Dr. Ana Elizabeth Villalta Vizcarra)

During the 74th regular session held in Bogota, Colombia, in March 2009, the Inter-American Juridical Committee addressed the need to follow-up on the opinions of the body, and therefore decided to include under "migration topics" the evaluation and follow-up on the opinions of the Committee, both the opinion on the "Directive on Return approved by the Parliament of the European Union", as well as the "Primer or Manual on the Human Rights of Migrant Workers and their Families". The agenda was as follows: "**Migratory Topics: Follow-Up on the Opinions of the Inter-American Committee"**. Doctors David P. Stewart and Ana Elizabeth Villalta Vizcarra were appointed Rapporteurs.

In this regard, and taking into consideration that during the 73rd regular session of the Inter-American Juridical Committee held in Rio de Janeiro in August 2008, the Work Group composed by Drs. Ricardo Seitenfus, Mauricio Herdocia Sacasa and Ana Elizabeth Villalta Vizcarra presented document CJI/doc.311/08 entitled **"Draft resolution: Opinion on the Directive on Return approved by the Parliament of the European Union",** which, following the analysis by the Committee members, was adopted unanimously during the meeting held on August 8, 2008 as Resolution CJI/RES. 150 (LXXIII-O/08), under the title "Opinion of the Inter-American Juridical Committee on the Directive on Return approved by the Parliament of the European Union".

In that session the members of the Inter-American Juridical Committee also determined that the resolution should be delivered by the Chairman to the Permanent Council of the Organization of American States (OAS). On September 10, 2008 the Permanent Council of the OAS took note of the resolution, which was referred to the Special Committee on Migration Matters for consideration. On the following day a press release was published with part of the resolution, which read:

THE INTER-AMERICAN JURIDICAL COMMITTEE, through resolution CJI/RES. 150 (LXXIII-O/08) adopted an Opinion on the Directive on Return approved by the Parliament of the European Union, which, among other matters, ruled as follows:

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:

- It does not offer adequate guarantee of due legal process for immigrants liable to expulsion;
- 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;
- 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;

2. 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.

3. 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.

During the thirty-ninth regular session of the OAS General Assembly held in San Pedro Sula, Honduras, from 1 to 4 June, 2009, resolution AG/RES. 2502 (XXXIX-O/09) under the title **"The Human Rights of all Migrant Workers and of their Families"** was approved. The preamble took into account, among other matters, resolution CJI/RES. 150 (LXXIII-O/08), "Opinion of the Inter-American Juridical Committee on the Directive on Return approved by the Parliament of the European Union", which resolved as follows:

1. To urge the States to promote and protect effectively the human rights and fundamental freedoms of all migrant workers and their families, especially of women and children, regardless of their immigration status, in accordance with international human rights law.

2. To express its concern about the legislation and measures adopted by some States that could restrict the human rights and fundamental freedoms of migrants; and to reaffirm that, in exercising their sovereign right to enact and enforce measures regarding migration and their border security, the States must fulfill the obligations incumbent upon them under international law, including international human rights legislation, to ensure full respect for the human rights of migrants.

3. To vigorously condemn all manifestations or acts of racism, racial discrimination, xenophobia, and related forms of intolerance against migrants, among them those related to access to employment, professional training, housing, education, health care services, social services, and public services; and to urge States to enforce and strengthen legislation and policies in force to address these situations, especially in order to prevent the impunity of those who commit acts of racism or xenophobia.

4. To reiterate categorically that no state should consider an individual's migration status as a crime in itself nor, for that reason, adopt criminal sanctions or those of equivalent effect.

5. To request all States, in accordance with national legislation and applicable international legal instruments to which they are party, to enforce labor law effectively, and to address violations of such law in connection with migrant workers' labor relations and working conditions, inter alia, those related to their remuneration, workplace health and safety, and right to freedom of association.

6. To encourage all States to facilitate the safe and expeditious transfer without restrictions of remittances of migrants to their countries of origin or to any other country, in accordance with the applicable legislation, bearing in mind that the funds belong to the

migrants themselves, and to consider, as appropriate, measures to resolve other difficulties that may impede such transfers.

7. To reaffirm that the American Declaration of the Rights and Duties of Man ensures that every person may resort to the courts to ensure respect for his legal rights. There should likewise be available to him a simple, brief procedure whereby the courts will protect him from acts of authority that, to his prejudice, violate any fundamental constitutional rights.

8. To welcome the immigration programs adopted by some countries that allow migrants to integrate fully into the host countries, facilitate family reunification, and promote a harmonious, tolerant and respectful environment; and to encourage the States to consider the possibility of adopting these types of programs.

9. To request all States, international organizations, and other interested parties to take into account in their policies and initiatives on migration issues the global nature of the migration phenomenon and to give due consideration to international, regional, and bilateral cooperation in this area by organizing dialogues on migration with participation by the countries of origin, transit, and destination and by civil society, including migrants, in order to give exhaustive consideration to, among other things, the causes and consequences of migration and the problem of undocumented or irregular migrants, giving priority to protection of the human rights of migrants. These dialogues should include an exchange of positive experiences and best practices in regularizing the status of migrants in the host countries.

10. To reaffirm emphatically the duty of the States Parties to the 1963 Vienna Convention on Consular Relations to fulfill their obligations under the Convention, including the obligation of the States Parties to inform foreign nationals detained within their territory of their right to communicate with their consular officers; and in that regard, to call to the attention of the States Advisory Opinion OC-16/99, issued by the Inter-American Court of Human Rights, as well as to the ruling of the International Court of Justice of March 31, 2004, in the Case Concerning Avena and Other Mexican Nationals, regarding the obligation of the States to comply with Article 36 of the Vienna Convention.

11. To call to the attention of the States Advisory Opinion OC-18/03, issued by the Inter-American Court of Human Rights, which maintains that "the migratory status of a person cannot constitute a justification to deprive him of the enjoyment and exercise of human rights, including those of a labor-related nature."

12. To encourage the Member States to consider the adoption of programs for the integration of migrants into their societies, with a view to promoting an environment of harmony, tolerance, and respect.

13. To encourage constructive dialogue and cooperation among Member States in order to refine their migration policies and practices, aiming to establish adequate protection for all migrants, including migrant workers and their families, and to promote migration procedures in accordance with the domestic legislation of each State and applicable international law.

14. To urge the Member States to consider signing and ratifying, ratifying, or acceding to, as the case may be, the instruments of the inter-American human rights system; and to take the necessary measures to guarantee the human rights of all migrants, including migrant workers and their families.

15. To urge the Member States to consider signing and ratifying the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.

16. To instruct the Permanent Council to continue supporting the work of the Inter-American Commission on Human Rights (IACHR) in this area and to take into account the efforts made by other international organizations in support of migrant workers and their families, in order to contribute to improving their situation in the Hemisphere and, in particular and where applicable, the efforts of the Special Rapporteurship on the Human Rights of Migrants of the United Nations Commission on Human Rights and those of the International Organization for Migration (IOM).

17. To instruct the Secretary General and the pertinent organs, agencies, and entities of the Organization to continue to follow up on the Inter-American Program and the Work Plan presented by the OAS Secretary General on February 13, 2007, in document CP/CAJP-2456/07; and to request that, in their annual reports to the General Assembly at its fortieth regular session, they include actions taken to implement the activities described in the Program.

18. To encourage the States to take into consideration the optional activities suggested in the Inter-American Program for the Promotion and Protection of the Human Rights of Migrants, including Migrant Workers and Their Families, when formulating, executing, and evaluating their migration policies.

19. To encourage the Member States to collaborate in the exchange of information and experiences within the framework of the Regional Conference on Migration (RCM), the South American Conference on Migration (CSM), the OAS Special Committee on Migration Issues (CEAM), the MERCOSUR Specialized Forum on Migration, and the Andean Forum on Migration, to better coordinate positions on migration issues.

20. As established in the Inter-American Program, to convene a meeting of the Committee on Juridical and Political Affairs (CAJP) for the first half of 2010, with participation by government experts, representatives of the organs, agencies, and entities of the inter-American system, and representatives of other international organizations and of civil society, for the purpose of exchanging best practices and activities carried out in the past year in support of the Program, as well as new proposals that could be incorporated into the Program.

21. To instruct the Secretary General to review and update the Work Plan of the Inter-American Program for the Promotion and Protection of the Human Rights of Migrants, including Migrant Workers and Their Families (CP/CAJP-2456/07) to ensure that the distribution of activities is consistent with the new structure of the Organization, and to present the updated Program to the CAJP.

22. To request the organs, agencies, and entities of the OAS to report to the CAJP, in the first quarter of 2010, on the implementation of the activities assigned by the Inter-American Program, by means of a comparative table indicating assigned tasks, progress made, and deadlines for completing pending tasks.

23. To urge the Member States, permanent observers, and regional, international and civil society organizations to make voluntary contributions to the Fund for the Inter-American Program for the Promotion and Protection of the Human Rights of Migrants, Including Migrant Workers and Their Families.

24. To urge the General Secretariat to disseminate, through the Secretariat for Legal Affairs, the Inter-American Program for the Promotion and Protection of the Human Rights of Migrants, Including Migrant Workers and Their Families.

25. To request the General Secretariat to take account of the crosscutting nature and priority of the human rights of migrants in coordinating the efforts of all relevant organs, agencies, and entities of the OAS; and to ensure the States that those efforts are supplemented by those ’

26. To entrust the Inter-American Commission on Human Rights with:

a. Considering the advisability of participating in partnerships implemented by SEDI in this area;
b. Providing the Special Rapporteurship on Migrant Workers and Their Families with the necessary and sufficient means to perform its functions in accordance with the resources allocated in the program-budget of the Organization and other resources; and
c. Submitting to the Permanent Council individual reports on the situation of the rights of migrant workers and of their families prior to the fortieth regular session of the General Assembly.

27. To invite Member States, permanent observers, organs, agencies, and entities of the inter-American system and other bodies to contribute to the Voluntary Fund of the Special Rapporteurship on Migrant Workers and Their Families of the IACHR.

28. To urge the Member States to consider the possibility of inviting the Special Rapporteur on Migrant Workers and Their Families to visit their countries to enable that Rapporteur to fulfill his or her mandate effectively.

29. To request the General Secretariat to report to the General Assembly at its fortieth regular session on the implementation of this resolution, the execution of which shall be subject to the availability of financial resources in the program-budget of the Organization and other resources.

This resolution used many of the arguments of the Inter-American Juridical Committee on its "Opinion on the Directive on Return approved by the Parliament of the European Union", particularly when stating that no State should consider the migrant status of a person as a crime in itself, nor should it adopt, based solely on this fact, any criminal or equivalent measure, among other matters.

As regards the report on "**The Legal Status of Migrant Workers and their Families,** the Inter-American Juridical Committee, during the 70th regular session held in San Salvador, El Salvador, from February 26 to March 9, 2007, approved resolution CJI/RES. 127 (LXX-O/07) under the title "The Legal Status of Migrant Workers and their Families in the International Law", in which it considered that the migration of workers and their families, whether documented or not, is a matter of interest for all the States in the American Continent, that it is necessary to know the legal aspects of human mobility, particularly as regards human rights, so that these are applied to migrant workers, and that it is convenient to bear in mind the work conducted by the Inter-American System on this issue.

