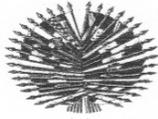


PERMANENT COUNCIL



OEA/Ser.G
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1 March 2011
Original: English

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



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

ORGANIZATION OF AMERICAN STATES
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Rio de Janeiro, February 15, 2011

CJI/O/2/2011

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. 336/10), regarding the activities of the Committee in 2010.

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

76th REGULAR SESSION
August 2 to 13, 2010
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

2010

General Secretariat
Organization of the American States
www.oas.org/cji
cjioea.trp@terra.com.br

EXPLANATORY NOTE

Until 1990, the OAS General Secretariat published the “Final Acts” and “Annual Reports of the Inter-American Juridical Committee” under the series classified as “Reports and Recommendations”. In 1997, the Department of International Law of the Secretariat for Legal Affairs began to publish those documents under the title “Annual Report of the Inter-American Juridical Committee to the General Assembly”.

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

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INTRODUCTION

The Inter-American Juridical Committee is honored to present its “Annual Report to the General Assembly of the Organization of American States.” This report concerns the Committee’s activities in 2010, 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. 1586 (XXVIII-O/98), AG/RES. 1669 (XXIX-O/99), AG/RES. 1735 (XXX-O/00), AG/RES. 1839 (XXXI-O/01), AG/RES. 1787 (XXXI-O/01), AG/RES. 1853 (XXXII-O/02), AG/RES. 1883 (XXXII-O/02), AG/RES. 1909 (XXXII-O/02), AG/RES. 1952 (XXXIII-O/03), AG/RES. 1974 (XXXIII-O/03), AG/RES. 2025 (XXXIV-O/04), AG/RES. 2042 (XXXIV-O/04), AG/RES. 2136 (XXXV-O/05), AG/RES. 2197 (XXXVI-O/06), AG/RES. 2484 (XXXIX-O/09), and CP/RES. 847 (1373/03), all of which concern the preparation of the annual reports submitted to the General Assembly by the Organization’s organs, agencies, and entities.

During 2010, the Inter-American Juridical Committee’s held two regular periods of sessions. On both occasions, the Juridical Committee’s agenda included the following topics: Innovating forms of access to justice in the Americas; International Criminal Court; Considerations on an inter-American jurisdiction of justice; Promotion and strengthening of democracy; Implementation of international humanitarian law in OAS Member States; Cultural diversity in the development of international law; Migratory topics: Follow-up on the Opinions of the Inter-American Juridical Committee; Asylum; Freedom of thought and expression; Topics on private international law: Inter-American Specialized Conference on Private International Law (CIDIP). It should also be noted that three new topics were proposed during the period in question: Participatory democracy and citizen participation; Peace, security and cooperation; and Simplified stock companies. Finally, the following mandates were deemed concluded: Strengthening the consultative function of the Inter-American Juridical Committee and Draft Inter-American Convention against Racism and all Forms of Discrimination and Intolerance.

This Annual Report contains mostly the work done on the studies associated with the aforementioned topics and is divided into three chapters. The first discusses the origin, legal bases, and structure of the Inter-American Juridical Committee and the period covered in this Annual Report. The second chapter considers the issues that the Inter-American Juridical Committee discussed at the regular sessions in 2010 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 the other 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-sixth Regular Session

The 76th regular session of the Inter-American Juridical Committee took place on March 15 to 24, 2010, in Lima, Peru.

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:

Jorge Palacios Treviño
Hyacinth Evadne Lindsay
Freddy Castillo Castellanos
João Clemente Baena Soares
Fabián Novak Talavera
Mauricio Herdocia Sacasa
Miguel Aníbal Pichardo Olivier
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 M. Negro, Director of the Department of International Law; Manoel Tolomei Moletta, Secretary of the Inter-American Juridical Committee, and Luis Toro Utilano, Senior Attorney. Maria Helena Lopes served as the rapporteur for the proceedings.

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

In beginning the Committee's work, the Chairman thanked the efforts made by Dr. Fabián Novak for the meeting to be held in Lima; he also expressed his gratitude to Government of Peru for its cordial invitation, certain that the work would be carried out successfully thanks to the efficient support provided to the Committee by the Ministry of Foreign Affairs.

The Chairman then welcomed the members of the Juridical Committee and, in particular, its new member, Dr. Miguel Aníbal Pichardo Olivier of the Dominican Republic, who was elected at the thirty-ninth regular session of the General Assembly (2009).

Addressing the meeting, Dr. Fabián Novak noted his pleasure at receiving his colleagues in Lima and made himself available for any guidance they might need, and said he hoped they all had a pleasant stay in the city.

Dr. Miguel Pichardo Oliver then acknowledged the honor he felt by belonging to the Juridical Committee and promised he would make his best efforts in pursuit of the Committee's objectives.

On that occasion the Committee adopted resolution CJI/RES. 165 (LXXVI-O/10), "Date and Venue of the Seventy-seventh Regular Session of the Inter-American Juridical Committee," in which it resolved to hold its 77th Regular Session at its headquarters in the city of Rio de Janeiro, Brazil, commencing on August 2, 2010.

CJI/RES. 165 (LXXVI-O/10)

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

THE INTER-AMERICAN JURIDICAL COMMITTEE,

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

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

RESOLVES to hold its 77th regular session at its headquarters in the city of Rio de Janeiro, Brazil, as of August 2, 2010, authorizing its Chairman to fix the date of its conclusion according to the circumstances.

This resolution was unanimously adopted at the session held on March 18, 2010, by the following members: Drs. Jorge Palacios Treviño, Hyacinth Evadne Lindsay, Freddy Castillo Castellanos, João Clemente Baena Soares, Fabián Novak Talavera, Mauricio Herdocia Sacasa, Miguel Anibal Pichardo Olivier, Guillermo Fernández de Soto, David P. Stewart, Ana Elizabeth Villalta Vizcarra, and Jean-Paul Hubert.

The Inter-American Juridical Committee had before it the following agenda, adopted by means of resolution CJI/RES. 161 (LXXV-O/09), “Agenda for the Seventy-sixth Regular Session of the Inter-American Juridical Committee”:

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

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

(Lima, Peru, 15 to 24 March 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
Rapporteur: 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.

The Juridical Committee adopted two resolutions rendering homage to jurists of the Hemisphere. By means of resolution CJI/RES. 164 (LXXVI-O/10), the Committee paid homage to Dr. Jaime Aparicio Otero, a former Chairman and member of the Committee, who was in attendance on the last day of the session in addition to having taught a class at the 37th Course of International Law, 2010.

CJI/RES. 164 (LXXVI-O/10)

TRIBUTE TO DR. JAIME APARICIO OTERO

THE INTER-AMERICAN JURIDICAL COMMITTEE,

CONSIDERING that Dr. Jaime Aparicio Otero's mandate as member of this organ ended on December 31, 2009;

RECALLING furthermore that Dr. Aparicio was elected Vice Chairman in 2006 and Chairman of this organ on August 8, 2008. In this capacity, he represented the Committee in several international forums;

TAKING INTO ACCOUNT the studies presented by Dr. Aparicio and his outstanding participation in the Inter-American Juridical Committee,

RESOLVES:

1. To express its gratitude to Dr. Jaime Aparicio for the work he performed as member, Vice Chairman, and Chairman of the Inter-American Juridical Committee.
2. To take into account the studies he carried out at the Inter-American Juridical Committee, such as: The essential and fundamental elements of representative democracy and their relation to collective action within the framework of the Inter-American Democratic Charter; Follow-up on the application of the Inter-American Democratic Charter; the Directive on Return adopted by the Parliament of the European Union, in addition to his contributions on the topic of Access to information and protection of personal data, Juridical-institutional cooperation with the Republic of Haiti, and the Struggle against discrimination and intolerance in the Americas.
3. To wish Dr. Jaime Aparicio the best of success in his future endeavors.

4. To transmit this resolution to Dr. Jaime Aparicio Otero and to the Organs of the Organization.

This resolution was unanimously adopted at the regular session held on March 18, 2010 by the following members: Drs. Jorge Palacios Treviño, Hyacinth Evadne Lindsay, Freddy Castillo Castellanos, João Clemente Baena Soares, Fabián Novak Talavera, Mauricio Herdocia Sacasa, Miguel Aníbal Pichardo Olivier, Guillermo Fernández de Soto, David P. Stewart, Ana Elizabeth Villalta Vizcarra, and Jean-Paul Hubert.

By means of resolution CJI/RES. 166 (LXXVI-O/10), the Juridical Committee paid posthumous homage to the memory of Dr. Tatiana B. de Maekelt, a Venezuelan jurist and professor of international law who served as Assistant Secretary for Legal Affairs at the OAS General Secretariat.

CJI/RES. 166 (LXXVI-O/10)

**HOMAGE TO THE MEMORY OF
DR. TATIANA B. DE MAEKELT**

THE INTER-AMERICAN JURIDICAL COMMITTEE,

DISTRAUGHT by the sad demise on August 17, 2009 in Caracas of the distinguished Venezuelan jurist Dr. Tatiana B. de Maekelt;

RECALLING that between 1978 and 1984, Dra. Maekelt held the office of Legal Consultant and Secretary for Legal Affairs of the Organization of American States;

BEARING IN MIND that while she headed the juridical area of the OAS, Dr. Maekelt was always willing to cooperate and facilitate the work carried out by this Organ, especially with regard to the holding of the Course on International Law;

UNDERSCORING the intellectual legacy left by Dr. Maekelt, her work devoted to the area of conflict of laws; her academic work as professor of Universidad Central de Venezuela, Universidad Católica Andrés Bello, Universidad Simón Bolívar, and her contribution to the Washington College of Law of the American University in the United States, besides holding important positions in her Country,

RESOLVES:

1. To pay sincere tribute and recognition to the memory of Dr. Tatiana B. de Maekelt.
2. To transmit this resolution offering the condolences of the Juridical Committee to the Government of the Bolivarian Republic of Venezuela and to the family of Dr. Tatiana B. de Maekelt.

This resolution was unanimously adopted at the regular session held on March 18, 2010, by the following members: Drs. Jorge Palacios Treviño, Hyacinth Evadne Lindsay, Freddy Castillo Castellanos, João Clemente Baena Soares, Fabián Novak Talavera, Mauricio Herdocia Sacasa, Miguel Aníbal Pichardo Olivier, Guillermo Fernández de Soto, David P. Stewart, Ana Elizabeth Villalta Vizcarra, and Jean-Paul Hubert.

Finally, the Inter-American Juridical Committee thanked the Government and people of the Republic of Peru for the previous working session held in Lima with the adoption of resolution CJI/RES. 163 (LXXVI-O/10), "Vote of Thanks to the Government and People of the Republic of Peru."

CJI/RES. 163 (LXXVI-O/10)

**ACKNOWLEDGEMENT TO THE GOVERNMENT
AND PEOPLE OF PERU**

THE INTER-AMERICAN JURIDICAL COMMITTEE,

HAVING accepted the cordial invitation of the Government of Peru to hold its 76th regular session in Lima, from March 15-24, 2010;

RECOGNIZING the efforts made by the Government of Peru towards the successful organization and development of the regular session of the Juridical Committee,

RESOLVES:

1. To express its deepest gratitude to the Government and the people of Peru for their warm and generous hospitality, with special recognition to Dr. Fabián Novak Talavera.
2. To leave on record the importance it represents for the Inter-American Juridical Committee to hold its 76th regular session in this Country, emphasizing the opportunity its members have had to meet with the most prominent political, juridical and academic authorities of Peru.
3. To forward this resolution as an expression of its gratitude to the Government and the people of Peru, to His Excellency Dr. Alan García Pérez, President of the Republic, and to His Excellency Dr. José Antonio García Belaunde, Minister of Foreign Affairs.

This resolution was unanimously adopted at the session held on March 18, 2010, by the following members: Drs. Jorge Palacios Treviño, Hyacinth Evadne Lindsay, Freddy Castillo Castellanos, João Clemente Baena Soares, Fabián Novak Talavera, Mauricio Herdocia Sacasa, Miguel Aníbal Pichardo Olivier, Guillermo Fernández de Soto, David P. Stewart, Ana Elizabeth Villalta Vizcarra, and Jean-Paul Hubert.

B. Seventy-seventh Regular Session

The 77th regular session of the Inter-American Juridical Committee took place from August 2 to 13, 2010, 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":

Miguel Aníbal Pichardo Olivier
Hyacinth Evadne Lindsay
Ana Elizabeth Villalta Vizcarra
João Clemente Baena Soares
David P. Stewart
Guillermo Fernández de Soto
Fabián Novak Talavera
Mauricio Herdocia Sacasa
Jean-Paul Hubert
Freddy Castillo Castellanos

Representing the General Secretariat, technical and administrative support was provided by Drs. Dante Negro, Director of the Department of International Law; Luis Toro Utilano, a Senior

Attorney with that Department; Manoel Tolomei Moletta, Secretary of the Inter-American Juridical Committee, and Maria Helena Lopes who served as the rapporteur for the proceedings.

The Chairman welcomed the members of the Committee and congratulated those who were reelected at the recent General Assembly in Lima: Drs. Hyacinth Lindsay, Jorge Palacios, and João Clemente Baena Soares. The mandates of these three members are to commence on January 1, 2011, for a period of four years. Dr. Palacios was unable to attend this regular session for health reasons.