The Inter-American Juridical Committee, on considering this issue during the 71st regular session held in Rio de Janeiro, Brazil, from July 30 to August 10, 2007, adopted resolution CJI/RES. 131 (LXXI-O/07) and took due note of the reports CJI/doc.266/07 and CJI/doc.269/07 under the title "**The Legal Status of Migrant Workers and their Families in International Law**", which were respectively presented by the rapporteurs on the topic, Drs. Jorge Palacios Treviño and Ana Elizabeth Villalta Vizcarra.

In said resolution, the Inter-American Juridical Committee resolved in item 3, "To accept the proposal of the co-rapporteurs to prepare a draft brochure or handbook that delineates the rights of migrant workers and their families, based on international law, with the objective of allowing migrants to demand compliance therewith".

Complying with resolution CJI/RES. 131 (LXXI-O/07), during the 72nd regular session of the IAJC the rapporteurs presented a "Primer or Manual on the rights of migrant workers and their families", taking into consideration the provisions set forth in International Law and the work carried out by the Inter-American System on this issue. The Primer was delivered promptly for the consideration of the Permanent Council of the Organization, although no follow-up was determined.

In this regard, it would be suitable for the Inter-American Juridical Committee to devise a follow-up mechanism on its own opinions, under the responsibility of the Committee Chairman or Secretariat or the rapporteurs; this topic could be addressed during this 75th regular session of the IAJC, so as to determine the most suitable mechanism.

Bearing in mind that the consulting capacity of the Inter-American Juridical Committee is practically unlimited, as the Charter of the Organization of American States itself states when referring to the Inter-American Juridical Committee in Article 99: "The purpose of the Inter-American Juridical Committee is to serve the Organization as an advisory body on juridical matters;…". In this regard, the Inter-American Juridical Committee can provide a great many opinions together with suitable follow-up.

Similarly, in accordance with Article 100 of the OAS Charter the Inter-American Juridical Committee can issue opinions when requested by the General Assembly of the Organization, the Meeting of Consultation of Ministers of Foreign Affairs, or the Councils of the Organization, in addition to the opinions that the Committee may decide to provide on its own initiative, which would also have to be followed up.

Furthermore, it would be appropriate for the Inter-American Juridical Committee to establish a mechanism to disseminate its reports and opinions, not only to the other OAS Organs, but also to international forums related to the various topics, as well as to civil society (especially as regards academic forums), with the aim of informing all sectors about the consultative work of the Inter-American Juridical Committee.

The participation of the rapporteurs during the Sessions of the Permanent Council and in the Committee on Juridical and Political Affairs should also be considered, with regard to the various topics dealt with by those organs, thus allowing a sharing of experiences with the political organs of the Organization and providing an insight on how the different topics are addressed, because a closer relationship between the Juridical Committee and the political organs, as well as with the OAS Member States, does seem necessary.

In the follow-up mechanism to be defined for the opinions of the Inter-American Juridical Committee, the occasion on which said opinions are expressed should also be analyzed, so that this coincides with the agenda of the Organs of the Organization, thus serving them at the most convenient time, since only in this way will the opinions of the Committee be relevant and useful to those Organs.

In light of the above, and as proposed during the 74th regular session of the Inter-American Juridical Committee held in Bogota, Colombia, in March 2009, it seems suitable to resume analysis of this matter in order to determine the best mechanisms for following up and diffusing the opinions of the Committee, so that these can be put to greater benefit for the Inter-American System.

7. Innovative forms of access to Justice in the Americas

At its 66th regular session (Managua, February 28–March 11, 2005), the Inter-American Juridical Committee included the topic Principles of Judicial Ethics on its agenda.

At its thirty-fifth regular session (Fort Lauderdale, June 2005), the General Assembly, by resolution AG/RES. 2069 (XXXV-O/05), "Observations and Recommendations on the Annual Report of the Inter-American Juridical Committee", resolved to encourage initiatives that the Inter-American Juridical Committee may adopt to conduct studies with other organs of the inter-American system, in particular with the JSCA, on different matters geared toward strengthening the administration of justice and judicial ethics.

At the 70th regular session of the Inter-American Juridical Committee (San Salvador, February-March 2007), Dr. Ana Elizabeth Villalta Vizcarra, rapporteur of the topic, presented report CJI/doc.238/07, "Principles of Judicial Ethics". The Inter-American Juridical Committee adopted resolution CJI/RES. 126 (LXX-O/07), "Administration of Justice in the Americas: judicial ethics and access to justice". Said resolution appointed Drs. Ricardo Seitenfus and Freddy Castillo Castellanos as co-rapporteurs to work alongside with Dr. Ana Elizabeth Villalta Vizcarra. It also underscored the critical link between judicial ethics and the access to justice as fundamental topics for the administration of justice and the strengthening of the rule of law in the Americas. It was decided to keep the topic on the Juridical Committee's agenda under the heading: "Administration of Justice in the Americas: judicial ethics and access to justice". The co-rapporteurs were asked to continue to update the report with the purpose of drafting a text that would encompass the principles of judicial ethics of the inter-American system.

At its thirty-seventh regular session, the OAS General Assembly (Panama, June 2007) made no request of the Inter-American Juridical Committee on this topic.

During the 71st regular session of the Inter-American Juridical Committee (Rio de Janeiro, August 2007), it decided to instruct the rapporteurs to present a report at the next regular session concerning the scope of the topic of judicial ethics and access to justice in the context of international law, including alternative forms.

During the 72nd regular session of the Inter-American Juridical Committee (Rio de Janeiro, March 2008), the Inter-American Juridical Committee decided to change the title of the topic to "innovative forms of access to justice in the Americas".

Dr. Freddy Castillo suggested that the topic be reformulated, eliminating the reference to "judicial ethics". He stressed that the focus should rest on mechanisms of access to justice which, because of its wide scope, could be developed within the framework of other topics, as well as in the light of the Inter-American Democratic Charter.

Dr. Ricardo Seitenfus proposed to limit the topic to access of justice. He recalled the great weakness of the State in fighting transnational crime, such as the trafficking of arms, women and children, all very current topics whenever it is necessary and urgent to join efforts to strengthen judicial cooperation among the States of the region. In this respect, he considered that the topic of judicial cooperation is more sensitive and important than the attempt to draft a code of ethics.

Dr. Hyacinth Evadne Lindsay referred to the experience of Jamaica and other Caribbean countries based on the *common law*, which applied judicial measures in those cases of ethical transgressions on the part of judges. In her opinion, the drafting of a code of judicial ethics should be the responsibility of judges and in accordance with domestic law. In her view, access to justice is a more important topic, because of the fact that law is under permanent construction and consequently new alternative methods of conflict settlement have been created to promote an easier access to the courts' decisions.

On June 25, 2008, at the request of Dr. Guillermo Fernández de Soto, the Department of International Law forwarded to the members of the Inter-American Juridical Committee a summary of studies on the topic developed in recent years by the Inter-American Development Bank and the World Bank, along with the respective web page references, where further information on these works may be

found, as well as the Final Report on the Project "Guidelines and Good Practices for Adequate Access to Justice in the Americas", prepared in the framework of the OAS General Secretariat.

At the 73rd regular session of the Inter-American Juridical Committee (Rio de Janeiro, Brazil, August 2008), Dr. Freddy Castillo Castellanos, rapporteur on the subject, presented document CJI/doc.315/08, "Access to Justice: preliminary considerations", with a view to receiving comments on his approach to the topic, so that he could subsequently draw up a more detailed report.

During the 74th regular session of the Inter-American Juridical Committee (Bogotá, Colombia, March 2009), Dr. Dante Negro recalled that in August 2008, the Committee discussed the subject based on a document presented by the rapporteur, and that this issue was expected to be discussed in greater depth at this session. Dr. Negro reported that in January 2009, the Department of International Law began implementing a project financed by CIDA-Canada, involving support for free counseling services at two universities in the Hemisphere, one in Honduras and the other in Paraguay, in order to increase access to justice on the part of the poorest sectors. He indicated that the objective of the project was to provide these counseling services with more effective tools for their operation, and to use them as pilot projects to be disseminated in other countries of the Americas. In addition, this experience could be used to draw up a report with recommendations as to how to improve access to justice for the poorest sectors without real access to the system.

Dr. Freddy Castillo harked back to comments in his previous report on the subject aimed at moving the study forward, and said that he would like to have more detailed information on the activities being carried out in this area by the Secretariat for Legal Affairs, and specifically on links with law schools and law firms, and on implementation of the program of judicial facilitators.

Dr. Jean-Michel Arrighi, Secretary for Legal Affairs, referred to what the Secretariat has been doing in this area. He indicated that one of the projects that is being developed is the program of judicial facilitators in rural areas, that originated in Nicaragua, and has now been extended to Panama, Paraguay, and Ecuador, and soon to Honduras. He also commented that they are working with Ecuador to implement mediation centers in civil matters.

Further on this point, Dr. Dante Negro reported that an evaluation of these programs would be conducted shortly, with a view to revising those areas where recommendations are made, to capitalize on the experiences of the judicial facilitators' and the legal counseling programs.

In response to a question from Dr. Fabian Novak Talavera on the specific lines of action and goals in the area of access to justice, Dr. Freddy Castillo referred back to the origin of the issue, and explained that it had to do with an effort to draw up a code of ethics for OAS Member States.

After an exchange of views, the Juridical Committee decided that the most important issue was to approach access to justice in innovative ways and to expand channels of access to justice, and that the role of the Committee in this effort would be similar to the role played by the Committee in the area of the right to access to information. In other words, it would approve general guidelines to promote access to justice, with follow-up by the Inter-American Juridical Committee.

Dr. Jean-Paul Hubert expressed the view that the Inter-American Juridical Committee is not an implementing or evaluating entity for OAS programs. In the same vein, he stated that the Committee should be clear on what its role is on Haiti. He believed that the Inter-American Juridical Committee should stick solely to drawing up general guidelines, but should avoid any involvement in implementation of specific programs. He requested that the document entitled "Making Law Work for Everyone" of the Commission on Legal Empowerment of the Poor be circulated, as it suggests four pillars for access to justice on the part of the poorest sectors, the precise subject under discussion.

Dr. Fabián Novak suggested that the Committee approve the work referred to by Dr. Negro, and that it draw up a list of the obstacles to access to justice in our countries, and the innovative measures and solutions being developed in domestic legislation. This information could be used as a basis for preparing a manual on the subject.

Dr. Jean-Michel Arrighi recalled the different approaches that the Inter-American Juridical Committee had taken to this issue of access to justice in the past. In the beginning, the focus was on the

independence of the judiciary in countries, and the rapporteur on the subject was Dr. Jonathan Fried of Canada, whose report was presented to the Permanent Council and the General Assembly, with a series of final recommendations. He indicated that in a second stage, the rapporteur on the subject, Dr. Luis Marchand of Peru, drafted a report based on his experience as an IDB consultant on government reform, in which he referred to the problem of the poor sectors of society without access to justice. He indicated that the next study to be undertaken by the Juridical Committee should thus take into account what has already been written earlier, and either update the prior reports or propose new approaches. As regards Haiti, he added that work on legal standards for access to justice of persons with disabilities was proceeding together with Dr. Ricardo Seitenfus, former member of the Juridical Committee. Should this initiative be implemented, work on the subject could go forward in cooperation with the Committee.

Dr. Jaime Aparicio Otero commented on a paper on access to justice developed by the World Bank, where reference is made to the problem of preventive imprisonment, when persons are incarcerated for a crime for excessive periods of time, without a trial. This is a fundamental problem that has not so far found a solution. He therefore suggested that it might be the focus of a study by the Committee.

Dr. Ana Elizabeth Villalta recalled that the subject had been discussed by the Ibero-American and Central American Judicial Summits, from two standpoints: first, that justice should be effective and prompt, which poses a challenge for judicial organs; and second, with a focus on how persons can gain access to justice. She asserted that the programs developed by the OAS Secretariat for Legal Affairs are designed to meet these two objectives. Consequently, she believed that it would be difficult at this point to determine what direction the Committee could take in studying this subject.

Dr. Guillermo Fernández de Soto recommended that the Chairman of the Inter-American Juridical Committee, together with the Secretariat for Legal Affairs, examine the program developed by the Inter-American Development Bank (IDB) on alternative dispute resolution procedures, with an emphasis on community conciliation, which has been implemented with model or prototype laws in the legislation of different countries of Latin America to protect the poorest sectors. He believed that the Committee could not fail to take up a study of procedures for settlement of trade disputes in different bilateral or multilateral scenarios, since states are increasingly dealt with as individuals.

Dr. Hyacinth Lindsay supported the proposal by Dr. Fernández de Soto, and pointed out that the most positive alternative dispute settlement method is one where the parties reach agreement without interminable litigation in the courts.

Dr. Mauricio Herdocia Sacasa pointed out that work is already advanced in the context of the judicial facilitators project, hence the Juridical Committee should use this experience to instruct the rapporteur to draw up a general study on alternative or complementary mechanisms for access to justice and settlement of disputes, based on work already done by the Committee, with a list of comments. In this way the Inter-American Juridical Committee could determine a specific area to define the direction the subject should take.

During the 75th regular session of the Inter-American Juridical Committee (Rio de Janeiro, Brazil, August 2009), Dr. Freddy Castillo Castellanos presented report CJI/doc.336/09 “Innovating forms of access to justice in the Americas,” which sets out principles and offers alternatives with a view to guiding the Committee in the future. After a rich exchange of ideas, the rapporteur was asked to submit a first draft of principles for the Committee’s consideration in March 2010.

8. Considerations on an Inter-American Jurisdiction of Justice

At the Inter-American Juridical Committee's 71st session (Rio de Janeiro, August 2007), the Chairman, Dr. Jean-Paul Hubert, recalled how this topic was introduced in the IAJC: at Dr. Eduardo Vio Grossi's suggestion, it had been included under the item on the challenges facing the Committee as it celebrated its centennial. Dr. Vio had presented a preliminary document at the previous session, which the Committee was unable to examine at that time: CJI/doc.241/07, "Inter-American Court of Justice (IACJ): some comments on the challenges of the Inter-American Juridical Committee on the occasion of its centenary".

At the same session, Dr. Eduardo Vio Grossi presented a new report, CJI/doc.267/07, "Inter-American Court of Justice (IACJ)", wherein he again made the point that his goal was that the Inter-American Juridical Committee's work should more closely parallel the issues that the Organization was pursuing. He pointed to the vacuum within the inter-American system: the OAS did not have an inter-American court, whereas the United Nations system had the International Court of Justice. Dr. Vio Grossi was of the view that the Inter-American Juridical Committee should revisit the idea of creating an inter-American court of justice. It would figure in the OAS Charter as an autonomous body whose purpose would be to settle disputes and issue advisory opinions. In the opinion of Dr. Vio Grossi, the Inter-American Juridical Committee could take on the role of a court serving both functions. The Committee's advisory opinions would be its legal interpretation of the questions put to it, which would have greater force than the reports or studies the Committee prepares. Dr. Vio Grossi acknowledged that the issue of the inter-American court's jurisdictional role was more problematic, as evidenced by the reluctance to accept the compulsory jurisdiction of the Inter-American Court of Human Rights or even the terms of the Pact of Bogotá, which refers disputes between American States to the International Court of Justice for adjudication. Dr. Vio's opinion was that, to perform this function, no amendment to the Charter would be needed. Instead, the Inter-American Juridical Committee would only need to be empowered to serve as a court in disputes between Member States of the OAS. He also said that the time was right, since legal certainty and juridical security was one of the major concerns in relations among the countries of the Americas. Mechanisms, he said, were needed to settle differences. The rapporteur went on to say that this was a function that the Juridical Committee ought not to back away from; taking on this role would keep the Juridical Committee in step with the times and give it a modern dimension and a practical sense of the Hemisphere.

Based on these discussions, the Inter-American Juridical Committee adopted resolution CJI/RES. 134 (LXXI-O/07), "Inter-American Court of Justice (IACJ)", wherein it takes note of the report prepared by Dr. Eduardo Vio Grossi and decides to continue to study this topic, taking into account the reasoning developed in the documents already presented. Moreover, the rapporteur was requested, to present another report prior to December 31, 2007, if he so deemed advisable and without prejudice of any other reports that the co-rapporteurs might choose to present. Dr. Eduardo Vio Grossi submitted an explanation of his vote (CJI/doc.283/07) on this resolution.

During the 72nd regular session of the Inter-American Juridical Committee (Rio de Janeiro, March 2008), Dr. Mauricio Herdocia Sacasa proposed that the initial idea regarding this topic, i.e., that the Juridical Committee assume jurisdictional functions, be reformulated, since it seemed to him to be excessively complex, given that, within the inter-American system, article 31 of the Pact of Bogotá assigns the settlement of disputes to the International Court of Justice. He recalled that the proposal of having an international court had been taken up by the Secretary General and therefore in Dr. Herdocia's opinion it was worthwhile to study the creation of a court, but without necessarily linking it to the Juridical Committee.

After exchanging views, the members decided to keep the topic on the agenda, changing its title to "Considerations on an inter-American jurisdiction of justice", submitting it under a new proposal separate from the initial one made by Dr. Vio Grossi. Drs. Freddy Castillo Castellanos and Guillermo Fernández de Soto were designated as rapporteurs.

During the 73rd regular session of the Inter-American Juridical Committee, (Rio de Janeiro, August 2008), the rapporteur on the subject, Dr. Guillermo Fernández de Soto, initiated a discussion of the subject

with an oral presentation. He recalled the direct and indirect antecedents on the subject, and referred to Dr. Eduardo Vio's report, the 1923 initiative of the Pan-American Union and the August 2007 report. He noted that the most recent political initiative was the Secretary General's report on the subject.

After an intensive debate, Dr. Jean-Paul Hubert proposed that the members of the Committee continue to discuss the issue to give it time to mature.

During the 74th regular session of the Inter-American Juridical Committee (Bogota, Colombia, March 2009), Dr. Guillermo Fernández de Soto, rapporteur on the subject, presented document CJI/doc.323/09, "Reflections on an Inter-American Jurisdiction for Justice," referring to the concept initially put forward by former member Dr. Eduardo Vio Grossi and to the OAS Secretary General's comments at the General Assembly on the possibility of creating an exclusive regional jurisdiction within the inter-American system. An intense exchange of opinions on the topic then took place, and it was decided to continue analyzing it at the next meeting of the Juridical Committee.

During the 75th regular session of the Inter-American Juridical Committee (Rio de Janeiro, Brazil, August 2009), Dr. Guillermo Fernández de Soto summarized the debate, the current parameters regarding the development of the topic, and received additional comments and thoughts, with a view to presenting a report at the March 2010 session.

9. Cultural diversity in the development of international law

Document

CJI/doc.333/09 Reflections on the topic of cultural diversity and the development of international law
(presented by Dr. Freddy Castillo Castellanos)

During the 74th regular session of the Inter-American Juridical Committee (Bogota, Colombia, March 2009), Dr. Freddy Castillo presented a document in which he proposed to include the topic on cultural diversity and international law entitled "Cultural Diversity in the Development of International Law," document CJI/doc.325/09. After presenting it, the Inter-American Juridical Committee decided to include the topic on its agenda and to elect Dr. Freddy Castillo as rapporteur.

However, some of the members expressed their interest in exploring the substantive contributions that the Committee could make in this regard, recalling that the international community already has a convention covering the topic. The members also expressed concern about the guidance of the Committee's work, specifically as regards the development of studies into cultural diversity guidelines for national constitutions or countries' domestic laws. In this regard, the decision was made to limit the subject to providing guidelines in application of the principles and rules of the UNESCO Convention, and to eliminate reference to Constitutions. In addition, it was requested that the Committee report to the Permanent Council on its involvement in this area, so that Member States could express their views. Finally, the rapporteur was asked to present a subsequent version of the document reflecting the suggestions by members of the Juridical Committee at its next regular session.

At the thirty-ninth regular session of the OAS General Assembly (San Pedro Sula, June 2009), by Resolution AG/RES. 2515(XXIX-O/09), it requested the Inter-American Juridical Committee to report to the General Assembly on its progress in this area.

During the 75th regular session of the Inter-American Juridical Committee (Rio de Janeiro, Brazil, August 2009), Dr. Freddy Castillo Castellanos presented his report on the topic, titled "Reflections on the topic of cultural diversity and the development of international law" (CJI/doc.333/09).

He initially spoke about the instruments adopted within the United Nations, such as the Universal Declaration of Human Rights, the International Covenant on Economic, Social, and Cultural Rights, and the International Covenant on Civil and Political Rights, with which progress has been made in the protection of cultural rights, starting with the recognition that all people have the right to experience in full the cultural life of their communities and the exhortation for states to adopt measures to ensure the full enjoyment of those rights, and later expanded with the right to education, to access to information, and, more recently, the provisions governing discrimination on the grounds of age or gender.

Within the inter-American system, he quoted provisions from the American Declaration of the Rights and Duties of Man and from the Additional Protocol to the American Convention on Human Rights in the area of Economic, Social, and Cultural Rights ("Protocol of San Salvador") which also provide protection for cultural rights in the region's countries.

He emphasized the work of UNESCO, set out in instruments such as the Convention Concerning the Protection of the World Cultural and Natural Heritage (1972), the Convention on the Protection of the Underwater Cultural Heritage (2001), the Convention for the Safeguarding of Intangible Cultural Heritage (2003), and the Convention on the Protection and Promotion of the Diversity of Cultural Expressions (2005).

He also spoke of the consequences of globalization, which ultimately and cruelly eliminate cultural pluralism and ensure the predominance of the uniformity imposed by the countries that dominate cultural industries. That caused UNESCO to react with the adoption of the Convention on the Protection and Promotion of the Diversity of Cultural Expressions in October 2005, which represents a substantial step forward in reverting numerous decades of policies that have worked against multiculturalism. He stated that the subordination of culture and its creative processes to the machinery of capital has led to an immense intellectual and artistic impoverishment in our countries, since many cultures remain invisible to

and unknown by the majority of the population. He referred to the reaction to this in various international spheres, including the early work of the Frankfurt School, intended to stop this devastation of authentic cultures by the overwhelming hegemony of cultural trade.