In compliance with Article 12 of the Committee's Rules of Procedure, the Chairman of the Inter-American Juridical Committee gave his verbal report on its activities since the last meeting. In connection with the presentation of the report at the Committee on Juridical and Political Affairs (CAJP) of Permanent Council, the meeting noted the delegations' interest in the work carried out on the Inter-American Democratic Charter, the International Criminal Court, and the Course of International Law. He added that other important topics were addressed, such as antidiscrimination efforts, cultural diversity, migration issues, asylum, mechanisms for access to justice, strengthening the CJI, creating an inter-American jurisdiction, freedom of expression and information, and finally, the treatment given by the Juridical Committee to the topics of the CIDIP process. The Chairman noted his concern at the budgetary constraints facing the Committee in performing its tasks of legal consultation and encoding international law, but said he had found a good response to his efforts to identify alternative sources of additional funding. In closing, the Chairman spoke of the presentation of the Annual Report to the fortieth regular session of the OAS General Assembly, held in Lima, Peru, on June 8, 2010.

On Friday, August 6, the Chairman and Vice Chairman of the Committee were elected in accordance with the Statute and the Rules of Procedure, respectively. Dr. Guillermo Fernández de Soto was elected Chairman and Dr. João Clemente Baena Soares as Vice Chairman for a period of two years and by acclamation.

Dr. Guillermo Fernández de Soto expressed appreciation for the trust shown by the members and underscored his willingness to continue strengthening the image and work of the Juridical Committee. He also acknowledged the support received from Dr. Baena Soares during the period in which they held the executive offices, as well as the support extended by Drs. Arrighi, Negro, Moletta, and Toro representing the OAS Secretariat for Legal Affairs.

Dr. João Clemente Baena Soares also thanked the members and the Secretariat for their support, and he noted his intent to combine efforts in order to strengthen the legal organ of the Americas.

At its 77th regular session, the Inter-American Juridical Committee had before it the following agenda, which was adopted by means of resolution CJI/RES. 167 (LXXVI-O/10), "Agenda for the Seventy-seventh Regular Session of the Inter-American Juridical Committee":

CJI/RES. 167 (LXXVI-O/10)

**AGENDA FOR THE SEVENTY-SEVENTH REGULAR SESSION OF THE
INTER-AMERICAN JURIDICAL COMMITTEE
(Rio de Janeiro, August 2 to 13, 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
6. Implementation of international humanitarian law in OAS Member States
Rapporteur: Dr. Jorge Palacios Treviño
7. Cultural diversity in the development of international law
Rapporteur: Dr. Freddy Castillo Castellanos
7. Migratory topics
Rapporteurs: Drs. Ana Elizabeth Villalta Vizcarra and David P. Stewart
8. Asylum
Rapporteuse: Dr. Ana Elizabeth Villalta Vizcarra
9. Freedom of thought and expression
Rapporteur: Dr. Guillermo Fernández de Soto
10. Topics on private international law: Inter-American Specialized Conference on Private International Law (CIDIP)
Rapporteurs: Drs. Ana Elizabeth Villalta Vizcarra, David P. Stewart and Guillermo Fernández de Soto

This resolution was unanimously adopted at the session held on March 23, 2010, by the following members: Drs. Jorge Palacios Treviño, Hyacinth Evadne Lindsay, Freddy Castillo Castellanos, João Clemente Baena Soares, Fabián Novak Talavera, Mauricio Herdocia Sacasa, Miguel Aníbal Pichardo Olivier, David P. Stewart, Ana Elizabeth Villalta Vizcarra, and Jean-Paul Hubert.

At its August meeting, the Inter-American Juridical Committee decided to hold its next session in the city of Rio de Janeiro, Brazil, commencing on March 21, 2011, “and to empower its Chair to set, in accordance with the circumstances, the date of its conclusion,” through resolution CJI/RES. 168 (LXXVII-O/10), “Date and Venue of the Seventy-eighth Regular Session of the Inter-American Juridical Committee.” It also adopted resolution CJI/RES. 169 (LXXVII-O/10), “Agenda for the Seventy-eighth Regular Session of the Inter-American Juridical Committee.”

CJI/RES. 168 (LXXVII-O/10)

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

THE INTER-AMERICAN JURIDICAL COMMITTEE,

CONSIDERING that article 15 of its Statutes provides for two regular sessions annually;
BEARING IN MIND that article 14 of its Statutes states that the Inter-American Juridical Committee has its headquarters in the city of Rio de Janeiro, Brazil,

RESOLVES to hold its 78th regular session at its headquarters in the city of Rio de Janeiro, Brazil, as of March 21, 2011, authorizing its Chairman to fix the date of its conclusion according to the circumstances.

This resolution was unanimously adopted at the session held on August 11, 2010, by the following members: Drs. Miguel Aníbal Pichardo Olivier, Hyacinth Evadne Lindsay, João Clemente Baena Soares, Freddy Castillo Castellanos, David P. Stewart and Jean-Paul Hubert.

CJI/RES. 169 (LXXVII-O/10)

**AGENDA FOR THE
SEVENTY-EIGHTH REGULAR SESSION
OF THE INTER-AMERICAN JURIDICAL COMMITTEE
(Rio de Janeiro, as of March 21, 2011)**

Topics under consideration

1. Peace, security and cooperation
Rapporteur: Dr. Mauricio Herdocia Sacasa
2. Participatory democracy and citizen participation
Rapporteur: Dr. Fabián Novak Talavera
3. Access to justice in the Americas
Rapporteur: Dr. Freddy Castillo Castellanos
4. International Criminal Court
Rapporteur: Dr. Mauricio Herdocia Sacasa
5. Considerations on an inter-American jurisdiction of justice
Rapporteur: Dr. Guillermo Fernández de Soto
6. Implementation of International Humanitarian Law in OAS Member States
Rapporteur: Dr. Jorge Palacios Treviño
7. Cultural diversity in the development of international law
Rapporteur: Dr. Freddy Castillo Castellanos
8. Migratory topics
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. Topics on Private International Law: Inter-American Specialized Conference on Private International Law (CIDIP)

Rapporteurs: Drs. Ana Elizabeth Villalta Vizcarra, David P. Stewart and Guillermo Fernández de Soto

This resolution was unanimously adopted at the session held on August 11, 2010, by the following members: Drs. Miguel Aníbal Pichardo Olivier, Hyacinth Evadne Lindsay, João Clemente Baena Soares, Freddy Castillo Castellanos, David P. Stewart and Jean-Paul Hubert.

CHAPTER II

**TOPICS DISCUSSED BY THE INTER-AMERICAN JURIDICAL COMMITTEE
AT THE REGULAR SESSIONS HELD IN 2010**

During 2010, the Inter-American Juridical Committee held two regular sessions. At those two meetings, the Juridical Committee's agenda covered the following topics: Innovating forms of access to justice in the Americas; International Criminal Court; Considerations on an inter-American jurisdiction of justice; Promotion and strengthening of democracy; Implementation of international humanitarian law in OAS Member States; Cultural diversity in the development of international law; Migratory Topics; Asylum/Refugees; Freedom of thought and expression; Topics on private international law. It should also be noted that three new topics were proposed during the period in question: Participatory democracy and citizen participation; Peace, security and cooperation; and Simplified stock companies. Finally, the following mandates were deemed concluded: Strengthening the consultative function of the Inter-American Juridical Committee and the Draft Inter-American Convention on Racism and all forms of discrimination and intolerance.

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

1. Innovative Forms of Access to Justice in the Americas

Documents

CJI/doc.353/10	Comprehensive Training of Judges: a need in the administration of justice (presented by Dr. Freddy Castillo Castellanos)
CJI/doc.361/10	Innovative Forms of Access to Justice (presented by Dr. Freddy Castillo Castellanos)

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 XXXV 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 XXXVII 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. Fabián 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" (v.1, 2008) 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 “Innovative 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.

At the 76th Regular Session of the Inter-American Juridical Committee (Lima, Peru, March 2010), the rapporteur for the topic, Dr. Freddy Castillo Castellanos, presented report CJI/doc.353/10 on “Comprehensive Training of Judges: A Need in the Administration of Justice,” drawn up on the basis of the guiding principles presented and the discussions that took place at the previous regular session. The meeting stressed the importance of greater rigor in the training of judges. Mention was made of the profiles of judges, who are generally promoted from litigating attorneys, which often leads to an excess of formalism in the administration of justice, with justice taking second place. In addition, the rapporteur spoke about the independence of judges, where he noted the existence of shortcomings since, in some countries, appointments of judges are political and they are not assured full and total autonomy. The rapporteur also noted that the courts shy away from the adoption of alternative methods of justice, with an excessive judicialization of disputes that ultimately poses an obstacle to the administration of justice. He concluded his report by asking the members to convey to him the situation of these points in their home countries, in order to ensure a better dissemination of the guiding principles.

The members then offered comments on how judges are trained and appointed in their countries and noted that the guiding principles to be adopted by the Committee must emphasize the essential nature of independence of the judiciary, its modernization, and its accessibility to all communities with equality, timeliness, and proportionality.

The Committee was visited by Dr. Javier La Rosa, (March 22, 2010) responsible for the “Access to Justice” area of Peru’s Legal Defense Institute (IDL). Dr. La Rosa spoke about the importance of access to justice in the region and the actions undertaken in each country to overcome geographical barriers as well as linguistic, economic, and cultural obstacles. He also underscored the importance and impact of the guiding principles to be adopted by the Committee. He said that the guidelines would strengthen declarations and provisions intended to protect sectors traditionally denied access to justice.

At the 77th Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, Brazil, August 2010), the rapporteur for the topic, Dr. Freddy Castillo Castellanos, presented his report on “Innovative Forms of Access to justice”, document CJI/doc.361/10. In his view, efforts had been made to follow the terms of the various international instruments that uphold the right of access to justice as an inherent part of human rights, the rule of law, and the principle of social justice. The background information included the documents prepared and reviewed to date by the rapporteur, in particular the decalogue of principles he presented at the August 2009 meeting as document CJI/doc.336/09, in addition to the exchanges held with organizations dedicated to studying the topic of access to justice, chiefly the Legal Defense Institute of Peru and the Due Legal Process Foundation.

The rapporteur also noted that his document was intended to guide state actions in establishing and improving channels for access to justice. In this context, he emphasized the role of education, which fosters awareness and the enjoyment of rights among the public. In addition, the rapporteur reaffirmed the intercultural approach in each country, independence within the administration of justice, attention for the most vulnerable groups (indigenous people, migrants, people with disabilities), and the adoption of alternative conciliation methods prior to involving judicial venues. He also stressed the training of justice system workers, the continued education of judges, and the availability of resources for encouraging the simplification of judicial proceedings. To summarize: a set of actions that should be adopted not only to reduce bureaucratic barriers to access to justice, but that also involve permanent educational efforts for both employees of the judiciary and society in general.

Dr. Fabián Novak, after congratulating the rapporteur for his work, said that since this was a draft declaration, the document would benefit from the inclusion of an introduction, in order to clarify the course taken by the discussions, its grounding, the goals sought with the declaration, and the problems existing in the region that inspired the Juridical Committee to address the topic. He also said it was important to understand the paths taken by the two nongovernmental organizations cited by the rapporteur in order to arrive at a declaration. He finally urged analysis and proposals on “innovative forms of access to justice” instead of traditional access methods.

Dr. Freddy Castillo recalled the preliminary discussions when the Juridical Committee began its study of the topic, its development under the rapporteurship of other members, and the abundant material existing on the matter. He welcomed the suggested inclusion of a brief introduction summarizing the Committee’s work in producing the draft declaration. He added that studying innovative methods did not preclude an analysis of traditional forms of justice, and that the title had been given to emphasize more modern procedures which, incidentally, could warrant a separate chapter in a future version of the draft. Finally, he clarified that the proposed declaration presented by the two organizations was based on his earlier report and, since it had been improved, he held it to be a work of joint authorship.

Dr. Mauricio Herdocia thanked the rapporteur for his synthesis efforts in identifying the principles that could be included in a declaration. In connection with this, he asked whether the proposed declaration was intended to be adopted by the Member States, or whether, as he deemed more appropriate, it was to be a set of guiding principles adopted by the Juridical Committee. He supported Dr. Novak’s proposal to include an introduction referring to the Court’s rulings and other agencies’ opinions, which would invest the draft with greater weight.

Dr. Hyacinth Lindsay joined in with the above congratulations and went on to say that in item 18, she thought it would be useful to place more emphasis on the training of justice system workers than on their qualifications.

Dr. Elizabeth Villalta suggested deleting, from item 4, the term “political” decisions, which could undermine the principle of separation of powers.

The Chairman noted that the topic did not arise from a General Assembly mandate, but rather from a recommendation from the Committee to examine the issue, with a view to adopting a set of guiding principles; his remarks were seconded by Drs. Jean-Paul Hubert and João Clemente Baena Soares.

Dr. João Clemente Baena Soares also proposed changing the reference to “freedom” of decisions in item 7 to “autonomy.” With regard to item 11, he said that States must respect customary law and not undermine traditional forms of access. In addition, he suggested deleting the phrase “as a counterpart” in item 12 and, in item 21, say that “States will guarantee” and including “technological” in the list of limitations. Finally, he suggested that the draft should stress innovative forms of access to justice.