From the legal point of view, he referred to the recognition of diversity as an act of democracy, recognized by UNESCO as a part of global heritage. That is to say, from the natural fact to the project of coexistence that at present gains life in international positive law. He thus affirmed that culture was a public and collective asset and criticized the efforts of the WTO to regulate cultural goods as if they were merely another form of merchandise. Perhaps the most important ingredient in the relationship between cultural diversity and democracy is, he said, to represent a real channel for inclusion, through forms of effective participative.

He noted that the question of culture had been addressed in a number of European constitutions (Spain, 1978, and Portugal, 1976) and in the more recent constitutions of Latin America (Brazil, Colombia, Bolivia, Venezuela), with a substantial development of cultural rights.

He then gave a historical overview of the juridical treatment of cultural diversity, recalling that in November 2001 UNESCO approved the Universal Declaration on Cultural Diversity, enshrining cultural pluralism, respect for human rights, the promotion of creativity, and international solidarity. Cultural diversity has become a principle of international law, connected with other cultural rights that assist with the protection and development of that principle. Another significant fact is that UNESCO's Convention on the Protection and Promotion of the Diversity of Cultural Expressions now has almost a hundred states that have deposited their ratification, acceptance, or adhesion.

The relevant aspects of the Convention, he said, include its positioning of culture in its own legal space, separate from international trade law and in no way subordinated to it; he noted that diversity in and of itself is a form of cultural heritage, and therefore one of the essential components of human heritage. In second place, he emphasized the not exclusively mercantile way of treating cultural goods and culture in general; the recognition that diversity represents regarding creations, traditions and popular knowledge, which, while unprotected, were at the mercy of misappropriation and looting by the economic voracity of corporations or international companies, whose aims were quite removed from those of culture. All of that without exhausting the list of basic ideas that the Convention contains, and without forgetting the principles of solidarity and cooperation that oblige the party states to create reinforced media for cultural expression in developing countries, as well as the complementary principle of economic and cultural aspects within that development, principles which are compulsory both for the public sector and private individuals.

He concluded by saying that regionally, the Inter-American Juridical Committee could provide a contribution in the form of pertinent guidelines at the international level for the enforcement of the principles contained in the Convention, as well as by exploring other means for the concretion of the paradigm of cultural diversity among the region's countries. Thus, close observation of the Committee's thematic agenda reveals that a considerable number of those matters are connected to cultural diversity. That is the case, for example, with the Convention Against All Forms of Discrimination and the topic of innovative forms of access to justice, along with others not yet contained on our catalogue of studies but that will no doubt be included in the future, including the topics of private international law, where cultural diversity plays an undeniably important role.

The Chairman congratulated the rapporteur on his stimulating report, and that sentiment was seconded by the other members. He also spoke of the importance of technology in disseminating knowledge, as a tool that can work either in favor of it or against it, chiefly when real forms of protection are not available.

Dr. João Clemente Baena Soares said that the topic was of great importance and, as a first reaction to the rapporteur's document, suggested addressing the dangers posed by new technologies.

Dr. Hubert spoke of the cultural situation in Canada which, without the assistance of international instruments, had succeeded in preserving the culture of its French-descended minority. He spoke in favor

of promoting cultural diversity, in line with the support that Canada has given to the adoption of the UNESCO Convention.

Dr. Herdocia suggested studying, in the future, those judgments of the Inter-American Court of Human Rights related to cultural matters, such as indigenous cultural diversity.

The following paragraphs set out Dr. Castillo Castellanos's report, along with their annex:

CJI/doc.333/09

REFLECTIONS OF THE TOPIC ON THE CULTURAL DIVERSITY AND THE DEVELOPMENT OF INTERNATIONAL LAW

(presented by Dr. Freddy Castillo Castellanos)

1. Some international rules on cultural rights

As a first approach to the topic, I feel the need to make some references to the inclusion of the concepts of cultural rights and cultural diversity in International Law. We know that in this field culture rights have been progressively gaining ground ever since the Universal Declaration of Human Rights, adopted by the United Nations General Assembly on December 10, 1948, established in Article 27 that:

"1) Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.

(2) Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author."

On the other hand, Article 22 of the Declaration says that "Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality".

Later the concept of cultural rights was developed by the International Covenant on Economic, Social and Cultural Rights of 1966. Article 15 of said Pact reads as follows:

"1. The States Parties to the present Covenant recognize the right of everyone:

a) To take part in cultural life;

b) To enjoy the benefits of scientific progress and its applications;

c) To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for the conservation, development and diffusion of science and culture.

3. The States Parties to the present Covenant undertake to respect the freedom indispensable for scientific research and creative activity.

4. The States Parties to the present Covenant recognize the benefits to be derived from the encouragement and development of international contacts and co-operation in the scientific and cultural fields".

We may add the International Covenant on Civil and Political Rights, also of the year 1966, where Article 27 grants persons belonging to ethnic, religious or linguistic minorities the right to enjoy their own culture, to profess and practice their own religion or to use their own language. As we see, this is a collective right that complements other rights established by the Covenant. It also comprises recognition of cultural diversity.

The spectrum of cultural rights has been broadening to the same extent to which the concept of "culture" has increased its field of application. With it nobody refers just to the works of arts or to the scientific and humanistic knowledge that people have. Culture, as UNESCO has been proclaiming for some decades now "comprises the educational system, means of communication, cultural industries, and so on". Thus, to the international text on the rights of culture we should add Article 26 of the

Universal Declaration of Human Rights and Article 18.4 of the International Covenant on Civil and Political Rights, relating to the right to education that all persons enjoy, as well as Article 19 of the Universal Declaration of Human Rights and Article 19 of the International Covenant on Civil and Political Rights as regards the right of information and the right to freedom of opinion and expression. Nor can we omit the norms on age and gender discrimination, included in several provisions referring to children and women, respectively, such as the Convention on the Rights of the Child and the Convention on the Elimination of All Forms of Discrimination against Women (1979).

Within the list of Inter-American texts we should mention the American Declaration on Rights and Duties of Man (1948), as the first regional instrument to include a catalogue of cultural rights. Article XIII of the Declaration determines that:

> *"Every person has the right to take part in the cultural life of the community, to enjoy the arts, and to participate in the benefits that result from intellectual progress, especially scientific discoveries.*
>
> *He likewise has the right to the protection of his moral and material interests as regards his inventions or any literary, scientific or artistic works of which he is the author.*

Further, Article 14 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador) added the obligation of states to "respect the freedom indispensable for scientific research and creative activity".

The above are some of the references to cultural rights in the international norms. We should also add here the UNESCO Conventions that specifically address issues on cultural property and diversity, including the 4 most recent ones:

Convention Concerning the Protection of the World, Cultural and Natural Heritage (1972).
Convention on the Protection of the Underwater Cultural Heritage (2001)
Convention for the Safeguarding of Intangible Cultural Heritage (2003)
Convention on the Protection and Promotion of the Diversity of Cultural Expressions (2005).

2. Convention on the Protection and Promotion of the Diversity of Cultural Expressions

I want to thank the divine labyrinth of effects and cause for the diversity of creatures which form this strange universe. (Borges. *Another poem on gifts*) *Free translation*	*Gracias quiero dar al divino laberinto de los efectos y de las causas por la diversidad de la criaturas que forman este singular universo.* (Borges. *Otro poema de los dones*).

The fact of including culture within globalized mono-culture policies is one of the contemporary perversions from which we have not yet been able to recover completely. Precisely in light of this kind of perversity, UNESCO approved the Convention on the Protection and Promotion of the Diversity of Cultural Expressions in October 2005, as a substantial step to revert many decades of policies against multiculturalism. But we must not boast victorious too early. Diversity does not happen by decree, especially if there is still a mono-cultural hegemony that mistrusts any attempt to make it cede an inch or simply questions it. Subordinating culture and its creative processes to the machinery of capital was immensely detrimental for intellectual and artistic values in our countries. Little by little the market has consumed the critical breath of many cultural and authentic expressions. Not all of them, luckily. Serial production evidences that demolishing trend. Access to broadcasting circuits is frequently discriminatory, and therefore many cultures have not been able to at least be visualized, let alone be known to the majority of the population. That is how we find out that every year the last speaker of a language -which we in our "civilized centers" have never heard of- passes away. Recently in Venezuela, my country, the last *mapoyo* speaker died. (*Mapoyo* is an Orinoco language). In the meanwhile, the cinema that we exhibit in America and Europe continues to be more than 80% North-American, notwithstanding the excellent productions from Portugal, Spain, France, Germany, Argentina or Venezuela, not to mention Iranian or Chinese productions. An indefatigable erosion of culture has been happening around us. Many cultures have no refuge other than catacombs or thematic parks, and the breathlessness or nervousness that this represents.

It is a paradox that at a moment in history in which technological possibilities permit the creative and educational dissemination of the most varied cultural forces in the world, we only hear a single language and the same message.

I believe that the cultural standardization of people to some extent means to mediatize their creative capacity. And this is what the powerful mediatic machinery of cultural capital is doing with us. Many decades ago the first voices of protest were raised against this systematic alienating program. Thus, we cannot help mentioning the components of the Frankfurt School, who used the expression "cultural industry" to denominate the phenomenon. Although not sharing the elitist tone that stemmed from that German protest, I believe that it opened a respectable path that was instrumental, among other things, in helping social sciences to seriously engage in the topic.

A legally significant step was taken in the year 2005. From cultural exception we arrived at cultural diversity. But there is still a long way to go in order to achieve a real cultural dialogue and a fairer and more balanced universal community.

Why is it that we have to talk about diversity in America? Simply because America is a vigorous and dynamic system of bio-cultural diversity. That is why we may think, write and perform **cultural diversity** with the necessary strength and imagination to make it something fertilizing.

Let us begin with something that is of great concern to the inter-American juridical system:

The recognition of diversity is an act of democracy, involving individuals and peoples. For that reason, the UNESCO Convention is right when it refers to it as a common heritage of humanity. It is not only an effective mechanism to preserve the peoples' memory, but a property to be maintained. From being a natural fact it has become an object for reflection to be accepted and adopted by science. From biodiversity to cultural diversity. That is to say, from the natural fact to the project of coexistence that at present gains life in international positive law.

Supra-national hegemonies in the democratic area of culture try to avoid confiscation. This is public property, collective property. Let's recall the WTO's attempt to regulate cultural goods as if they were just merchandise. Perhaps the most important ingredient in the relationship between cultural diversity and democracy is to represent a real channel for inclusion, through effective participative forms.

Of course, this participation system has to be supported by cultural rights, the development of which has been quite significant in the last few years. The master-key of participation lies in ***interculture***, which in turn finds its basic grounds in the value of equality. The fact is that there is still an odious hierarchy of cultural expressions and that there are still circuits in charge of ignoring so-called "popular culture" in favor of elitist forms. The presence of ***inter-culturality*** as an active tool is to challenge that trend.

Master Jesús Prieto de Pedro highlights that "this democratic, participative and egalitarian order translates into cultural rights (…), cultural rights configured as fundamental rights, which displace the center of gravity in the performance of that public property". And the Spanish professor continues: "One of the most attractive phenomena of 20th century's constitutionalism has been incorporating culture as a public issue, but from a providential vision, for everybody, through which public powers received mandates and tasks related to cultural development, with the promotion of creating, transmitting and guaranteeing the conservation of culture. However, it was about exempting goods, but leaving the main individual aside. Cultural rights, insofar as resistance, subjective legal powers (the subjects outweigh the institutions that perform them), and also (powers) for participation and demand before public powers, are meant to reduce arbitrary margins, in the best of cases, from the whims and crazy ideas of power in the anomalous performance of cultural goods. That is their fundamental mission".