Dr. David Stewart suggested dividing the document into three distinct parts: the first would cover the articles dealing with the importance of access to justice; the second would deal with the principles that the Juridical Committee deems important in order to guide the States; and, finally, the third would address a series of measures that States should adopt in order to implement those principles.

The rapporteur for the topic thanked and welcomed the members’ contributions. Regarding the nature of the document, he explained that it was a guide of principles governing access to justice, emphasizing innovative forms. Finally, the rapporteur proposed presenting a document with the suggested amendments at the next period of sessions.

The following paragraphs contain transcriptions of the two reports presented by the rapporteur during 2010: “Comprehensive Training of Judges: A Need in the Administration of Justice,” document CJI/doc.353/10, and “Innovative Forms of Access to Justice,” document CJI/doc.361/10.

CJI/doc.353/10

COMPREHENSIVE TRAINING OF JUDGES: A NEED IN THE ADMINISTRATION OF JUSTICE

(presented by Dr. Freddy Castillo Castellanos)

In our previous report, we included some type of guiding principles which mentioned the need to have judges receive comprehensive training. We then put it this way:

Society and the State should be permanently concerned over the legal and ethical training of judges. We know that Law Schools are basically focused on training litigation lawyers and that judicial study programs only include occasional courses given by the Judiciary. A comprehensive judicial training system should be created since pre-graduate years. (CJI/doc.336/09)

Before referring to this aspect which, I believe, is of utmost importance to deal with the topic of access to justice, I would like to stress the convenience of having the Juridical Committee strengthen its ties with organizations like the Peruvian Legal Defense Institute (IDL for its acronym in Spanish) and the Due Process of Law Foundation (DPLF), which are working on different aspects of this topic, as well as on a draft Declaration on Access to Justice in the Americas. Thanks to these ties, we are more familiar with the progress being made by our countries, mainly with regard to alternative means of delivering justice. We can see that an

increasingly larger percentage of lawsuits could be resolved through conciliation or friendly mechanisms, which would help reduce the workload of courts and other auxiliary entities engaged in the administration of justice. The excessive judicialization of conflicts is making the administration of justice bear an enormous weight. That's why the search for alternative mechanisms is one of the best options available to make good progress on this topic.

Judges, law and justice

In view that most judges graduate from Law Schools the study programs of which focus on the profile of litigation lawyers, in resolving judicial matters our judges apply strictly legal criteria. As we know, "administering justice" is nothing else but enforcing compliance with the law. A challenging exercise of intelligence often obliges judges to find a balance between the sense of justice and the legal rules which are not always fair and foreseeable. But this desiderative which is ideally required is not always fulfilled in a system where justice is mechanically administered by judges, who take better care of the fulfillment of procedural steps than of the administration of justice itself. Spanish writer Alejandro Nieto, in his controversial book entitled "Balada de la Justicia y la Ley" (Trotta Pub. House, Madrid, 2002), used to tell us: "The professional training of the judge tends to be perverse since it focuses on a scrupulous and inflexible respect for procedural steps, which seems to be the quintessence of judicial activity. The so-called procedural guarantees have become a fetish of the official democratic juridical ideology". With judges limited to the application of rules of procedure out of habit, we cannot exactly speak of access to justice in the non-functional sense of this term.

Indeed, this reality is not exactly the same in all our countries, but we are aware that in a large part of them there are deficiencies in the comprehensive training of judges, as well in their selection and independence. These issues must be addressed simultaneously with the previous one, since it will be useless if we improve the qualifications of the candidates to the judicature but do not guarantee that they will be accepted due to the prevalence of more political rather than professional selection criteria. As we may see, this is a complex reality that must be addressed with a consistent group of measures and not with isolated and partial solutions.

The existence of numerous material that serves to diagnose the issue and give an account of the progress made does not relieve us from permanently updating said material. To this end, a rigorous review of two basic aspects that could result in an intellectual and practical contribution for our countries, without prejudice to other aspects that must be necessarily addressed by the rapporteur, is proposed:

1. Training profile of the judges
2. Functional independence of judges and courts, professional independence of the judge and independence of the Judiciary.

Apart from analyzing the current status of these two aspects, through a significant sample from our countries, guiding principles will be prepared as a contribution from the Inter-American Juridical Committee to a topic that is essential for the strengthening of democracy in the Americas.

CJI/doc.361/10

INNOVATIVE FORMS OF ACCESS TO JUSTICE

(presented by Dr. Freddy Castillo Castellanos)

DRAFT DECLARATION

Much of the material prepared and revised so far by this rapporteurship has been directed towards setting up a guide of principles on innovative forms of access to justice in the Americas. The feedback received from organizations such as the Institute of Legal Defense (IDL) of Peru

and the Due Legal Process Foundation (DPLF), as well as examination of the various proposals consulted allow us to consider the current pertinence of a draft Declaration on Access to Justice that incorporates the basic principles enunciated by this consultative body. Accordingly, available to us is a proposal from the above-mentioned organizations that already includes some of the arguments formulated by this rapporteurship. For the purposes of discussion, I hereby transcribe this draft declaration with some slight additions and alterations made by us:

“We, the States of the Americas represented by the Organization of American States,

Considering that realizing the right to access to justice is an unavoidable step towards strengthening democracy and the rule of law in the region, and reducing social inequality,

Considering that the problem of access to justice in our countries is very complex and is responsible for a variety of institutional, economic, geographical, cultural, linguistic and gender obstacles, and

Considering the great social, cultural and ethnic diversity that enriches us,

We declare the following:

- 1. Access to justice is a human right.*
- 2. Realizing the right to access to justice is fundamental to consolidating the Rule of Law and social justice.*
- 3. Access to justice presupposes development of citizens’ capacity to enjoy their rights. The necessary public policies must not tend towards judicial assistentialism but rather to empowering the citizens.*
- 4. Reform of the judicial system geared towards guaranteeing full access to justice calls for political decisions to be demanded on a priority basis over all spheres of international law.*
- 5. Public policies on access to justice should be designed to include focusing on gender and interculturality, taking into account the reality of each country and the juridical needs of their citizens.*
- 6. Access to justice guarantees the legitimacy of public institutions and promotes higher levels of governability.*
- 7. Effective independence of the administration of justice must be ensured. Not only independence from other public powers, but also from the factual powers that use all types of pressure to impinge upon freedom of decision.*
- 8. States should sponsor initiatives in conjunction with civil society to put an end to the barriers against access to justice.*
- 9. States will guarantee the right to effective jurisdictional protection.*
- 10. States will prioritize attention to existing vulnerable groups.*
- 11. States recognize the existence of pluriculturality. The duty of the State to ensure access to justice is not limited to providing a qualified judicial system but rather presupposes recognition and support from special jurisdictions based on the cultural identity of the indigenous people, and coordination mechanisms will be installed to this end. The States will respect common law and the traditional ways of settling disputes as long as they do not violate fundamental rights.*
- 12. The right to access to justice presupposes as a counterpart the right of citizens to access communal instances of settling disputes and/or administering justice.*
- 13. A juridical culture should be made available that opens a channel for harmonious living by means of conciliation in cases where there is no reason to appeal to judicial measures. And even if they do, attempts should be made to resolve them “in limine litis” through arrangements or reparatory agreements.**

14. The organs of public administration are also qualified to avoid judicialization of matters that require the decision of a third party. Many fair decisions can and should be made in the administrative sphere. All this without affecting the non-renouncible guarantee that all administrative decisions must be submitted to jurisdictional control.

15. States shall ensure access to a court translator and anthropological expert when and if necessary.

16. States shall ensure interdisciplinary professional support during all stages of court procedures.

17. Access to justice implies the promotion of alternative methods for dispute settlement other than traditional court procedures, within the framework seeking to promote a culture of peace.

18. Qualification of the judicial system agents must promote a culture of peace and endeavor to eliminate social inequality.

19. Juridical education should be encouraged, so as to allow the population to **know their rights as citizens and thereby facilitate the actual enjoyment of same.**

20. The ethical and juridical qualification of judges must be a permanent concern of society and of the State **and should be conceived in an integral manner. Contents of programs of study or curricula shall be guided by humanistic principles and values.**

21. States will endeavor to provide the necessary funding so as to overcome the logistic, technical and infrastructure limitations which commonly afflict State justice systems.

22. States shall endeavor to provide cost-free legal assistance with interdisciplinary support.

23. States shall promote the lowering of judicial costs.

24. States shall ensure top-quality infrastructure conditions to permit disabled persons to have access to court services.

25. States shall promote proper conditions for the access of vulnerable people whose condition result from migration or internal displacement, and ensure the same degree of material equality as the nationals or natives of each country or region.

26. States shall seek simplification of judicial procedures, reducing process bureaucracy. Emphasis should be given to cases in which people are deprived of their liberty.”

2. International Criminal Court

Documents

CJI/doc.348/10	International Criminal Court (presented by Dr. Ana Elizabeth Villalta Vizcarra)
CJI/doc.349/10	International Criminal Courts (presented by Dr. Jorge Palacios Treviño)
CJI/doc.352/10 rev.1	Progress Report on Efforts Toward Adopting National Legislation Based on Guidelines of Principles of the Inter-American Juridical Committee and Training of Employees for the Cooperation of the Member States of the OAS with the International Criminal Court and the Drafting of Model Laws for the Crimes Contemplated in the Rome Statute (presented by Dr. Mauricio Herdocia Sacasa)
CJI/doc.360/10 rev.1	Report on the Activities on Promotion of the International Criminal Court and Preliminary Draft of Model Texts for Crimes Contemplated in the Rome Statute (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 (XXXVI-O/06) and AG/RES. 2176 (XXXVI-O/06), 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 send 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 XXXVII 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 programs 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 XXXIX 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.

At the 76th Regular Session of the Inter-American Juridical Committee (Lima, Peru, March 2010), the rapporteur, Dr. Mauricio Herdocia, spoke of document CJI/doc.352/10, which contains three points of the mandate in General Assembly resolution AG/RES. 2505 (XXXIX-O/09): 1) implementation of measures toward encouraging the adoption of national law on the subject; 2) support and promotion for the training of state officials in collaboration with the OAS General Secretariat, and 3) submission of a progress report for the fortieth regular session of the General Assembly.

Regarding the first mandate, the rapporteur spoke of the origin and development of the CJI's work, the replies received to the Questionnaire prepared by the Committee and sent to the states that are parties to the Rome Statute as well as to those that are not; the Guide of General Principles, and,

finally, the Guidelines for State Cooperation with the International Criminal Court. He also spoke of the note sent by the Chairman of the Committee to the Rome Statute States Parties that had not yet enacted legislation on cooperation with the ICC, in order to offer such technical assistance as it can provide.

Regarding the second mandate, the rapporteur described his participation at the Fourth Special Working Meeting on the International Criminal Court within the framework of the CAJP, held on January 27, 2010, in Washington, D.C. On that occasion the Department of International Law organized a meeting among the participating organizations to enable the various stakeholders to combine their efforts and improve their communications. In addition, he reported that on February 18, he attended a Special Seminar in El Salvador on challenges and solutions for the ratification of the Rome Statute; the event was attended by almost 200 high-ranking people from the Office of the Court's Prosecutor and El Salvador's government and civil society. During this period, the rapporteur participated at meetings with universities that have dealt with topics related to the Criminal Court. Finally, he spoke of his attendance at the Special Meeting on International Humanitarian Law, held in Washington, D.C., on January 29, 2010, the topics of which bore a close relation to the mandates dealing with the International Criminal Court. In connection with this, he said that model laws dealing with the Rome Statute must pay due consideration to the four Geneva Conventions and the other international instruments identified in his report.

Regarding the third aspect of the Juridical Committee's work in drafting model legislation on war crimes, crimes against humanity, and genocide, the rapporteur has proposed developing criminal definitions that embrace the Rome Statute and the terms of the Geneva Conventions and its additional protocols, an idea that has earned currency in Latin America. He also indicated the need to build on the efforts undertaken by the International Committee of the Red Cross. His report therefore gathers together the 22 criminal offenses that the ICRC proposed to the States, and it also considers solutions reached by various national laws that offer a reference point for the adoption of the Rome Statute and of the supporting legislation.

For the Committee's next period of sessions in Rio de Janeiro, the rapporteur proposed submitting a report on a draft model law on crimes against humanity and genocide. Dealing with crimes against humanity requires paying attention to the numerous conventions that exist in that area, including those of the inter-American system, and the topics involved in its analysis – such as torture, forced and involuntary disappearances, extrajudicial killings, etc. – in addition to the elements of humanitarian law and situations of peace.

Finally, he explained that his report sets out in detail all the actions that the Juridical Committee has been pursuing to promote cooperation with the International Criminal Court. In this regard, he referred to the cooperation project prepared by the OAS Department of International Law in consultation with the Juridical Committee and the 22-point proposal prepared by the International Committee of the Red Cross.

Dr. Villalta in turn noted that the Seminar in El Salvador was intended to facilitate a domestic debate since El Salvador was not yet a party to the Rome Statute, and for that reason it was attended by high-level representatives from the government, the Supreme Court, the Ministry of Foreign Affairs, civil society, and academia. In connection with this, she presented an informational document titled "International Criminal Court" (CJI/doc.348/10).

Dr. Castillo spoke about his participation at an event held at the Supreme Court of Venezuela, which was intended to promote the International Criminal Court. It was attended by representatives of the highest echelons of government and by the Committee's own rapporteur, Dr. Mauricio Herdocia.

After congratulating the rapporteur on his report, Dr. Hubert stressed the importance of sending it to the General Assembly, so that the representatives of the missions could see the kind of work that was taking place.

Dr. Palacios underscored the importance of implementing the elements set out in Article 21 of the Rome Statute, which assist in interpreting war crimes, genocides, and crimes against humanity.

Dr. Stewart noted that one of the problems that existed regarding the ICC was its recent creation. In his opinion, the Committee should pay more attention to procedural matters than to ratifications. Another important and complex issue is that of universal jurisdiction and, in that regard, the incorporation of the Rome Statute into domestic law poses a significant challenge, in particular when domestic jurisdiction is extended to cover actions not related to a state. The Statute provides that individuals who commit war crimes, genocide, or crimes against humanity must face trial in their countries or before the ICC in The Hague. In some cases countries have used their own laws to secure jurisdiction over individuals who have committed crimes in other countries but who are not citizens of those countries, nor were the crimes committed against their citizens. The Rome Statute is being given global jurisdiction without national ties, which is a highly controversial issue for lawyers and could lead to legal chaos.

Dr. Herdocia thanked his colleagues for their comments. In his work he endeavored to integrate the studies carried out by the other rapporteurs, the contributions made by the countries at the six special meetings of the CAJP, as well as the invaluable cooperation of the Department of International Law. He noted that pursuant to the mandate in the General Assembly's resolution, the report had to be put before the General Assembly. Regarding Dr. Palacios's contribution, he noted that the report cited all the instruments that had to be taken into consideration, including those articles dealing with the elements of the crimes. Regarding the problem raised by Dr. Stewart, he noted that the Statute's states parties had insisted greatly on respect for the right to a fair trial and on observance of the main principles of both domestic and international law. As for the matter of universal jurisdiction, complementary jurisdiction implies the obligation of universal prosecution when the country does not want to or cannot, over and above the Statute. He said that these were topics of interest for doctrinal considerations as well as for the development of the Rome Statute. Finally, the rapporteur called on the members to promote the Committee's work in their home countries.

The rapporteur's document was sent to the Permanent Council by the Chairman in March 2010, and it was distributed to the Member States on April 8 as document CP/INF.6028/10.

At the fortieth regular session of the OAS General Assembly (Lima, June 2010), resolution AG/RES. 2611 (XL-O/10) urged the Committee to continue working on three specific issues: promoting the adoption of national laws on the topic; providing training for administrative and judicial civil servants and academics; and preparing a model law for the implementation of the Rome Statute, particularly as regards the criminalization of those offenses over which the International Criminal Court has jurisdiction.

At the 77th Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, Brazil, June 2010), the rapporteur for the topic, Dr. Mauricio Herdocia, placed before the Juridical Committee's consideration the document CJI/doc.360/10 "Report on the Activities on Promotion of the International Criminal Court and Preliminary Draft of Model Texts for Crimes Contemplated in the Rome Statute", pursuant to the mandate set out in resolution AG/RES. 2577 (XL-O/10).

In terms of that progress, he pointed out that there had been no change in the number of states of the Americas that had ratified the Rome Statute, nor with their ratification of the Agreement on Privileges and Immunities of the Court (APIC).

He also reported that three meetings on the topic of the International Criminal Court had been held since the March period of sessions. The first was the Review Conference of the Rome Statute in Kampala, the results of which are set out in detail in the report prepared by the Department of International Law (DDI/doc.03/10), attached as an annex to his report. However, he made particular mention of the resolutions dealing with the complementarity between the Rome Statute and national laws and jurisdiction, the topic of the impact of the Rome Statute system on victims and affected communities, compliance with Article 124, the amendments to Article 8 of the Rome Statute, and the crime of aggression. Under Article 124, a State may withdraw from the jurisdiction of the International Criminal Court for a period of 7 years, until the review is concluded. The Court had resolved to maintain that situation with respect to Article 124, so that States would continue to maintain their status on the margin of the Court.

He also spoke of the Kampala meeting's adoption of an amendment to Article 8 of the Rome Statute regarding the use of chemical substances, biological weapons, and other kinds of weapons that cause unnecessary harm to victims. It should be recalled that as noted by this rapporteurship in its previous reports, war crimes occur in both international and domestic armed conflicts, and that is also the case with the use of the weapons referred to above, which undeniably do cause the same harm to human lives even when not the result of international conflicts. Finally, he spoke of the achievement of defining the crime of aggression, which embraces the thrust of Resolution 3314 of the 29th United Nations General Assembly and transforms acts of aggression into crimes of aggression, depending on their seriousness and the means used to commit them, a notion that has now been incorporated into the Rome Statute.

The second meeting took place in Mexico during the International Conference of Latin American and Caribbean National International Humanitarian Law Commissions, organized by Mexico's Secretariat of Foreign Affairs and the International Committee of the Red Cross, at which the rapporteur gave a presentation on the Juridical Committee's work.

In pursuit of the mandate of publicizing the Committee's work in this area, he added that he had attended the meeting of the Convention of Lawyers of El Salvador; that event, intended to raise awareness about the International Criminal Court, was also attended by Dr. Ana Elizabeth Villalta Vizcarra.

The rapporteur then presented a set of model texts for war crimes; while still only in preliminary form, they did take into account the work of both the Red Cross and the Committee itself, which had been fully recognized in light of the Kampala meeting results. He proposed distributing them at the next working session of the CAJP and to receive the opinions of the states, in order to further progress and fine-tune the study of the topic. In his document, the rapporteur proposes that crimes of genocide be incorporated into the Rome Statute, the text of which already bans the defense of such crimes. Finally, he addressed the topic of model legislation covering crimes against humanity taking place during systematic attacks on the civilian population.

Dr. João Clemente Baena Soares congratulated the rapporteur for his efforts and for the cutting-edge proposals he had made. He noted that in recent years, the international community had made great progress in areas that previously were not even matters of governmental concern.

Dr. Freddy Castillo said that emphasis should be placed on the CJI's contribution to doctrine through the rapporteur's reports. The example relating to Kampala that he had given was of particular relevance for the dissemination of the Juridical Committee's work, which sets out opinions, principles, and precepts adopted by the international community with specific reference to the Rome Statute. This motion received the support of the other members of the Committee.

Dr. Luis Toro noted that the next working session of the CAJP was scheduled for no later than June 2012, although an exact date had not yet been set.

Dr. David Stewart said that notwithstanding the excellent quality of the rapporteur's report, he thought certain points should be explored in greater detail if it was to be presented to the next General Assembly. Regarding item 2.2.1.1, dealing with crimes of aggression, he asked whether the Committee was going to recommend its incorporation into domestic law. Regarding item 2.2.1.2, he was unclear whether the language was the rapporteur's proposal or whether it was the text adopted in Kampala. In addition, he said that he would like to explore certain points in the model texts. For example, he supported the use of the term "armed conflict" without specifying whether it was an international conflict or not. He thought that the text of Article 1 was too broad and could cover other kinds of armed conflict not necessarily related to war. In discussing genocide, the rapporteur's proposal went further than the definition in the Genocide Convention; he was not opposed to that, but he suggested that a note be included in the report when the proposed texts went further than the applicable conventions.

Dr. Mauricio Herdocia said that this report should be considered a preliminary text, since he was looking forward to hearing the opinions of the Member States at the special meeting. In any event, it would be placed before the General Assembly, in compliance with the mandate, but noting its preliminary status. After that, the rapporteur would gather the comments made at this meeting, those offered by the Member States, and any from other future meetings, in order to amend the text for analysis at future sessions.

Regarding Dr. Stewart's comments, he explained that the amendment to Article 8 reflected the proposal of the Juridical Committee and that it was not a text from the rapporteur but was basically what was adopted by the Review Conference. Regarding the expression "during an armed conflict" (Article 1 – p. 6), he explained that this was in reference to the two categories of armed conflict: that is, the intentional killing of a person protected by international humanitarian law in accordance with the Geneva Conventions and their additional protocols.

If the Juridical Committee was proposing preparing legislation on crimes, that would require that at some point, reference also be made to the crime of aggression.

Regarding the topic of defending genocide, the idea contained in some legislations was that although reference was made to the crime of defending it, that was not included in the definition in Article 6 and had been included in the report as a reflection of progress with the issue.

Dr. João Clemente Baena Soares summarized the opinions of all the members and suggested that the rapporteur's report be conveyed to the General Assembly in compliance with the mandate, but emphasizing its preliminary status and that it will be subject to ongoing analysis as the topic progresses.

The following paragraphs contain transcriptions of the documents presented by Dr. Elizabeth Villalta, document CJI/doc.348/10, and Dr. Jorge Palacios, document CJI/doc.349/10. They also include the two reports by the rapporteur, Dr. Mauricio Herdocia, documents CJI/doc.352/10 rev. 1 and CJI/doc.360/10 rev. 1:

CJI/doc.348/10

INTERNATIONAL CRIMINAL COURT

(presented by Dr. Ana Elizabeth Villalta Vizcarra)

At the 75th regular session of the Inter-American Juridical Committee held in Rio de Janeiro, Brazil, in August 2009, the importance of holding seminars or workshops to promote the International Criminal Court was stressed, for which reason several members proposed combining efforts with a view to encouraging the holding of seminars in their countries.

Accordingly, on February 18, 2010, the Ministry of Foreign Affairs of El Salvador carried out a “Seminar on the International Criminal Court”. The Seminar was held at the Dr. Alfredo Martínez Moreno auditorium of the Ministry of Foreign Affairs. It was opened by the Minister of Foreign Affairs of El Salvador, Eng. Hugo Roger Martínez Bonilla. The lecturers included: Dr. Miriam Spittler of the Office of the Prosecutor of the ICC, who delivered a lecture entitled “Overview of the Rome Statute”; Dr. Francesca Varda, of the NGO Coalition for the ICC, who delivered a lecture entitled: “Practical cases of actions and measures taken by Member States to facilitate the ratification of or adherence to the Rome Statute”; Dr. Patrick Zahnd, ICRC Legal Adviser for Latin America and the Caribbean, who delivered a lecture entitled “Work carried out by the International Committee of the Red Cross (ICRC), with emphasis on the International Criminal Court”.

The Inter-American Juridical Committee (IAJC) was represented by its member Dr. Mauricio Herdocia Sacasa, and rapporteur on the topic of the International Criminal Court, who delivered a lecture entitled “Mechanisms used by Member States to Resolve Problems Encountered during the Ratification of the Rome Statute and Model Law on Cooperation with the International Criminal Court”, and the undersigned, who delivered a lecture entitled “Contributions of the Inter-American Juridical Committee of the OAS to Promote the International Criminal Court”.

Said Conference was called:

**CONTRIBUTIONS OF THE INTER-AMERICAN JURIDICAL COMMITTEE OF THE
OAS TO PROMOTE THE INTERNATIONAL CRIMINAL COURT**

Background

As a result of the atrocities committed during the First and Second World Wars, the International Community undertook to deprive future generations of these crimes, and that’s how the world cried out “Never Again” given the enormous suffering caused by this holocaust.

In keeping with this commitment and with the Principle of Universal Jurisdiction, five International Investigation Committees and four *Ad Hoc* International Tribunals were created, as follows: the International Military Tribunal for the trial of war criminals of the European Axis of 1945, better known as the Nuremberg and Tokyo Tribunals; the International Military Tribunal for the Trial of War Criminals of the Far East of 1946; the International Criminal Tribunal for the Former Yugoslavia of 1993; and the International Criminal Tribunal for Rwanda of 1994.

These Tribunals had a limited effect and only served as a partial mechanism to establish international criminal liability. Due to this reason and to the fact that criminal justice lacked permanent international jurisdictional bodies, the United Nations International Law Commission resolved that it was necessary to set up a Permanent Criminal Court for the international community. In 1992, the United Nations General Assembly requested the International Law Commission to prepare a draft statute for an International Criminal Court.

The establishment of this Court dates back to the issuance of Resolution N° 50/46 dated September 11, 1995, whereby the United Nations General Assembly decided to set up a

Preparatory Committee for the establishment of an International Criminal Court the main purpose of which would be to review the draft Statute for the establishment of a Permanent Criminal Court prepared by the United Nations International Law Commission in 1994.

After a series of meetings held by the Preparatory Committee, the United Nations General Assembly, at its 52nd Regular Session and by Resolution No. 52/160 dated December 15, 1997, summoned the “UN *Diplomatic Conference of Plenipotentiaries* on the Establishment of an International Criminal Court”, which was held in Rome, Italy, from June 15 to July 17, 1998, and adopted on July 17 the Final Act of the Rome Statute whereby the International Criminal Court was set up. Said Act contains the votes cast by Member States, as follows: 120 votes in favor, 21 abstentions, and 7 votes against. In said meeting, it was decided that the International Criminal Court would be headquartered in The Hague, Netherlands.

As provided for in the Rome Statute, the International Criminal Court is a permanent institution and has the power to exercise its jurisdiction over natural persons, not over States, for the most serious crimes of international concern like genocide, crimes against humanity, war crimes, the crime of aggression (still pending definition). For the first time, these crimes were coded on an organized and detailed basis, regulating effective individual criminal liability.