Firstly in some European constitutions (the Spanish of 78 and the Portuguese of 76), and afterwards in the most recent Latin American constitutions (Brazil, Colombia, Bolivia, Venezuela), a substantial development of cultural rights has taken place.

In the presence of the phenomenon of worldlization of culture, it is essential to join national legal systems to international law rules that provide protection of the diverse cultural expressions and promote a balanced dialogue among them. Cultural diversity, luckily, is already a principle in international law, articulating other cultural rights that help protect and develop that principle.

3. Cultural Diversity and International Law

On March 18, 2007 the Convention on the Protection and Promotion of the Diversity of Cultural Expressions, adopted by UNESCO in October 2005, came into force. It is, I believe, a historical fact, not only for its significance as a legal achievement of culture in gaining a larger presence within International Law, but also for the possibilities this instrument provides for vigorously channeling cultural policies marked by pluralism. It is in itself a step forward the fact that concepts such as cultural diversity and inter-culturality form part of positive law, and not merely notions used by the doctrine or by academic speeches that have dealt with the topic for some time now. With the Convention, these categories now gain an obvious legal belligerency.

Let us present a very brief account of the legal treatment of the topic on cultural diversity.

Declaration

The first idea we must recall is that of "cultural exception", which appeared as a defense mechanism to mitigate the effect of market laws on bilateral trade agreements. Of course this was a step forward, but only as an attempt to demand a different look at cultural assets. The topic was then kept within a limited territory in the contractual field and was conceptually deceitful. Its use was inspired in market ideology and its presence drew more from the GATT rules than from a cultural claim in itself. For some time the enormous differential factor of culture would be seen as a market concession rather than a predominant feature at the time of interchange.

At its General Conference in November 2001, UNESCO approved the Universal Declaration on Cultural Diversity. The paradigm of diversity, worked in academic and social environments, started to have evident acceptance. The conceptual aspects of greatest importance in the Declaration were represented by cultural pluralism, respect for human rights, the promotion of creation and international solidarity, which for the States Parties were the basic elements within the essential ethical horizon to build a world characterized by coexistence, tolerance and recognition and respect for all cultural expressions, as the basis for sustainable development. Our time, characterized by the predominance of trade interests and by practices that provide a safe-conduct for the appropriation of cultural richness, allowing it to travel everywhere with impunity, began to face new limitations.

From the moment the aforementioned Declaration (was adopted), the topic on cultural diversity started to gain force in the area of international law, and intense negotiations and meetings of experts were convened to shape and prepare the final Draft Convention that was finally adopted by the UNESCO member countries on October 20, 2005, with only two votes against: United States and Israel. Having defeated the lobby opposed to the Convention led by Condoleezza Rice, the international cultural community was given forceful backing for an instrument which had been drafted in the most ample and rigorous manner.

Convention

In little more than two years, almost a hundred States have deposited the ratification, acceptance or adhesion to instruments for the Convention on the protection and promotion of the diversity of cultural expressions.

Relevant aspects of the Convention:

Principles

We consider that the first relevant aspect lies in the consecration of cultural diversity within positive law. The Convention puts culture in its own legal space, unlike that of international trade law and in no way subordinated to it.

Understanding that there is not a unique culture, or a single thought, or a single history, or a unique view, or a unique language, and so on, is to bet on coexistence in the planet and on respect for all human beings, without discrimination of any nature. To provide legal protection for plurality is obviously a great cultural step forward. In addition, this protection is born from the vital verification that diversity is a cultural property in itself, and one of the fundamental patrimonies of human beings.

The second, in our opinion, is represented by the recovery of a not exclusively mercantile way aspect, of treating cultural goods and culture in general. This includes going against the tide as regards so-called globalization and the predominance of a regulatory framework for trade that included, indistinctively, cultural creation and any kind of merchandise.

In the third place we should refer to the recognition that diversity represents regarding creations, traditions and popular knowledge, which, while unprotected, were at the mercy of misappropriation

and looting by the economic voracity of corporations or international companies, whose aims were quite removed from those of culture.

Without exhausting the list of basic ideas that the Convention contains, we should not forget the principles of solidarity and cooperation which oblige Party States to create a reinforced media for cultural expression in developing countries, as well as the complementary principle of economic and cultural aspects within that development, principles which are compulsory both for the public sector and private individuals.

Mechanisms

The Convention establishes an institutional infrastructure to ensure compliance. Said infrastructure is composed by the Parties' Conference and by the Intergovernmental Committee.

In accordance with Article 22, the Conference of Parties is the plenary and supreme body of the Convention and shall meet in regular sessions every two years, if possible in conjunction with the General Conference of UNESCO.

The Intergovernmental Committee shall be composed of representatives of 18 States Parties to the Convention, elected for a term of four years and shall be in charge of the effective promotion and encouragement of the purposes of the Convention, as well as monitoring its application.

A policy for the real prevalence of the Convention

We are of the opinion that only the implementation of a cultural policy promoting the application of the Convention and the establishment of effective formulas to allow it to have deep roots will facilitate enforcement of the principles established by the Convention. It is up to the States Parties to play this crucial effort. We have already stepped into this stage that we could denominate "the hour of truth". The ratification process for the Convention has been a good indicator to measure the degree of importance that countries grant the Convention.

Our obligation is not to repeat the history of some conventions or international treaties which became dead letter as a result of the lack of a firm determination as regard their enforcement.

In our regional environment the Inter-American Juridical Committee may provide a contribution in the form of pertinent guidelines at the international level vis-à-vis the enforcement of the principles contained in the Convention, as well as by exploring other means for the concretion of the paradigm of cultural diversity among us. Observing carefully the thematic agenda of the Committee, one will easily realize the considerable number of matters that we are addressing which are connected to cultural diversity. The case, for example, of the Convention against all Forms of Discrimination and Intolerance that on the Innovative Forms of Access to Justice, not to mention other issues that are not included as yet in our catalogue of studies, but that will certainly be incorporated soon, including the topics on private International Law, where cultural diversity plays a relevant role, and that we cannot deny.

Appendix

REFLECTIONS ON THE PRESENCE OF CULTURAL DIVERSITY IN THE VENEZUELAN CONSTITUTION OF JUDICIAL POWER AND THE SYSTEM OF JUSTICE: THE ETHICAL CHALLENGE[17]

The enshrinement of cultural diversity in our Constitution also implies recognition of various ways of imparting justice without jeopardizing nationally and internationally protected fundamental rights. This doubtless represents the basis for starting among Venezuelans a new juridical culture that privileges principles, virtues and ethics above mechanical applications of single, closed norms and also uses the administration of justice as an effective tool for solving problems rather than an instrument to aggravate and prolong them.

The guideline of cultural plurality coincides with the concept of justice, expands its view and incorporates traditions that lay on the margin of State hegemony and were considered against the law. Adopting a constitutional text that gives rise to the alternative means of justice and establishes special

[17]. Freddy Castillo.

jurisdictions is a way of materializing the pluricultural character of the Bolivarian Republic of Venezuela.

The paradigm of cultural diversity enables Law to be seen as something more than written laws, and facilitates drawing closer to the rich tradition of customs and daily life as important sources of juridical value. Dialogue, agreement, understanding the Other, harmonious interchange of reasons and the "good neighbor" philosophy are appropriate forms of living together linked to genuine respect for human, personal and collective rights.

The writers of the Constitution included in the Magna Carta a norm that orders the law entrusted with peace justice to use arbitration, conciliation, mediation and any other optional measures to settle disputes. Likewise, it is allowed to use instances of justice based on ancestral traditions on the part of the legitimate indigenous authorities. All this constitutes a path to develop by legislation and jurisprudence, coherently and in the awareness of contributing to create a juridical culture that is more civic and human.

Below are some aspects suggested for consideration of the topic of cultural diversity as it relates to the judicial power and the system of justice.

Cultural diversity and peace justice in the communities

Article 258 of the Constitution established peace justice for the communities, as well as universal, direct and secret election of the judges entrusted to apply it. The law will be responsible for setting the guidelines and developing the fundamental principles of this form of administration of justice based on a culture of dialogue, living together and finding solutions. The writers of the Constitution were clear and forceful: first, the community must elect those it feels are capable of fulfilling the role of peace judge; and secondly, peace justice is not punitive, it is justice to remedy or avoid disputes.

One of the values that the paradigm of cultural diversity fosters is precisely that which protects this constitutional norm: living together in communities. It is up to the legislator, based on the axiology indicated above, to allow effective and extensive peace justice that can use the appropriate means of settling disputes.

Cultural diversity and ancestral traditions

One of the most important innovations that the Constitution of 99 embodied in the judicial sphere was to create a special jurisdiction for the indigenous communities of Venezuela. This is actually an express acknowledgement of cultural diversity, for it means that the indigenous peoples can resort to instances of justice based on their ancestral tradition by means of regional laws that allow them to exercise jurisdictional functions within their habitat and only with reference to their members, with their own rules and procedures. The law will only establish mechanisms that coordinate this indigenous jurisdiction and the national system of justice.

What we witness here is the vigorous insertion of customary law within the Venezuelan justice and largely connected to positive law, that is to say, written law. Customary law, as is known, is a system of norms based on uses, customs and traditions.

Cultural diversity, administration of justice and human rights

The Constitution of 99 was constantly guided by guaranteeing human rights. So the judicial system must be vigilant that these rights are complied with and repair any violation of same. One of these rights is directly related to cultural diversity. Indeed, our Constitution guarantees equal treatment to all people and all cultures and in its Article 21 expressly prohibits any form of discrimination, granting the judicial power (the Constitutional Hall of the Supreme Court of Justice) the faculty to annul norms or acts that conflict with the Constitution. So any violation of the principles of cultural diversity by law, regulation, administrative act or action can be denounced before the Defense of the People and submitted to annulment on the part of our supreme Tribunal.

THE LEGISLATIVE: THE CHALLENGE TO PARLIAMENT[18]

The Venezuelan Constitution in effect has traced for the so-called "cultural sector" of the country a route that was hitherto juridically unheard of: a route that includes autonomy, diversity, equality and inter-culturality, among other concepts, which represent expressions that have been current in the academic milieu for the last few decades but had not yet reached at the conventional

18. Freddy Castillo.

texts of Venezuelan law. Now the important agenda traced by the Constitution as regards culture needs to be fulfilled, and its necessary normative development attended to. This national commitment cannot be postponed, nor can the international obligation of the State to see immediately to the legislation of cultural diversity in the light of the Convention adopted by UNESCO in October 2005.

Furthermore, a contextual view of the Constitution reveals the obligation to drive forward a process where culture is for the country an indispensable field for dialogue and the fruitful exchange of differences, the place for limits that cross over and where the contribution of forgotten traditions or excluded practices can become truly fertile. In this way, from a broad and diverse point of view, effective application of the Constitution can make culture something more than a merely functional tool.

It is essential to hold a debate where experiences of yesteryear and the present can be evaluated, and the basic concepts of a cultural policy properly defined and determined, founded on the clauses of the brand-new Venezuelan Constitution. In this way, the sources could be explored for a dynamic transformation of cultural institutionalism, the key elements of which are cultural diversity and the autonomy of the public instances responsible for driving this policy.