The Rome Statute is the result of the work carried out by the international community over a long period of time to establish a permanent criminal institution with jurisdiction over international crimes and an international jurisdictional instance against impunity, while contributing to the prevention of new crimes.

In keeping with the above, it is worth highlighting that the International Criminal Court *per se* is a very special jurisdictional instance which will only take action when a very serious infringement of human rights or of the International Humanitarian Law has taken place and in a way that complements or supplements national justice.

The International Criminal Court complements national jurisdictions and is competent only in those cases where the State cannot prosecute or does not wish to prosecute people accused of these crimes. The International Criminal Court is a permanent institution authorized to exercise its jurisdiction over natural persons with respect to the most serious crimes of international concern according to its Statute and is complementary to national criminal jurisdictions.

The Rome Statute which created the International Criminal Court went into effect on July 1, 2002 and the International Criminal Court was formally set up on March 11, 2003 at the inaugural session held in The Hague, Holland. As from the entry into force of the Rome Statute, the perpetrators of the most serious crimes against humanity can be prosecuted, thereby fighting impunity.

The Inter-American Juridical Committee (IAJC) and the Rome Statute

The Inter-American Juridical Committee (IAJC) included the topic of the International Criminal Court as an Agenda item to be discussed at its 67th Regular Session held in August 2005, by OAS General Assembly Resolution AG/RES. 2072 (XXXV-O/05) dated June 7, 2005, corresponding to its 35th Regular Session, whereby the Inter-American Juridical Committee was requested to draw up a questionnaire to be presented to the Member States of the OAS in order to obtain information on the manner in which their respective national laws are able to cooperate with the International Criminal Court.

The topic was included in the agenda of the Inter-American Juridical Committee as “Promotion of the International Criminal Court”. Dr. Mauricio Herdocia Sacasa was designated to act as rapporteur on the topic.

The Questionnaire on the International Criminal Court was approved by the Inter-American Juridical Committee at its 67th regular session held from August 1 to 19, 2005 in Rio de Janeiro, Brazil, by resolution CJI/RES. 98 (LXVII-O/05), and included both States Parties and Non-State Parties to the Rome Statute in the answer process. Answers were received from

17 countries, of which 11 were States Parties to the Rome Statute (Canada, Argentina, Ecuador, Bolivia, Colombia, Mexico, Uruguay, Dominican Republic, Costa Rica, Brazil and Paraguay) and 6 were then non-State Parties (Suriname, El Salvador, Nicaragua, Chile, Guatemala and the United States). Based on this information, the rapporteur presented the report he had been asked to prepare, stressing the great interest shown by OAS Member States in the topic of cooperation with the International Criminal Court, in view that 17 States had answered the questionnaire. Said Questionnaire showed that most States deal with genocide in their domestic legislation, followed by crimes of war and then, to a smaller extent, crimes against humanity.

Moreover, it was determined that not all countries have included in their domestic legislation the crimes enshrined in the Rome Statute, but many countries are currently working on the incorporation of such crimes.

Some States answered that they already have domestic laws in place to cooperate with the Criminal Court; therefore, they are ready to meet cooperation requests from the Court under the legal rules in force. Other States answered that they are drafting the necessary legislation to cooperate with the Criminal Court.

In said Questionnaire, some issues which could be raised by the States as a possible source of conflict between the Rome Statute and their domestic legislations were also determined, as follows: *ne bis in idem*, inadmissibility on public charge grounds, duties and powers of the Prosecutor with respect to investigations; the arrest procedure; the surrender of persons to the Court; life imprisonment; and remission of penalty and pardon.

To resolve this problem among OAS Member States which are still not a Party to the Rome Statute, certain mechanisms have been identified, as follows:

- Undertake a comprehensive constitutional reform which overcomes contradictions or objections, whether or not it includes interpretative statements.
- Request the Constitutional Control Bodies to issue an advisory opinion, statement or a similar document which will allow in some cases to make a simple interpretation under the Statute and the Constitution and, when applicable, directly request a previous constitutional reform.
- Carry out studies and consultations which result in the direct ratification of or adhesion to the Rome Statute, without major inconvenience.

Following are some of the main cooperation measures contemplated in the Statute:

Part 9. International Cooperation and Judicial Assistance:

- States Parties shall cooperate with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court.
- States Parties shall ensure that there are procedures available under their national law for all of the forms of cooperation which are specified in the Statute.
- States Parties shall, in accordance with the provisions of the Statute and the procedures established under their national law, comply with requests for arrest and surrender of persons.
- Concerning matter adjudged, the Court will determine whether it admits the cause and, if the case is admissible, then the State must comply with the request.
- A State Party shall authorize transportation through its territory of a person being surrendered to the Court by another State.
- If besides the Court another State is requesting a given person, then priority will be given to the Court, except for some specific cases:
- In urgent cases, the Court may request the provisional arrest of the person sought, subject to the fulfillment of the necessary formalities.
- States Parties shall comply with requests made by the Court to provide assistance in relation to investigations or prosecutions, provided they are not contrary to the law of

the requesting State and further provided they facilitate the investigations or prosecutions.

- The Court can also cooperate with States Parties or non-State Parties (at their request) in relation to matters which constitute a crime within the jurisdiction of the Court or which constitute a serious crime under the national law of the requesting State.

Part 10. Enforcement

- A sentence of imprisonment shall be served in a State designated by the Court from a list of States which have indicated to the Court their willingness to accept sentenced persons.
- States Parties shall give effect to fines or forfeitures ordered by the Court; otherwise, if a State Party is unable to give effect to a fine or order for forfeiture, it shall take measures to recover the value of the proceeds, property or assets ordered by the Court. Property or the proceeds of the sale of real property shall be transferred to the Court.

Document CJI/doc.199/05 dated August 15, 2005 was also taken into account. In said document, the Inter-American Juridical Committee addressed the topic of “Legal Aspects of Compliance within the States with Decisions of International Courts or Tribunals or other International Organs with Jurisdictional Functions”, which included a series of answers given by the States in relation to the International Criminal Court.

Based on the results of this report, the General Assembly of the Organization of American States, by resolution AG/RES. 2176 (XXXVI-O/06) dated June 6, 2006, took note with satisfaction of the Report and requested the Inter-American Juridical Committee to prepare a document of recommendations to the OAS Member States on how to strengthen cooperation with the International Criminal Court, as well as on progress made in that regard, and to present it to the Permanent Council, so that it may in turn submit it to the General Assembly of the Organization at its thirty-seventh regular session. Said report was submitted by the rapporteur on the topic at the 70th regular session held by the Inter-American Juridical Committee in San Salvador, El Salvador, from February 26 to March 9, 2007 in the document entitled CJI/doc.256/07 “Promotion of the International Criminal Court”, which was approved by the Committee and submitted to the Permanent Council for it to refer it to the OAS General Assembly.

For this reason, the OAS General Assembly, by resolution AG/RES. 2279 (XXXVII-O/07) called “Promotion of the International Criminal Court”, dated June 5, 2007, requested the Inter-American Juridical Committee to prepare a model law on cooperation between States and the International Criminal Court, taking into account the different legal systems which exist in the hemisphere (civil law and common law), and to submit it to the General Assembly at its 38th regular session.

The rapporteur on the topic presented his report at the 72nd regular session of the Inter-American Juridical Committee held in Rio de Janeiro, Brazil, from March 3 to 24, 2008, where he expressed the convenience of embracing the experiences of existing national legislations, without limitation: Crimes against Humanity and War Crimes, Act of 2000 of Canada; Law N^o. 18.026 Cooperation with the International Criminal Court in the fight against Genocide, War Crimes and Crimes against Humanity in the Eastern Republic of Uruguay, of 2006; Law N^o. 26.200, Law on the Implementation of the ICC Rome Statute in the Republic of Argentina, of 2006; Decree N^o. 957 Peruvian Code of Criminal Procedure of 2004, which contains rules on international judicial cooperation with the International Criminal Court; Law N^o. 8272 on Criminal Repression to Punish War Crimes in Costa Rica; and the International Criminal Court Act of Trinidad and Tobago, of 2006.

Cooperation with the International Criminal Court in the above legislations will be consistent with the respective domestic laws. Accordingly, on some occasions, the Inter-American Juridical Committee will have to indicate the need to develop some national procedures in some fields, in which case said procedures will have to be established by national laws, based on their own democratic institutionality.

A solution should also be found to bring the various common law and civil law systems into agreement, starting from the premise that a unifying element already exists, that is, the Rome Statute, which actually provides a normative bridge between one system and the other one.

We should bear in mind the fact that a law on cooperation with the International Criminal Court does not replace the Rome Statute, nor does it displace it, because the Rome Statute is an International Treaty. For this reason, these laws are only intended to complement it because State rules are insufficient. It is necessary to establish internal procedures, in those cases where national rules are required, in order to facilitate, expedite, and implement the Rome Statute provisions.

Consequently, the model law should contain principles and guidelines on matters which may require the support of the domestic institutional machinery for it to be able to work in all legal systems. Almost all cooperation measures are addressed in Part 9 of the Rome Statute, related to International Cooperation and Judicial Assistance. Cooperation with the International Criminal Court should be understood in the broadest sense. This means that States not only cooperate with the International Criminal Court; in fact, the Court also cooperates with States by providing assistance when a Party State is carrying out an investigation or trying a case related to a behavior which constitutes a serious crime under the domestic law of the requesting State, in accordance with the provisions set forth in Article 93, paragraph 10, of the Rome Statute.

Non-Party States are not excluded from the cooperation requirement, in accordance with the provisions set forth in Article 87, paragraph 5, of the Statute, which provides that the Court may invite any State which is not a party to the Statute to provide assistance under Part 9 of the Statute on the basis of an ad-hoc arrangement, an agreement with such State or any other appropriate basis.

The model law and domestic laws must be consistent with the Statute, in compliance with the duty of cooperation, for which reason the procedures to be established in these cooperation laws will be basically aimed at supplementing and complementing the Statute. In this sense, States Parties, in keeping with Section 88 of the Statute, must ensure that there are procedures available under their national law for all of the forms of cooperation with the Court.

It is worth highlighting that it is not the intent of the International Criminal Court to replace the national administration of justice, but rather to make the national administration of justice protect and safeguard the prosecution, trial, and punishment of the perpetrators of the crimes enshrined in the Statute, for which reason national judges are capable of exercising their jurisdiction in the field of International Criminal Law.

So far, the Inter-American System laws enacted to cooperate with the International Criminal Court have not followed a uniform procedure. In some cases, laws have been specifically issued to deal with this subject, while in other cases laws have been incorporated into Criminal or Procedural Codes. However, in other cases, mixed procedures have been followed, for which reason there has been more than one way to implement cooperation with the International Criminal Court.

For the above reason, the rapporteur on the topic, Dr. Mauricio Herdocia Sacasa, considered that the most convenient thing to do at this stage was to prepare a "Guide to General Principles and Guidelines on Cooperation between the States and the International Criminal Court" of general nature, in order for domestic laws, supported by a framework of reference, to implement their respective rules in accordance with the domestic legal systems.

At its 39th regular session, the General Assembly of OAS adopted resolution AG/RES. 2505 (XXXIX-O/09) dated June 4, 2009, entitled “Promotion of the International Criminal Court”, where it requested the Inter-American Juridical Committee to promote, using as a basis the OAS Guide on Cooperation with the International Criminal Court, the adoption of the relevant national legislation, within their means and with the support of Civil Society, by the States that do not yet have it, and, with collaboration from the General Secretariat and the Secretariat for Legal Affairs, continue providing support and promoting in OAS member states the training of administrative and judicial officials and academics for that purpose.

Moreover, the Inter-American Juridical Committee was instructed to prepare a model law on the implementation of the Rome Statute, in particular regarding the definition of crimes within the jurisdiction of the International Criminal Court.

The above request made by the OAS General Assembly to the Inter-American Juridical Committee is very special, to the extent it asked for collaboration in the training of officials, which implies a more dynamic way of performing its duties.

Due to this new request, the Inter-American Juridical Committee is drafting a model law on the implementation of the Rome Statute, for which purpose it will coordinate with the International Committee of the Red Cross (ICRC) and with other organizations with are directly related to this matter. Similarly, the work carried out by the Juridical Committee in relation to the International Humanitarian Law shall also be taken into account.

Current situation

So far, 25 Member States of the Inter-American System have ratified the Rome Statute, as follows: Antigua and Barbuda; Argentina, Barbados, Belize, Bolivia, Brazil, Canada, Colombia, Costa Rica, Chile, Dominica, Ecuador, Guyana, Honduras, Mexico, Panama, Paraguay, Peru, Dominican Republic, Saint Kitts and Nevis, Saint Vincent and The Grenadines, Suriname, Trinidad and Tobago, Uruguay and Venezuela. Ten Member States of the Inter-American System have not ratified the Rome Statute, as follows: Bahamas, Cuba, El Salvador, United States of America, Guatemala, Grenada, Haiti, Jamaica, Nicaragua, and Saint Lucia.

Concerning the “Agreement on Privileges and Immunities of the International Criminal Court”, it has been ratified by 13 Member States of the Inter-American System, as follows: Argentina, Belize, Bolivia, Canada, Colombia, Ecuador, Guyana, Honduras, Mexico, Panama, Paraguay, Trinidad and Tobago, and Uruguay.

The above proves that the OAS Member States are seriously committed to cooperating with the International Criminal Court.

Worldwide, 110 countries are States Parties to the Rome Statute, which proves the international community Member States’ willingness to cooperate with the International Criminal Court.

The Inter-American Juridical Committee, through its member and rapporteur on the topic, Dr. Mauricio Herdocia Sacasa, attended on January 27, 2010, at OAS headquarters, in Washington, D.C., a work meeting on the International Criminal Court, in accordance with the provisions set forth in OAS resolution AG/RES. 2505 (XXXIX-O/09) dated June 4, 2009, where the Permanent Council, with support from the Department of International Law of the Secretariat for Legal Affairs, was instructed to hold a work meeting which should include high-level dialogue to discuss “topics of interest to the region to be considered in negotiations before and during the Review Conference”, in particular substantive amendments to the Statute, such as the definition of the crime of aggression.

At the 76th regular session to be held by the Inter-American Juridical Committee (IAJC) in Lima, Peru, from March 15 to 24, 2010, the rapporteur on this topic will present the progress made so far with regard to the fulfillment of the instructions given by the OAS General Assembly through its various resolutions, as well as the manner in which the Juridical Committee will continue to make progress on its work”.

This kind of Seminar leads the OAS Member States to cooperate with the Promotion of the International Criminal Court, in keeping with the provisions set forth in the OAS Assembly General resolutions issued in relation to this matter, as well as with the resolutions adopted by the Inter-American Juridical Committee at its 75th regular session.

CJI/doc.349/10

INTERNATIONAL CRIMINAL COURTS

(presented by Dr. Jorge Palacios Treviño)

When on July 17, 1998 the Rome Diplomatic Conference adopted the treaty containing the Statute whereby the International Criminal Court was created, the old aspiration came true of establishing a permanent international criminal court aimed preventing impunity for crimes of which millions have been victims and which due to their seriousness are considered as a “threat to peace, security and well-being of the world”, as stated in the Preamble of the Rome Statute. In a certain way, the International Criminal Court constitutes the realization of the so-called universal jurisdiction; that is, the duty of the States to punish or extradite, in accordance with the provisions contained in international conventions. The background of the establishment of the Court dates back to the end of World War I, since the Peace Treaty of Versailles already contemplated the establishment of *ad hoc* courts –although none was established- “to prosecute those accused of committing unlawful acts and customs of war”. Article 227 of this treaty even ordered the arraignment of Kaiser William II for a “supreme offense against international morality”; in other words, for considering that he was the main responsible for the war. However, the government of Holland, which had given him asylum, refused to extradite him. For this reason, only a few criminals were prosecuted in Germany, and were qualified as symbolic.

Since that time, the opinion became widespread that International Law could directly impose obligations upon individuals and, consequently, liability for committing these crimes of war and crimes against humanity and, for this reason, they were qualified as international crimes. This opinion was included in the London Agreement of August 8, 1945, which created the Nuremberg International Tribunal for the purpose of judging war criminals of the Axis powers. On this agreement, which was challenged on the grounds of violating the principle of non-retroactivity, Alfred Verdross states “it exceeds the limits of common International Law, since it not only encompasses war crimes and crimes against humanity, which were already punishable in accordance with the laws of all States, but also crimes against peace which are defined as the “planning, preparation, initiation and waging of wars of aggression” and were only contemplated as crimes committed by States and not by individuals.

In any case, the jurisprudence of the Nuremberg International Military Tribunal consolidated the opinion that physical persons should be liable and, therefore, punished for such crimes in spite that the judgments issued by the referred court were even qualified as illegal and it was said that the punishment of the guilty authorities was only based on *lege ferenda*.

The Nuremberg Tribunal justified its actions as follows:

That international law imposes duties and liabilities upon individuals as well as upon States has long been recognized ... Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforcedThe principle of international law, which under certain circumstances protects the representative of a state, cannot be applied to acts which are condemned as

criminal by international law. The authors of these acts cannot shelter themselves behind their official position in order to be freed from punishment in appropriate proceedings.

On the other hand, resolutions unanimously adopted by the United Nations General Assembly in 1946 recognized the juridical value of the principles contained in the 1945 London Agreement and in the judgments of the Nuremberg Tribunal, and entrusted the International Law Commission to formulate them:

These principles are the following:

- I. Any person who commits an act which constitutes a crime under international law is responsible therefor and liable to punishment.
- II. The fact that internal law does not impose a penalty for an act which constitutes a crime under international law does not relieve the person who committed the act from responsibility under international law.
- III. The fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible Government official does not relieve him from responsibility under international law.
- IV. The fact that a person acted pursuant to order of his Government or of a superior does not relieve him from responsibility under international law provided a moral choice was in fact possible to him.
- V. Any person charged with a crime under international law has the right to a fair trial on the facts and law.
- VI. The crimes hereinafter set out are punishable as crimes under international law:

Crimes against peace:

- a) Planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties, agreements or assurances; b) Participation in a common plan or conspiracy for the accomplishment of any of the acts mentioned under a).

War crimes:

Violations of the laws or customs of war which include, but are not limited to, murder, ill-treatment or deportation to slave-labor or for any other purpose of civilian population of or in occupied territory; murder or ill-treatment of prisoners of war, of persons on the Seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns, or villages, or devastation not justified by military necessity. Crimes against humanity: Murder, extermination, enslavement, deportation and other inhuman acts done against any civilian population, or persecutions on political, racial or religious grounds, when such acts are done or such persecutions are carried on in execution of or in connection with any crime against peace or any war crime.

- VII. Complicity in the commission of a crime against peace, a war crime, or a crime against humanity as set forth in Principle VI is a crime under international law.

It is now indisputable that since long ago International Law contains rules that apply directly to individuals.

Once the legitimacy of the jurisprudence of the Nuremberg and Tokyo trials was established – the latter set up to prosecute Japanese World War II criminals – they served as important precedent for the establishment of the International Criminal Court in Rome.

Nguyen Quoc Dinh, Patrick Dailler and Alain Pellet, in their “Droit International Public”, Paris, 1980, consider that even though there is still no doubt that individuals are subject to international community law, their participation as such is limited to two cases: when the

international community “assigns duties and fully punishes them if they violate them and when it protects and confers rights upon them”. Examples of these hypotheses could be the following: with regard to the former, the punishment of crimes that fall under the jurisdiction of the International Criminal Court - which will be discussed below- and, with regard to the second one, human rights.

In order for the international community to be able to discharge the duty of punishing, International Law establishes the universal jurisdiction to punish these acts; in other words, as the above-quoted authors state, “the ubiquity of punishment is the main principal of international criminal law”.

Until now, the duty of punishing these crimes is the jurisdiction of the States although limited to specific cases established in common International Law or specific treaties; however, in order to be able to punish them, the States must enact the corresponding criminal rules; in other words, International Law imposes upon the State the obligation of punishing a given crime, but it can only be punished by virtue of internal law. Although the foregoing is true, it should be recalled that there are two exceptions since in 1933 the United Nations Security Council established an *ad hoc* international criminal court to prosecute those responsible for violating Humanitarian International Law and laws and customs of war during the conflict of former Yugoslavia, and in 1994 it established another similar tribunal in connection with the Civil War in Rwanda. It should be pointed out, however, that the establishment of these *ad hoc* tribunals was challenged by several countries, among them Mexico, since they considered that the Security Council lacks authority to create these tribunals.

Although for some internationalists there are no rules of International Law that regulate, in general, the international liability of individuals, just only in specific cases such as genocide, piracy, slavery and apartheid; for others, the majority, crimes of war, crimes against peace and crimes against humanity are crimes in respect of which it is accepted, by virtue of common International Law, that not only the responsibility of the individual but also the universal jurisdiction to punish them is included in general international law; that is, *jus cogens*. It is even considered that statutory limitations do not apply to these crimes according to common International Law and the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity adopted under the auspices of the United Nations in 1968.

Many countries support universal jurisdiction, and accordingly, some European countries have adopted legislation that allows them to prosecute in their courts nationals and foreigners charged with crimes against humanity committed abroad; for example a Belgian court condemned 4 Hutus from Rwanda for genocide; Prosecutors from that country investigated Prime Minister of Israel Ariel Sharon, and French judges stated their intention of summoning Henry Kissinger for interrogation on the crimes committed during the coup d'état that ousted Allende. On the other hand, Israel used the above principle to prosecute and obtain the death penalty for war criminal Rudolf Eichmann, after he was abducted by a commando in Argentina, and a Nuremberg tribunal requested the extradition of Carlos Guillermo Gutiérrez Manso, a former Argentinian general, for the disappearance and murder of German student in Argentina in 1977. An Argentine judge ordered the preventive imprisonment of this person for the purpose of extraditing him and an Italian Court also sentenced him in absence for the disappearance of 8 Italians during the Videla administration.

In the United States, the courts have also resorted to the principle of universal jurisdiction for violation of human rights occurring outside this country.

It was also on the basis of this principle of universal jurisdiction that the Spanish Judge Garzon requested the British authorities to arrest and hand over Augusto Pinochet. Chile, on its part, claimed the principle of territoriality and diplomatic immunity.

Some treaties that serve as examples of the generalization of the principle of universal jurisdiction are the following:

Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted in New York on December 10, 1984. According to the provisions contained in the Convention, torture is a crime that the States Parties are obliged to punish or to extradite the indicted person, as provided in Article 6, which reads as follows: ...

Any State Party in whose territory a person alleged to have committed any offence referred to in article 4 is present shall take him into custody or take other legal measures to ensure his presence. The custody and other legal measures shall be as provided in the law of that State but may be continued only for such time as is necessary to enable any criminal or extradition proceedings to be instituted.

The Inter-American Convention on the Forced Disappearance of Persons, adopted in Belém, Brazil, on June 9, 1994. This Convention establishes that the forced disappearance of persons is a crime considered as continuous or permanent, and that the systematic practice thereof is considered a crime against humanity; it further provides that it is not a political crime for extradition purposes and that statutory limitations are not applicable to either the criminal actions or the punishment except in those countries where a fundamental rule prevents it, and, in this case, the statute of limitations must be equal to that applicable to the most serious offense of the internal legislation of the country in question.

Convention on the Prevention and Punishment of the Crime of Genocide (which is a crime against humanity), dated December 9, 1948. The Convention provides that genocide is a crime under international law which the States Parties undertake to prevent and punish and that persons committing genocide will be punished, whether they are rulers, officials or private individuals. Article 5 of the Convention is worth quoting because it provides that the crime of genocide must be prosecuted by the State where it was committed or by the relevant criminal court, since it is considered that with this provision a State Party to the Convention and to the Statute that created the International Criminal Court would be obliged to hand over to the Court a person who may be found in its jurisdiction and required by such Court, even if the possibility of the existence of such Court had not been taken into account since it was established exactly 50 years after the Convention in question was adopted.

Statute of the International Criminal Court. It is essentially a list of serious and important crimes for the international community which the States Parties undertake to punish or in the event they do not wish to or are unable to do it, the Court will do it on a supplementary basis. Consequently, the system established by the Statute does not prevent national courts from continuing to operate normally and continue having the primary responsibility of preventing and punishing all crimes over which they have jurisdiction including those which, on a supplementary basis, fall under the jurisdiction of the Court. In other words, it does not replace the criminal judicial systems of the States Parties but supplements them. For the time being, the Court will only have jurisdiction over serious crimes and if the national courts punish them properly it will never intervene; for this reason, it is said that the governments that protect corrupt or inefficient judicial systems are those that object to the establishment of the Court.

The crimes over which the Court will initially have jurisdiction are: genocide, crimes against humanity, and crimes of war. With regard to the latter, it should be clarified that the Court will have jurisdiction over those crimes committed both in an international armed conflict and those committed in a conflict that, without being international, takes place in the territory of a State but is a prolonged armed conflict between the government authorities and organized armed groups or among such groups.

Unfortunately, the Court will not have jurisdiction, at least until now, over the most atrocious crime – aggression – notwithstanding most countries wish it had, since the Statute provides that the Court may only exercise this jurisdiction 7 years after the treaty goes into

effect and provided an agreement is reached on the determination of the crime and on the conditions on which the Court will have jurisdiction over it.

The current lack of jurisdiction of the Court over the crime of aggression is a result of the influence the large powers have in international forums, and also the authority to interfere that was granted to the Security Council which may order the Court to stop an action or suit brought notwithstanding the fact that it is an eminently political body and the Court is a jurisdictional body; however, it is considered that this is the price paid for having the Court in the same way the Security Council is the price paid for having the United Nations. Another example that illustrates what has just been stated about the influence of the large powers is the failure to include in the treaty as a crime of war the use of mass destruction weapons (chemical, biological and nuclear).

Now then, in order for the Court to be able to comply with its role of supplementing national courts, it must have sufficient decision-making authority to intervene and judge the author of a crime that falls under its jurisdiction if the State that has original jurisdiction does not prosecute him or prosecutes him inadequately.

With regard to this authority of the Court it has been said that it would violate the principle that nobody can be prosecuted twice for the same crime; however, it has been considered that in the cases contemplated in the Statute there been no trial or, if there has been one, it has been a sham and therefore the Court would not be prosecuting the criminal for a second time.