The Legislative Power entrusted with adopting an Organic Law of Culture, among other normative bodies, has a fundamental role to play in this task. It has to set the basic framework for the action of the states, municipalities and communities; it also possesses competences that were expressly established by the Constitution in some areas, such as cultural heritage, intellectual property and social security for those who work with culture.

By way of illustration, the following paragraphs briefly develop some aspects suggested for consideration on the topic of cultural diversity as it relates to the Legislative Power.

Cultural diversity, author's rights and ancestral knowledge

Our Constitution overcame the unfair anachronism of reducing copyright to the sphere of intellectual property. And that is not all. Unlike the previous constitutional text (which included them in the chapter on economic rights), it opened the possibility for them to be what they really are: rights of culture rather than instruments for the appropriation or exclusivity of knowledge, and did so without this affecting the possibility of offering honest means of remuneration to their real owners.

In fact, Articles 98 and 124 enshrine the intellectual right of individuals and ancestral indigenous knowledge, respectively. These constitutional norms open the possibility of legislative development and a cultural policy that go beyond the patrimonialistic conception of copyright, also serving to protect collective creation, wider dissemination, and a more democratic appreciation of knowledge, art and all the products of human, individual or collective ingenuity.

The immediate task of the Legislative Power is to discuss and approve a Law of Intellectual Rights to develop the above-mentioned precepts of the Bolivarian Constitution.

National legislation for cultural diversity

In addition to producing a law to ratify the Convention of Cultural Diversity adopted by UNESCO in October 2005 with our active participation and vote, legislating on cultural diversity in a broad fashion facilitates applying the principles that the Constitution enshrines on the matter and fundamentally guides and prepares citizens prepared to recognize and appreciate cultural diversity. In this way, regional, municipal, rural and urban realities could benefit from the possibility of a dialogue that goes far beyond exchanging applause or taking part in some common spectacle. Recognizing differences of gender, age, sexual preference, ethnic origin, linguistic expression; understanding the specific needs of the offender, the victim, refugee and so on are challenges for an ethical and plural society that is more egalitarian, just and solidary. This law on cultural diversity could unfold in several texts, one of which the Organic Law of Culture. Of course, one should not discard a specific law on cultural diversity that uses what is fundamental in the Convention approved by UNESCO and which deals with specific aspects of Venezuelan reality.

A regional and municipal juridical framework for cultural diversity

Article 158 of the Bolivarian Constitution of the Republic of Venezuela sets forth that decentralization is a national policy and not just a technique of redistributing competences. But the writers of the Constitution did not stop there. Besides setting the decentralizing obligation for states and municipalities, they had the good sense to include a provision (Article 184) granting to peripheral communities and groups the possibility of managing directly services such as culture. The precept is

doubtless an extraordinary tool for developing the principle of cultural participation which is so relevant in the Constitution. Alongside the autonomic and decentralizing clauses is a juridical regime that brings us quite close to the State of Culture. And what is more relevant is that this master-key to cultural autonomy and recognition of a freer form of management allows living together in trust, as opposed to the impositional, authoritarian and clientele-minded models.

Cultural diversity and social security for those who work with culture

Cultural work as diversity or as a difference in itself – here lies the genuine sense of the constitutional norm that enshrines the guarantee of social security for those who dedicate themselves to culture. A juridical regime based on the ideology of productivity or corporative laws could not include culture workers within the social security systems. Recognizing that there exists another type of worker is a sign of respect for cultural diversity. In Venezuela today we have the certainty that cultural workers are also considered workers. Although it sounds like a lie, up to now this was neither constitutional nor legally clear. Now the State, in conformity with Article 100 of the Constitution, will guarantee that cultural workers are included in the system of social security, and will endeavor to enable them to lead a dignified life, always considering the particularities of cultural activity. It is up to the Legislative Power to develop this important scope of the Constitution.

INTERNATIONAL RELATIONS: SOLIDARITY AND REGIONAL INTEGRATION AS CHALLENGES[3]

If there is one topic where cultural diversity as a genuine State policy can find itself subjected to examination, it is precisely that of international relations. The Venezuelan Constitution showed this very clearly: to promote peaceful cooperation among the nations and drive and consolidate Latin-American integration according to the principle of non-intervention and self-determination of peoples. By overcoming the concept of Nation-State, with all its historical hindrances, Venezuela now adopts a concept of integration that necessarily includes culture, not to generate uniformity but rather to nurture the diversity of cultural processes and expressions.

Indeed, Article 153 states that "the Republic will promote and favor Latin-American and Caribbean integration in order to move toward a community of nations and defend the economic, social, cultural, political and environmental interests of the region".

A contextual interpretation of this norm incorporates the principle of diversity of culture so as to avoid uniformity in a region characterized by many similarities but also by many differences, including geographical, linguistic and historical. If cultural plurality is recognized in our country, then we Venezuelans are obliged to recognize it abroad.

Latin-American and Caribbean integration will only be possible if based on culture. In the light of cultural diversity, a form of diplomacy is called for that begins with integrating peoples rather than imposing "similarities". A foreign policy is necessary that disseminates the traditions, history and values of national identity with the same breadth and quality that should be shown when receiving the information that other countries offer. All this makes it indispensable to train diplomats for cultural diversity, diplomats for integration.

Below, some aspects are briefly addressed as suggestions for consideration on the topic of cultural diversity and international relations.

Cultural diversity and public cultural spaces of integration

We must sponsor public cultural spaces for integration. This presupposes carrying out common studies and activities on the part of the countries involved in this process. Accordingly, we would be doing nothing in Mercosur, for example, if we limited ourselves to the economic aspects of this integration. The public cultural space for integration is its genuine space, the only one that guarantees its permanence, over and above material circumstances. In this sense, we have to bring together a cultural policy that furthers the interchange of real experiences among the various countries and offers a deep mutual knowledge.

Trans-border cultural regions

The exercise of territorial sovereignty implies a borders policy where the values of culture are clearly present. These values include those derived from inter-culturality or the common presence of traditions. Where to place the limits is one of the hardest tasks of culture. The true limit is to be here

[3] Freddy Castillo.

and there at the same time. Geographical lines are only drawn amiably and harmoniously by culture. In other words, they cannot be drawn. And so, we must recognize the existence of common traditions in areas of different jurisdiction. Venezuela and Colombia, for example, have a political-territorial reality that must be compatible with a culture that transcends them.

Cultural diversity, the Republic, the community of nations and binational and international cooperation

The binational and international relations of our country demand a clear conscience on the importance of cultural diversity. There can be no community of nations or binational and international relations if the committed countries fail to include in their agendas common studies, research and cultural activities. It is not a question of exchanging spectacle for the purpose of being seen or applauded or just to attract admiration. It is a matter of exploring possibilities of permanent, not circumstantial, cooperation.

Cultural diversity and the human rights of refugees and exiles

The international norms ratified by Venezuela, as well as the Organic Law contemplated in the Constitution on the matter, oblige us to protect the human rights of refugees and exiles. There is a sure possibility of applying the principles of cultural diversity, admitting fully and without any imposition whatsoever the existence of persecuted cultures or communities that can count on our support without giving up their particularities. Let us remember the notable experiences of countries that have enriched their cultures by granting refuge to communities expelled from other territories.

Cultural diversity and human resources specializing abroad

Engaging in a foreign policy that includes cultural diversity necessarily depends on the existence of human resources prepared to carry it out. We know that at present there are no institutions of higher education or special training centers whose academic profile meets this demand. A fully qualified "integration", professional or a fully qualified cultural diversity professional does not exist among us today, at least in what we know is offered by the Venezuelan universities. It is indispensable to devise up training programs that begin to fill this lacuna and try to prepare Venezuelans to take part in a form of diplomacy of cultural integration that is sensitive to understanding.

Cultural diversity and international promotion of Venezuelan culture

Venezuelan culture is without any doubt the best mechanism to promote our country internationally. It is also the best instrument for dialogue with other countries. The natural mechanism of the diversity of cultures works more effectively than any program based on the diplomatic approach. The cultural differences encourage looking at similarities and vice-versa. Thus, the gastronomic tradition as the secret dialogue between myths and legends (to give only two examples), represents open avenues not only to show our identity marks but also to see ourselves as others see us. Because this is what is at stake: to promote our cultures the better to know those that are apparently alien to us.

Venezuelan cultural diversity, how it is managed, and diplomatic representation of the country overseas

Managing Venezuela's cultural diversity abroad presupposes activating permanent programs to spread and reflect upon our values and plural heritage. Of course it is necessary to have acquired awareness of the importance of culture as form and content. Diplomatic representation that is limited to political formality will not satisfy the country. Nor will the sort that dedicates itself to the ornamental presentation of "cultural" spectacles. The diplomatic representation of the country abroad is in the first place a representation of our culture. Only afterwards will it become a representation of a government or a policy.

THE SECURITY OF THE NATION: THE CHALLENGE OF BEING SOVEREIGN AND INDEPENDENT[4]

Article 326 of the Constitution of the Bolivarian Republic of Venezuela contemplates an integral concept of security grounded in the principles of independence, democracy, equality, peace, freedom, justice and solidarity. Its application is guided toward promoting and conserving the environment, and affirming human rights, as well as progressively satisfying the individual and collective needs of the Venezuelan population, based on sustainable and productive development that fully embraces the national community.

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[4] Freddy Castillo.

Putting this integral doctrine of security into practice is not the exclusive responsibility of the State. Those who drafted the Constitution had the wisdom to include under the principle of co-responsibility the participation of individual citizens by enumerating some of the spheres where this can be exercised, such as the economic, social, political, cultural, geographic, environmental and military fields.

In order to comply fully with this public and private co-responsibility, an awareness of security is needed that develops its integral character in a broad manner. To understand security as a matter bound to geography, politics or the military is to leave the most important thing unprotected: the nation's cultural sovereignty. As is known, so-called globalization and the mercantile use of culture have already taken up enormous spaces. Consequently, there is need for a long and patient educational process to regain the lost terrain and preserve and enrich the values of sovereignty.

Cultural diversity is also geographic diversity. The former cannot be understood without the latter. The opposite is also true. Exercising true sovereignty requires deep and wide knowledge both of the different cultural components that identify the Venezuelan people and the territorial components that make up the country. What a wise old Venezuelan writer called "understanding Venezuela" includes space as a social, cultural, ecological, political and economic given not just as physical reality. In the agenda of cultural diversity this topic is indisputably relevant and presupposes applying transportation programs on all levels and sectors connected with the nation's security policies.

The sense of belonging to a culture, to a place, to some traditions and a common history is probably the most solid base for defending a people's sovereignty.

By way of illustration, what follows is a brief introduction of some aspects suggested for consideration on the topic of national security and cultural diversity.

Cultural diversity, national sovereignty and border spaces

For our constitutional text, border vigilance is one of the priority roles in the national security policy. This text entrusts the law with special regulation of the border areas and stresses protection of the environment and the indigenous population that is settled there, as well as the development of a regime that includes the particular economic and social aspects of these spaces. Materializing this constitutional mandate in full harmony with human rights calls for incorporating the concept of cultural diversity in an effective manner. So, we cannot understand borders as spaces limited to mere cartography, we must see them as places alive with stories, traditions, encounters, differences and similarities. If we assume this imperative in the light of cultural diversity, we shall be defending our sovereignty in a far broader and permanent way, without jeopardizing the indispensable cooperation with our neighbors.