This authority of the Court is also criticized because it is considered that it is equivalent to having a supranational revision court. This is true; however, it should be taken into account that this the only way to prevent a crime from remaining unpunished besides the fact that this authority stems from the power the international community of States has, as a whole, to create imperative rules of international law, as provided in Article 53 of the 1969 Vienna Convention on the Law of Treaties, 1969.

No statutory limitation applies to crimes that fall under the jurisdiction of the International Criminal Court but the Court will only have jurisdiction in respect of crimes committed after the Statute went into effect; notwithstanding, it should also be considered whether the Court will be able to prosecute the so-called permanent crimes, such as, abduction or the forced disappearance of persons.

CJI/doc.352/10 rev.1

**PROGRESS REPORT ON EFFORTS TOWARD ADOPTING NATIONAL
LEGISLATION BASED ON GUIDELINES OF PRINCIPLES OF THE INTER-
AMERICAN JURIDICAL COMMITTEE AND TRAINING OF EMPLOYEES FOR
THE COOPERATION OF THE MEMBER STATES OF THE OAS WITH THE
INTERNATIONAL CRIMINAL COURT AND THE DRAFTING OF MODEL LAWS
FOR THE CRIMES CONTEMPLATED IN THE ROME STATUTE**

(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:

11. 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 OAS 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.

12. 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.

II. ORIGIN AND DEVELOPMENT OF THE WORK OF THE INTER-AMERICAN JURIDICAL COMMITTEE AND THE LEGAL STATUS OF THE ROME STATUTE AND THE APIC

As described in previous reports, 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 June 7, 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 States Parties of the Rome Statute and those that were not Parties at that time.

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

On June 6, 2006, the General Assembly of the OAS resolved to request the Inter-American Juridical Committee to prepare, on the basis of the results of the report presented, a document of recommendations to the Member States of the OAS on how to strengthen cooperation with the International Criminal Court. Said 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 March 10, 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 March 24, 2008.

On August 14, 2009, the rapporteur issued his last report entitled: Report on the Preparations and Advances in Efforts Toward Adopting National Legislation Based on Guidelines of Principles of the Inter-American Juridical Committee and Training of Employees for the Cooperation of the Members States of the OAS with the International Criminal Court, CJI/doc.337/09.

The current Report describes the progress achieved since then, so that the Fortieth regular session of the General Assembly of the OAS may learn of the progress made in accordance with the mandate received.

Following the last report, the countries of the Inter-American System that have already ratified the Rome Statute are still 25. They are:

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), **Dominican Republic** (12 May 2005), **Ecuador** (5 February 2002), **Guyana** (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), **Saint Vincent and the Grenadines** (3 December 2002), **Trinidad and Tobago** (6 April 1999), **Uruguay** (28 June 2002), **Venezuela** (7 June 2000), **Suriname** (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.**

Ratifications of the APIC

With regard to the Agreement on Privileges and Immunities of the International Criminal Court (APIC) the Dominican Republic has joined after the last report was issued.

The Agreement on Privileges and Immunities of the ICC has been ratified by 14 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), **Guyana** (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), **Colombia** (15 April 2009), and the **Dominican Republic** (10 September 2009).

III. GENERAL CONTENTS OF THE GUIDE TO THE GENERAL PRINCIPLES AND AGENDAS FOR COOPERATION OF THE STATES WITH THE INTERNATIONAL CRIMINAL COURT, PRESENTED BY THE IAJC

As a reminder, the Guide started out with the following 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, enforcement 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 its entire 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 *ne bis in idem* (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

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”.

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 art. 93 paragraph 10.a), the Court can cooperate with and provide assistance on the request of a State Party carrying out an investigation into or trial in respect of conduct which constitutes a serious crime under national 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 provide 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 "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 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 State 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. At that time, the rapporteur considered it more convenient at this stage of the Committee's works to draft an instrument with general characteristics centered on large principles² 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.

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.

The Guide to the General Principles and Agendas for the Cooperation of States with the International Criminal³ 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.
- Its Nature is supplementary to the provisions of the Rome Statute and its complementary norms, contemplating that the integrity of procedures already in place 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

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.

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.

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 are the minimum standards to which the respective national legislations must adapt.
- Notwithstanding, 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 do 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.

- 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 Prosecutor; 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 State Party 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 Parties 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 SESSION OF THE CAJP

The 6th Working Session on the International Criminal Court was held on January 27th, 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, which is documented in document OEA/Ser .G CP/CAJP-2811/10.

This session took into consideration the following mandate contained in resolution AG/RES._2505 (XXXIX-O/09), paragraph fourteen of which reads as follows:

14. To request the Permanent Council to hold a working meeting prior to the Review Conference of the Rome Statute, with support from the Department of International Law, which should include a high-level dialogue among the Permanent Representatives of all OAS Member States, to discuss, among other matters, topics of interest to the region to be considered in negotiations before and during the Review Conference, in particular substantive amendments to the Statute, such as the definition of the crime of aggression. The International Criminal Court, international organizations and institutions, and civil society will be invited to cooperate and participate in this working meeting.

During the working meeting, the rapporteur made the following presentation on the Committee's work on efforts toward adopting national legislation based on Guidelines of Principles of the Inter-American Juridical Committee and Training of Employees for the Cooperation of the Member States of the OAS with the International Criminal Court (partial text):

“On behalf of the Inter-American Juridical Committee and in my capacity as rapporteur, it is a great pleasure to attend the Working Session which has already become an institutionalized annual activity of the OAS, of great value and timeliness which allows a fresh and innovative exchange of ideas, offers information that is essential to encourage cooperation with the International Criminal Court and allow convergence of efforts and actions both within and outside the Organization as an important core of associations and groups linked by enthusiasm and dedication in this work. Precisely, we have just held a meeting to establish an Informal Group of bodies and associations participating in this Special Meeting Process, in order to jointly promote dissemination, learning and cooperation with the International Criminal Court.

In its last mandate, the General Assembly of the OAS decided to: “Request the Inter-American Juridical Committee to promote, using as a basis the OAS

Guide on cooperation with the International Criminal Court, the adoption of national legislation on this topic, to the extent of its possibilities and with the support of civil society, among States that still do not have such legislation; and that with the cooperation of the General Secretariat and the Secretariat for Legal Affairs, continue supporting and encouraging the Members States to provide training to administrative, judicial and academic officials...”.

The mandate also requested 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...”.

This group of mandates of the General Assembly to the Juridical Committee has the very special characteristic of entrusting it to join efforts toward qualifying and promoting the 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.

PREPARATIONS AND ADVANCES ON PROMOTING THE GUIDE OF PRINCIPLES

Request for assistance and support to 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, support and assistance in fulfilling the resolutions of the General Assembly to promote the adoption of cooperation laws and undertake qualification processes.

Letter of the Chairman of the IAJC

The Chairman of the Inter-American Juridical Committee addressed the States Parties to the Rome Statute that had not adopted legislation on cooperation with the International Criminal Court in order to place at its disposition the work of the Juridical 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, the Honorable Permanent Missions were very respectfully requested assistance to “identify and establish relations of collaboration with the sectors of the government in each country involved in the topic 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 sense, I would like to take the opportunity to reiterate the request and thank the parties that have already replied.

Next activities scheduled

I would also like to announce that next February 18, two members of the IAJC will be in El Salvador together with officers from the Coalition, the Court and the ICRC, at the invitation of El Salvador to hold a special seminar on the situation, challenges and solutions for the ratification of the Rome Statute. I would

also like to stress that the Committee members have collaborated with the mission of international organizations in encouraging the work of either ratifying or adapting legislation in their respective countries for the purpose of cooperating with the Rome Statute.

The organization of academic meetings in Peru has also been contemplated to address the topic of the International Criminal Court, among others, on the occasion of the next session of the IAJC to be held in this country in March of this year.

Cooperation Project

In very close coordination with the IAJC, the Department of International Law prepared a project on Strengthening Cooperation of the States with the International Criminal Court concerning legislation, to last an estimated of 3 years beginning February 2010 and ending February 2013, for the purpose of strengthening the capacity of State bodies in respect of 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.
- 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, Saint Vincent and the Grenadines, Barbados, Guyana, Saint Kitts and Nevis, and Suriname.

Of course, nothing prevents the courses or workshops from being held in countries that have not ratified the Rome Statute, at their request.

In principle, the expected results consist in:

- i) Train 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 establishing a follow-up mechanism on the national development made on the legislative, administrative and judicial level in the countries whose employees received training.

I am pleased to inform that the Project Evaluation Commission (CEP) in its 51st session held on December 17 adopted the document entitled Strengthening of Cooperation of the States with the International Criminal Court on Legislation matters (ILA0901). The next step is to implement it with your support.

Offer of collaboration

The members of the Inter-American Juridical Committee offered 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 IAJC.

The Department of International Law and the rapporteur 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.

MODEL LAWS FOR CRIMES

The IAJC proposes to work on drafting model legislation on implementation of the Rome Statute, particularly in respect to typification of war crimes. To this end, it intends to intensify consultation with 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, in the sense of: "Supporting efforts made by Member States to fulfill obligations under international Humanitarian Law Treaties..."

The International Criminal Court is becoming more and more a reality that is gaining institutional and juridical life. Not only the ratification processes are impressive but also the transformation of national legislation according to the Statute, with or without the ratification thereof. Now, for the sixth time, we are assembled at a working meeting shortly before the Review Conference of the Rome Statute, which will add the crime of Aggression to the list of crimes under its supplementary jurisdiction. The OEA is giving more and more firm testimony of its commitment of promoting the Court's work and the IAJC is very satisfied to be afforded the opportunity of contributing to this monumental effort". (end of quote).

V. ESTABLISHMENT OF A WORKING GROUP AMONG THE PARTICIPATING ORGANIZATIONS

Prior to the Special Session, a meeting was held in Washington among the participating organizations: Assembly of States Parties to the Statute; International Criminal Court; Parliamentarians for Global Action; Coalition for the International Criminal Court; International Committee of the Red Cross; Inter-American Juridical Committee and the Department of International Law of the Secretariat for Legal Affairs of the OAS.

As a result of the foregoing, an informal exchange and communications group was set up among the above institutions and organizations in order to facilitate a smoother communication and establish coordination mechanisms. This tool will allow them to remain up-to-date on the various activities held on this matter, and exchange ideas and share efforts for a close and dynamic cooperation on this matter. On February 1, Dr. Dante Negro, Director of the Department of International Law, addressed the participating organizations to offer support in coordinating communications among the members of this informal Group.

VI. COMMUNICATIONS FROM SURINAME AND PERU

On January 20th, the Republic of Suriname sent a letter to the Department of International Law, acting as Technical Secretariat of the IAJC, informing it that, in response to the note dated October 21, 2009, related to the delivery of information on the national law on cooperation with

the International Criminal Court, and as indicated by the Ministry of Justice and Police, the following laws were being drafted by said Ministry:

- Design Law regarding International indictable offences.
- Design law regarding cooperation with the International Criminal Court.
- Design law regarding amendment of the Statute Book of Criminal Law, as to include indictable offences against the Criminal Court.

Similarly, at the request of the rapporteur on the International Criminal Court, the Minister Counsellor and Alternate Representative of Peru to the OAS Permanent Mission, Luis Castro Joo, submitted a draft law related to violations of the international human rights law and the international humanitarian law. Peruvian Congress is still to issue its advisory opinion on this draft law.

VII. SEMINAR ON THE INTERNATIONAL CRIMINAL COURT

The IAJC, through its rapporteur and through Dr. Ana Elizabeth Villalta Vizcarra, at the request of the Minister of Foreign Affairs of El Salvador, organized a Seminar on the International Criminal Court in El Salvador. The event was held on February 18th at the Ministry of Foreign Affairs of El Salvador, with nearly 200 people in attendance. Present were representatives from the Supreme Court of Justice, the Legislature, the Central American Court of Justice, Ambassadors, Prosecutors, government officials, and members of civil society. The following persons participated in this event: Hugo Martínez, Minister of Foreign Affairs of El Salvador; Miriam Spittler, International Criminal Court Delegate; Francesca Varda, representative of the organization “Coalition for the International Criminal Court”; Patrick Zhand, Principal Legal Adviser to the International Committee of the Red Cross; Mauricio Herdocia Sacasa, IAJC Rapporteur on the International Criminal Court; and Ana Elizabeth Villalta Vizcarra of the OAS Inter-American Juridical Committee.

The following agenda was discussed at the meeting:

SEMINAR ON THE INTERNATIONAL CRIMINAL COURT

Ministry of Foreign Affairs, “Dr. Alfredo Martínez Moreno” Auditorium, Antiguo Cuscatlán, February 18, 2010

AGENDA

8:00 – 8:15 Attendee Registration.

8:15 - 8:30

Opening Ceremony and Welcome Speech by the Minister of Foreign Affairs of El Salvador, Eng. Hugo Roger Martínez Bonilla.

8:30 – 9:15

First Lecture. “Overview of the Rome Statute” by Dr. Miriam Spittler, Representative of the Office of the Prosecutor of the International Criminal Court.

9:15 – 10:00

Second Lecture. “Mechanisms used by States to resolve the problems encountered for the ratification of the Rome Statute, and the Model Law on Cooperation with the International Criminal Court” by Dr. Mauricio Herdocia Sacasa, Member of the Inter-American Juridical Committee of the Organization of American States (OAS) and IAJC Rapporteur on this topic.