Cultural diversity, the National Armed Forces and citizens' security organizations

The preamble of the Constitution establishes as an objective of the Republic to consolidate independence, peace and territorial integration, among other fundamental values. This implies the active presence of a National Armed Force and some organizations dedicated to the security of the citizens. This dedication is not restricted to technical aspects, but presupposes an awareness of integral security sustained by culture, respect for human rights and furthering living together as a result daily social practice. Both the military and civilian bodies that comprise the Defense Council of the Nation should coordinate training programs that include full understanding of these values based on the cultural and geographic diversity of Venezuela.

Cultural diversity and managing the geographical reality

Exercising sovereignty over the territory is far more than military defense of the area. It is the cultural occupation of the spaces on the part of the population using the different free and peaceful ways of identifying with them. That is why the nation's security and defense policy must be harmoniously articulated with its cultural policy, especially if we consider a context like today's, with territorial realities suffering from interference by the tentacular, changing technology of communications and other factors of an economic, social and cultural nature that directly or indirectly affect our relation with physical space. Our history teaches us, both cruelly and eloquently, that preserving the territory is not an exclusively military or diplomatic matter. It is a cultural issue. In fact, spaces are lost, won, recovered or divided by the vigilant, creative and living mediation of culture.

10. Strengthening the consultative competence of the Inter-American Juridical Committee

During the 74th regular session of the Inter-American Juridical Committee (Bogota, Colombia, March 2009), the Committee decided to include on its agenda an item on "Strengthening the advisory capacity of the Inter-American Juridical Committee," and it asked Dr. Fabián Novak to serve as rapporteur. Dr. Novak commented that he had accepted to be rapporteur on the subject, but that he was still not clear as to the mandate, since members had referred various times during the session to the advisory function of the Committee, but they had also alluded to strengthening the Juridical Committee and its visibility, and to the need to establish alliances with NGOs, civil society, and OAS organs, which entails a broader and different proposition.

During the 75th regular session of the Inter-American Juridical Committee (Rio de Janeiro, Brazil, August 2009), Dr. Fabián Novak presented a preliminary report on the topic (CJI/doc.327/09), providing very detailed information on the consultative competence of the Juridical Committee as set out in the instruments on which that function is based: the OAS Charter and the Juridical Committee's Statute and Rules of Procedure. He also presented proposals and alternatives, but said that he would like to hear the opinions of the other members in order to fine tune what he had produced to date. In addition, Dr. Novak thanked the Secretariat of the Committee, in the person of Dr. Manoel Tolomei Moletta, for sending information of great importance to his research.

In consideration of the opinions expressed at the session, it was agreed that Dr. Novak would present a final document for consideration by the Committee at its next meeting in March, to be distributed among the members prior to that event. The rapporteur also proposed preparing an additional report – shorter and more informative – for distribution among the Member States of the OAS.

11. Asylum

During the 75th regular session of the Inter-American Juridical Committee (Rio de Janeiro, Brazil, August 2009), Dr. Dante Negro explained that his topic arose from a proposal made by Venezuela, which was taken up by the General Assembly and is included in the submitted document containing the General Assembly mandates. In dealing with this mandate, the Committee should take into account the work carried out by the CAJP. For information purposes, he added that the Department of International Law has been organizing annual courses on the topic of refugees, with the cooperation of the UNHCR. The first course was held in February of this year, and the next one is scheduled to take place in February 2010.

The Committee elected Dr. Ana Elizabeth Villalta Vizcarra to serve as rapporteur for this new topic.

Dr. Jean-Paul Hubert brought up a question regarding the term "refuge" versus that of asylum, as indicated in the English translation of the mandate, which appeared unclear to him. This remark was seconded by Dr. Baena Soares, who asked whether the Committee should deal with refuge (*stricto sensu*) or asylum (*lato sensu*).

Dr. David P. Stewart noted that under common law, the difference between asylum and refuge was not clear cut. Refuge is defined in the 1951 Geneva Convention and its Protocol, while asylum, as a form of temporary protection, is geared more toward diplomatic protection. He therefore lodged a consultation regarding the relationship between this proposal and the topic of migration already on the Committee's agenda.

Dr. Jorge Palacios Treviño explained that refugee matters were governed by the 1951 Geneva Convention, an instrument adopted after the Second World War when there were enormous numbers of stateless persons. In contrast, asylum deals with political situations; it is a matter of political law and is governed by three international conventions: Havana (1928), Uruguay (1933), and Caracas (1954).

Dr. Villalta spoke of the conceptual differences between asylum and refuge in the civil and common law systems, and she said that the Committee's challenge was to bring those differences into line with each other. She noted that refuge came into play as a result of different forms of persecution, among which migration is currently included, whereas asylum was essentially political in nature.

12. Freedom of thought and expression

During the 75th regular session of the Inter-American Juridical Committee (Rio de Janeiro, August, 2009), Dr. Dante Negro explained that the mandate originated in General Assembly resolution AG/RES. 2515 (XXIX-O/09), which requested the Juridical Committee "to conduct a study on the importance of guaranteeing the right of freedom of thought and expression of citizens, in light of the fact that free and independent media carry out their activities guided by ethical standards, which can in no case be imposed by the state, consistent with applicable principles of international law."

The Chair recalled the importance of the topic and mentioned that both the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights had pronounced on the matter in the sense of linking the words ethical and responsibility with respect to freedom of expression. Considerable jurisprudence had been developed on that subject. In the countries of the Americas, attempts had been made to repress the media with the argument that they were not responsible or were unethical. Attempts had even been made to establish various kinds of press tribunals or to have the press exercise self-control. Such attempts had a bearing on the topic of access to information.

Dr. Hubert asked about the advisability of linking the subject of freedom of thought and expression with that of access to information, for which there was currently no mandate. On that, Dr. Negro reported that the member states had preferred to keep the two topics separate, for technical reasons.

The Committee Chair recalled that the 10 principles had been issued and disseminated and that currently the General Assembly had entrusted the Secretariat for Legal Affairs with the preparation of a model law, with participation by the Juridical Committee.

Dr. Fernández de Soto offered to be the rapporteur, a proposal approved by the other members.

13. Access to public information

During the 75th regular session of the Inter-American Juridical Committee (Rio de Janeiro, Brazil, August 2009), the Chairman, Dr. Jaime Aparicio Otero, speaking in his capacity as rapporteur, said that in his opinion the topic was closed with adoption of the ten principles governing access to public information, which have been broadly publicized by the OAS, through the General Assembly, and at the regional and European levels, enjoying a good welcome from the international community and from all the civil society organizations involved with the area. He recalled his attendance at meetings in Lima and Hungary, which recommended that those principles should form the basis of any legislation. He therefore suggested declaring the topic closed.

He added that there was a General Assembly mandate, directed to the Department of International Law, for the drafting of a model law on the subject; since the Juridical Committee was cooperating with that, it was therefore an indirect mandate of the IAJC. He reminded the members that his time on the Committee was to end this year and suggested that Dr. David P. Stewart assume the rapporteurship for future work.

14. Institutional and Legal Cooperation with the Republic of Haiti

During the 75th regular session of the Inter-American Juridical Committee (Rio de Janeiro, Brazil, August 2009), the Chairman reminded the members that the topic was proposed by Dr. Ricardo Antônio Silva Seitenfus, a former member of the Committee currently serving as the representative of the Secretary General in Haiti. He remarked that he had had the opportunity to visit that country and to meet with the Minister of Justice, who expressed a keen interest in reforming the criminal and procedural codes as well as in other topics deserving of the Juridical Committee's cooperation. As he saw it, the Committee's actions are constrained by a lack of resources, and for that reason he proposed leaving the topic pending while external resources for funding that cooperation were sought. The Chairman's proposal was approved.

CHAPTER III

OTHER ACTIVITIES

ACTIVITIES CARRIED OUT BY THE INTER-AMERICAN JURIDICAL COMMITTEE DURING 2009

A. Presentation of the Annual Report of the Inter-American Juridical Committee

At the first meeting of the 75th regular session (Rio de Janeiro, Brazil, August, 2009), the Chairman of the Inter-American Juridical Committee, Dr. Jaime Aparicio Otero, gave a verbal report on the March 2009 meetings with the Working Groups of the Committee on Juridical and Political Affairs involved with topics on the Juridical Committee's agenda, with a view to presenting the Annual Report of the IAJC to the General Assembly. He also reported on his attendance at the 39th regular session of the General Assembly, held in San Pedro Sula, Honduras, which handed down seven mandates to the Committee.

B. Course on International Law

Between August 2 and 21, 2009, the Inter-American Juridical Committee and the Department of International Law of the OAS Secretariat for Legal Affairs organized the 36th Course on International Law, with the participation of 22 professors from different countries of the Americas and Europe, 29 OAS scholarship recipients selected from among more than 70 candidates, and 7 students who paid their own attendance costs. Among the scholarship recipients were four Afro-descendants – two from Jamaica, one from Belize, one from Haiti, and one from the Dominican Republic – who were able to participate thanks to the support of funds from CIDA/Canada. The Course's central topic was "Universalism and Regionalism at the Beginning of the 21st Century." It should be noted that this year, the duration of the Course was reduced to three weeks on account of budget problems, which did not lead a proportional increase in the costs to Rio de Janeiro.

The inauguration of the 36th Course of International Law took place on August 4, 2009, at the Convention Center of the Hotel Everest Rio. Dr. Ana Elizabeth Villalta Vizcarra paid homage to the distinguished Uruguayan jurist Felipe Paolillo, a former member of the Inter-American Juridical Committee.

The Chairman welcomed the members of the Committee and expressed his satisfaction at that morning's opening of the 36th Course of International Law, at which homage was paid to Dr. Felipe Paolillo, a former member of the Committee, by Dr. Ana Elizabeth Villalta Vizcarra.

The Course timetable was as follows:

36th Course of International Law
Rio de Janeiro, August 3 to 21, 2009
"Universalism and Regionalism at the Beginning of the 21st Century"

Week One

Monday 3

9:00 – 9:45	**Registration**
9:45 – 10:30	**Inauguration** **Jaime Aparicio Otero** Chairman of the Inter-American Juridical Committee Opening address **Jean-Michel Arrighi** Secretary for Legal Affairs of the OAS Opening address **Ana Elizabeth Villalta Vizcarra** Member of the Inter-American Juridical Committee *"Homage to Professor Dr. Felipe Paolillo"*
10:30 – 11:00	**Break**
11:00 –1:00	Brief message from Course Coordination

Tuesday 4

9:00 – 10:50 **Jean-Michel Arrighi**
"Current developments in the Inter-American system" (I)

11:10 – 1:00 **Luis García-Corrochano M.**
Professor of public international law at the Diplomatic Academy of Peru, member of IHLADI
"Investment dispute resolution in international law" (I)

2:30 – 4:30 **Jorge Cardona Llorens**
Chair of public international law at the University of Valencia, Spain
"Universalism and regionalism in peace-keeping at the start of the 21st century" (I)

Wednesday 5

9:00 – 10:50 **Jorge Cardona Llorens**
"Universalism and regionalism in peace-keeping at the start of the 21st century" (II)

11:10 – 1:00 **Luis García-Corrochano M.**
"Investment dispute resolution in international law" (II)

2:30 – 4:30 **Jean-Michel Arrighi**
Secretary for Legal Affairs of the OAS
"Current developments in the inter-American system" (II)

Thursday 6

9:00 – 10:50 **Jorge Cardona Llorens**
"Universalism and regionalism in peace-keeping at the start of the 21st century" (III)

11:10 – 1:00 **Luis García-Corrochano M.**
"Investment dispute resolution in international law" (III)

2:30 – 4:30 **David P. Stewart**
Member of the Inter-American Juridical Committee
"Choice of Court Agreements and Enforcement of Judgments" (I)

Friday 7

9:00 – 10:50 **Jorge Cardona Llorens**
"*Universalism* and regionalism in peace-keeping at the start of the 21st century" (IV)

11:10 – 1:00 **David P. Stewart**
"Choice of Court Agreements and Enforcement of Judgments" (II)

2:30 – 4:30 **Mauricio Herdocia Sacasa**
Member of the Inter-American Juridical Committee
"Recent cases from the Americas before the International Court of Justice and the use of the Pact of Bogotá"

<u>Week Two</u>

Monday 10

9:00 – 10:50 **Jaime Aparicio**
Chairman of the Inter-American Juridical Committee
"Right of access to public information"

11:10 – 1:00 **Jonathan T. Fried**
Ambassador of Canada to Japan
"International Regulation of Trade and Finance: Current Challenges" (I)

2:30 – 4:30 **Jorge E. Viñuales**
Counsel, Lévy Kaufmann-Kohler, Geneva, Switzerland. Assistant Professor of International Law, Graduate Institute of International and Development Studies, Geneva, Switzerland
"The international legal regime regarding climate change: Current issues" (I).

Tuesday 11

9:00 – 10:50 Jorge E. **Viñuales**
"The international legal regime regarding climate change: Current issues" (II)

11:10 – 1:00 **Jonathan T. Fried**
"International Regulation of Trade and Finance: Current Challenges" (II)

2:30 – 4:15 **Fabián Novak**
Member of the Inter-American Juridical Committee
"Protection of underwater cultural heritage under the 2001 UNESCO Convention" (I)

Wednesday 12

9:00 – 10:50 **Luis Toro Utillano**
OAS Department of International Law
"The Draft American Declaration on the Rights of Indigenous Peoples: Substantive issues" (I)

11:10 – 1:00 **Antônio Augusto Cançado Trindade**
Judge of the International Court of Justice and Professor of international law, University of Brasília and Rio Branco Institute, Brazil
"Universal International Law: Foundations and conceptual constructions" (I)

2:30 – 4:30 **Fabián Novak**
"Protection of underwater cultural heritage under the 2001 UNESCO Convention" (II)

Thursday 13

9:00 – 10:50 **Luis Toro Utillano**
"The Draft American Declaration on the Rights of Indigenous Peoples: Substantive issues" (II)

11:10 – 1:00 **Antônio Augusto Cançado Trindade**
"Universal International Law: Foundations and conceptual constructions" (II)

2:30 – 4:30 **Ana Elizabeth Villalta Vizcarra**
Member of the Inter-American Juridical Committee
"The Central American Integration System (SICA) as a regional agency for integration in Central America"

Friday 14

9:00 – 10:50 **Jorge Palacios Treviño**
Member of the Inter-American Juridical Committee
"The human rights of migrant workers and their families"

11:10 – 1:00 **Diego Moreno**
OAS Department of International Law
"An introduction to the draft Inter-American Convention against Racism and All Forms of Discrimination and Intolerance'"

Week Three

Monday 17

9:00 – 10:50 **María del Luján Flores**
Permanent Representative of Uruguay to the OAS
"Universalism and regionalism" (I)

11:10 – 1:00 **Arturo Santiago Pagliari**
Chair of International Public Law, School of Law and Social Sciences, National University of Córdoba, Argentine Republic
"Fragmentation of law. Effects and applications"

2:30 – 4:30 **Carlos Quesada**
Director of the Latin American Program of Global Rights – Partners for Justice
"Racial discrimination as a violation of international rights: International standards and mechanisms"

Tuesday 18

9:00 – 10:50 **María del Luján Flores**
"Universalism and regionalism" (II)

11:10 – 1:00 **Arturo Santiago Pagliari**
"Fragmentation of law. Effects and applications"

2:30 – 4:15 **Carlos Quesada**
"Protecting the human rights of Afro-descendants in the Organization of American States and its agencies"

4:30 – 6:00	**Nils Melzer** Legal Adviser, International Committee of the Red Cross *"International Humanitarian Law and the Mandate of the International Committee of the Red Cross"*
Wednesday 19	
9:00 – 10:50	**Paulo Borba Casella** Full Professor of Public International Law and Head of the International and Comparative Law Department at the University of São Paulo Law School *"International Law. The Postmodern Approach, the Classics, and the New Challenges"* (I)
11:10 – 1:00	**Paula María All** Professor in international private law at Litoral National University, Santa Fe, Argentina *"Regulating crossborder pollution: Trends and challenges"* (I)
2:30 – 4:15	**Juan Carlos Murillo** Regional legal advisor of the United Nations High Commissioner for Refugees (UNHCR), Costa Rica *"The universal and regional systems for the international protection of refugees and other victims of forced displacement"*
4:30 – 6:00	**Nils Melzer** *"The International Committee of the Red Cross's Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law"*
Thursday 20	
9:00 – 10:50	**Paulo Borba Casella** *"International Law. The Postmodern Approach, the Classics, and the New Challenges"* (I)
11:10 – 1:00	**Paula All** *"Regulating crossborder pollution: Trends and challenges" (II)*
2:30 – 4:30	**Juan Carlos Murillo** *"Current developments in the inter-American human rights system regarding refugees and other persons needing international protection"*
Friday 21	
10:00	**Closing Ceremony and Presentation of Certificates** **Dante Negro** Director, OAS Department of International Law **Manoel Tolomei Moletta** Secretary of the Inter-American Juridical Committee **Diego Moreno** OAS Department of International Law

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 2009:

1. Dr. Jaime Aparicio Otero, Chairman of the Committee, attended the following events:
   - Meeting of the Working Group on migration, to set out the Committee's position on the matter. On that occasion, he presented the Committee's resolution on the European Directive and the Primer adopted by the Committee, in both of which all the participants displayed a keen interest.
   - 61st meeting of the International Law Commission in Geneva in July 2009, with questions and discussions on topics such as racism and intolerance, the application of the Inter-American Democratic Charter, and the crisis in Honduras.

- 39th regular session of the General Assembly in 2009, at which the Chairman presented the IAJC's Annual Report and received seven mandates for the Committee, set out in resolution AG/RES. 2515 (XXXIX-O/09) and summarized in document DDI/doc.02/09, prepared by the Department of International Law.
- Meeting on access to information in Latin America, held in Lima, which was attended by important agencies working in the area as well as by government experts and representatives of NGOs. On that occasion he presented the principles adopted by the Juridical Committee, which were well received by all the participants.

2. Dr. Guillermo Fernández de Soto attended the high-level forum organized by the Council of State of Colombia on the evolution of "The consultative function and legislative quality – The experiences of France, Spain, and the Andean nations." This international event took place in Bogotá, Colombia, on May 5 to 7, and was attended by national and international experts from both the Americas and Europe.

Meetings Held by the Inter-American Juridical Committee

The Inter-American Juridical Committee received the following persons as guests at its sessions and made the following visits during 2009:

1. At the 74th regular session, held in Bogotá, Colombia:
   - March 12, 2009, the inaugural meeting of the 74th regular session was attended by: Adriana Mejía H., Vice-Minister of Multilateral Affairs at the Colombian Ministry of Foreign Affairs, and, representing Rosario University: Alejandro Vanegas, Dean of the School of Jurisprudence; Eduardo Barajas Sandoval, Dean of the Schools of Political Science and International Relations; and Dr. Camilo Reyes, former Foreign Minister of Colombia. The event was held at the Palace of San Francisco, at Rosario University in Bogotá, Colombia.
   - March 13, 2009, the Committee received the President of the Council of State, Mr. Rafael Enrique Ostau de Lafont Pianeta, in the protocol chamber of the Palace of San Francisco.
   - March 16, 2009, meeting at the Aula Máxima at Rosario University on "Perspectives on the Institutionality of the Inter-American System," organized by the School of Political Science and Government and the School of International Relations of Rosario University, during the 74th regular session of the CJI. The event was attended by Alejandro Vanegas, Dean of the School of Jurisprudence of Rosario University, Colombia.
   - March 16, 2009, visit by the Attorney General of the Nation, Mario Germán Iguarán Arana, at the Protocol Chamber of the Palace of San Francisco. Also present were Paula Ramírez, Advisory Prosecutor of the office of the Attorney General of Colombia, and Francisco Javier Echeverry Lara, Director of International Affairs at the Prosecutor's office.
   - March 17, 2009, visit by Romaric Ferraro, Legal Coordinator of the International Committee of the Red Cross in Colombia.
   - March 17, 2009, meeting with the presidents of Colombia's High Courts: Rafael Enrique Ostau de Lafont Pianeta, President of the Council of State; Nelson Pinilla Pinilla, President of the Constitutional Court; Francisco Javier G., President of the Supreme Court of Justice; and Hernando Torres Corredor, President of the Superior Council of the Judicature. The meeting took place in the Protocol Chamber of the Palace of San Francisco.
   - March 18, 2009, meeting with the executive officers of the Congress of the Republic. In attendance were the President of Congress, Hernán Andrade Serrano; the President of the Chamber of Representatives, Germán Varón Cotrino; the Presidents of the Second Committees of the Senate and Chamber of Representatives, Manuel Ramiro Velázquez

Arroyave and Julio Eugenio Gallardo Archbold; and the Vice Presidents of those Senate and Chamber Committees, Jairo Raúl Clopatofsky Ghisays and Silfredo Morales Altamar.

- March 18, 2009, visit by Vice Minister for Justice, Miguel Ceballos Arévalo, at the Protocol Chamber of the Palace of San Francisco.
- March 18, 2009, meeting with the Minister of Foreign Affairs, Jaime Bermúdez Merizalde, in the Indalecio Lievano Room, Palace of San Carlos.
- March 19, 2009, Academic Forum at the Diplomatic Academy of San Carlos.

2. At the 75th regular session, held in Rio de Janeiro, Brazil:
   - August 5, 2009, visit by Luis García-Corrochano, Professor of public international law at the Diplomatic Academy of Peru and member of IHLADI, and Jorge Cardona Llorens, Chair of public international law at the University of Valencia, Spain.
   - August 7, 2009, visit by Dr. Katya Salazar, Executive Director of the Due Process of Law Foundation.
   - August 11, 2009, visit by Dr. Jonathan T. Fried, Ambassador of Canada in Japan, former member of the Juridical Committee.
   - August 11, 2009, visit by Dr. Jorge E. Viñuales, Assistant professor in international law at the Graduate Institute of International and Development Studies, Geneva, Switzerland.
   - August 12, 2009, visit by Dr. Antônio Augusto Cançado Trindade, Judge of the International Court of Justice.

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