10:00 – 10:30

Third Lecture. “Practical cases on actions and measures taken by States to facilitate the ratification of or adherence to the Rome Statute” by Dr. Francesca Varda of the Coalition of NGOs for the International Criminal Court.

10:30-10:45 Coffee break

10:45-11:15 Questions and answers

11:15- 11:30

Fourth Lecture. “Work carried out by the International Committee of the Red Cross (ICRC) with emphasis on the International Criminal Court” by Dr. Patrick Zahnd, Legal Advisor for Latin America and the Caribbean, ICRC.

11:30 – 12:00

Fifth Lecture. “Contributions of the OAS Inter-American Juridical Committee to Promote the International Criminal Court” by Ambassador Ana Elizabeth Villalta Vizcarra, member of the Inter-American Juridical Committee and *Ad-honorem* Under-Secretary for Legal Affairs of the Ministry of Foreign Affairs of El Salvador. The text of this lecture is included in the International Criminal Court document OEA Ser. Q CJI doc. 384/10.

12:00 – 12:15 Questions and answers

The rapporteur addressed the topic of the “Mechanisms used by States to resolve the problems encountered for the ratification of the Rome Statute, and the Model Law on Cooperation with the International Criminal Court”. Following are some of the relevant sections of his lecture:

“I am going to divide my lecture into two major parts. In the first part, I will address the efforts made towards the development of a model law on cooperation with the International Criminal Court, and in the second part of my lecture I will address the Mechanisms used by States to resolve the problems encountered in relation to the ratification of the Rome Statute, which will be thoroughly developed later on by Francesca Varda of the Coalition of NGOs for the International Criminal Court, making reference to specific cases.

I will begin then with the model law on cooperation with the International Criminal Court.

I would like to start by saying that 25 countries of the Inter-American System have already ratified the Rome Statute, while 14 countries have ratified the Agreement on Privileges and Immunities of the International Criminal Court. This means that, from 110 States Parties to the Rome Statute, almost one-fourth are American countries. The Rome Statute is pending ratification by only 10 American States, including three Central American countries. That’s why it is so important not to delay anymore the enactment of laws on cooperation with the Court by the various domestic legal systems.

As a result, the General Assembly of the OAS entrusted the IAJC with the task of drafting said model instruments, which resulted in the presentation of the “Guide to General Principles and Guidelines on Cooperation between the States and the International Criminal Court”.

Let me refer now to the Mechanisms used by States to resolve the problems encountered for the ratification of the Rome Statute.

The practice of the different States has made it possible to identify the various mechanisms used by States to resolve the problems posed by their domestic legislation.

Before addressing these mechanisms, it is important to dispel three myths:

The first one is to think that the jurisdiction of the Court somehow replaces or annuls domestic jurisdiction.

It’s in fact quite the opposite. The Rome Statute is a subsidiary and complementary system. It acknowledges the central character of domestic courts and only takes action in exceptional circumstances when it is not possible for domestic courts to take action or otherwise if they do not wish to do it.

The International Criminal Court is not necessarily the main actor of the Rome Statute. In fact, the domestic courts of States should have the necessary criminal laws in place to exercise their domestic jurisdiction, which additionally implies enacting the necessary legal rules to cooperate with the Court whenever necessary.

Consequently, the Rome Statute endorses the national system's capacity to react, prevent and punish international crimes, thereby limiting the possibilities available to oblige the International Criminal Court to exercise its jurisdiction.

Another myth that should also be dispelled is the idea that the Rome Statute can be retroactively applied. That's absolutely false. The Rome Statute cannot be retroactively applied. Its mechanisms only have future application, once the Statute has been adopted and ratified by a State. There isn't any valid legal argument or cunning argument in support of the myth that the Rome Statute can be retroactively applied.

We cannot speak of preliminary acts or of the continuity of events throughout time. Nothing can make a past event acquire jurisdictional relevance if the Rome Statute is not yet effective in a State. The Statute is closely linked to past events. These crimes can be prosecuted by any institution other than the International Criminal Court if the timeframe premise is not fulfilled, that is, as from July 1, 2002 or on the date the Rome Statute goes into effect in each State Party (Articles 11 and 24), as the case may be.

The third myth built around the Rome Statute refers to the argument that national laws are so diverse that no solution can be similar to the other one. Such a categorical statement cannot be justified. Although it is true that the domestic legal systems of States differ from each other, it is also true that many constitutional laws are very similar to each other. For instance, the legal rule which prohibits the extradition of nationals is contained in almost all legislations. Constitutional authors frequently resort to these legal rules.

The same thing occurs with the legal rules which grant certain official immunities by reason of the position filled. That's why comparing experiences, when similar legal rules exist, is of great importance.

The solutions found by States having similar constitutional rules are used as a basis to find a solution which will obviously have some national colors and nuances. It is very useful and profitable to examine and compare legal rules and jurisprudence to inspire our own decisions.

Of course, we should also bear in mind the fact that the general legal principles contained in the various national legal rules, and also in international legal rules, point towards a set of rules which naturally foster cooperation and reciprocal assistance, fight impunity for the most serious crimes, prevent the commission of said crimes, and collaborate in the attainment of the high aims of international justice, while contributing to the maintenance of international peace and security.

The great objectives and the mission of the International Criminal Court, that is, prevent impunity and punish the most serious crimes like genocide, crimes against humanity and war crimes, cannot be perceived, within that perspective, as incompatible with the spirit and vision of the Constitution of a State.

Some other considerations are linked to sovereignty. As recognized by international jurisprudence, the adoption of international commitments, instead of becoming a limitation, rather reflects the State's power to consent to and assume international obligations. Accordingly, the ratification of the Rome Statute is an act of sovereign willingness. The commitments acquired thereunder in relation to the International Criminal Court become obligations enforceable against the relevant State by decision of the competent bodies of the State.

The gap between international law and domestic law has been narrowed. More and more, both legal systems are coming closer to each other and interacting with each other with a

high degree of collaboration and coordination, as components of a common system which fosters justice and security.

Now that I have dispelled the existing myths on this topic, I would like to underscore the fact that States have basically resorted to three different types of mechanisms to overcome possible internal legal frictions with the Rome Statute. These possible frictions are related both to the Court as such, as well as to some provisions of the Statute. The frictions which have caused more concern are related to the topic of Surrender of Nationals, which cannot be assimilated into extradition, which is an act between States; followed by the topic of life imprisonment and functional immunity linked to certain positions.

Broadly speaking, the following mechanisms have proved to be legally effective to overcome obstacles:

1.- There is a first group of States which afford the ratification of the Rome Statute full power to become a State commitment by reason of the sovereign act involved in the ratification process, without requiring any other type of interpretation, internal legal reform or constitutional change.

More than 80 States which did not consult with their national courts and have legal rules in place which prohibit the extradition of nationals are included in this group. These States ratified the Rome Statute without any problem. This shows their willingness to find pragmatic solutions, for which reason lawmakers seek constitutional interpretations which do not hinder the attainment of the objective of the Statute.

2.- A second group of States has opted for interpreting the coherence between the Rome Statute and the national system. All those States which required a formal interpretation from a judicial body (for instance, from a constitutional court) are included in this group. For example, Ecuador, Honduras, Costa Rica and Guatemala.

3.- There is another group of States which has undertaken constitutional reforms to open some space for the Rome Statute, like France, Germany, Mexico and Chile.

In most cases where constitutional reforms were undertaken, those articles related to purported incompatibilities between the topics of surrender of nationals, functional immunity, life imprisonment, and other eventual conflicting topics were not necessarily modified; in fact, only some articles were modified to allow incorporating the Court into the internal legal system.

It is worth highlighting that the problems resolved have not always been the same ones. Those countries which thought that incompatibility existed with the jurisdiction of the Court, to say it in some way, opted for a constitutional reform. Those countries which thought that certain incompatibilities existed with regard to the topic of surrender of nationals, life imprisonment or functional immunity ended up resorting to interpretations of compatibility and non-conflicting opinions.

Those Central American countries which have ratified the Rome Statute have resorted to the interpretation that the Rome Statute is in line with their domestic legislation.

It is worth highlighting the large number of countries which did not perform any act other than the ratification of the Statute, which shows the growing trend that gives sovereign acts an increasingly important and renewed role, including incisiveness and an effect on domestic legal rules, in keeping with a growing trend which focuses on narrowing the gap between national and international legal rules – to which I have already referred.

All these cases prove that, regardless of the mechanism sought, there should always be an enormous political willingness to achieve the great aims of international justice and the principles of international cooperation and assistance to prevent and eradicate this kind of crimes which are so detrimental to human dignity and constitute a crime against humanity, for which reason, to achieve these aims, the collective action and solidarity of everyone is required,

including cooperation to preserve the sacred assets which form part of the human heritage, which should be urgently protected and safeguarded” (end of quote).

VIII. MODEL LAW RELATING TO WAR CRIMES

In view that one of the mandates received by the Juridical Committee refers to the drafting of a model law on the crimes defined in the Rome Statute, the Rapporteur will only address war crimes in this report. The Crimes against Humanity and Genocide will be addressed in his next report, including, in due course, the crime of Aggression.

In view that a close relationship exists between the International Criminal Court topic and the International Humanitarian Law topic, the rapporteur attended, along with the IAJC rapporteur on International Humanitarian Law, Dr. Jorge Palacios Treviño, a Special Session on International Humanitarian Law held in Washington on January 29, 2010. Following is part of the text of his report:

“Through the mandate given by the General Assembly to the Inter-American Juridical Committee in 2009 in relation to the promotion of the International Criminal Court, the IAJC was entrusted with the task of drafting legislation on the implementation of the Rome Statute, particularly with regard to the definition of crimes which fall within the jurisdiction of the International Criminal Court (War Crimes, Genocide and Crimes against Humanity, and Aggression once the definition of this crime is approved at the Review Conference), and submitting a progress report before the fortieth regular session of the General Assembly.

This mandate allows making a comprehensive and complete review of the crimes enshrined in the Rome Statute and in the International Humanitarian Law. This is a great opportunity to complement and enrich the contributions made by the International Humanitarian Law in relation to the development of the different crimes enshrined in the Rome Statute. This is the right time to bring the jurisdictional world closer to the normative world embodied in the International Humanitarian Law.

American States have undertaken to punish war crimes, according to the system established in the Geneva Conventions, its Additional Protocol I, and the Rome Statute, among other conventions.

The challenge is that reform processes must overcome the problem that some crimes embodied in some conventional legal rules are not necessarily embodied in others or they are different or otherwise contain more restrictive and narrower elements, including provisions which introduce new criteria which are subject to interpretation on the scope thereof.

The harmonization and integration of these complementary realities is an interesting task that I will perform very soon in my capacity as rapporteur on the International Criminal Court. This is particularly true with respect to the crimes defined in Articles 11 and 85 of Additional Protocol I, on the one hand, and in Article 8 of the Rome Statute, on the other hand.

The idea is then to find appropriate solution channels which respect the integrity of the different texts, but at the same time complement said texts and resolve in a harmonious fashion the differences and omissions. Accordingly, it is important to create awareness of the need not to distinguish unnecessarily (when there is no need to do it) between international and non-international armed conflicts when the situations apply to both types of conflicts. This is the case of the use of certain weapons and poisoned gases: what is not acceptable under some circumstances is not acceptable under others. Its serious dehumanizing nature is

not lost just because we shift from one circumstance to another. Criminalization exists in both fields.

In the Guide to General Principles on Cooperation with the International Criminal Court, prepared by the Inter-American Juridical Committee, we addressed the importance of incorporating the crimes contemplated in the Geneva Conventions and in Protocol I. Of course, we share the idea that if we bring Criminal Law into agreement with the Rome Statute, we cannot weaken the obligations arising therefrom or from systemic complementarities, as the highest standards should always be enforced. Enrichment is undoubtedly a two-lane road.

Therefore, we must make sure that criminal law allows punishing the war crimes defined in the Geneva Conventions and in Additional Protocol I.

Accordingly, the challenge faced by the model Law lies in strengthening and complementing the design – in a model law – of both the Statute, as well as the Geneva Conventions and other instruments.

Then, this adjustment should be made notwithstanding the obligations undertaken under other agreements. The Rome Statute codifies a series of War Crimes which are not always considered a serious infringement under the Geneva Conventions. In turn, Additional Protocol I lists some crimes not included in the Rome Statute.

There are also some elements which are more restrictive in one Convention than in the rest (manifestly excessive, which is the phrase they use).

There's also an opportunity to complement related matters like, for instance, the protection of cultural wealth if an armed conflict breaks out.

The ICRC has been working with several countries in America to develop an extended list of war crimes which could be useful to the rapporteur. Several countries have also focused their efforts on developing this list, so we will very much appreciate if they could send us their laws, even their draft laws, if they have not done it already. There are laws and draft laws from the following countries, without limitation: United States, Canada, Trinidad and Tobago, Argentina, Panama, Nicaragua, Costa Rica, Peru, Brazil, Chile, El Salvador, Ecuador, Guatemala and Honduras.

The message that I want to share with you is that the drafting of a model law may turn out to be a very interesting exercise to give this work a broader perspective related not only to the Rome Statute, but also to the International Humanitarian Law, which is thus integrated into this necessary work which actually requires a large unifying vocation.

This statement may also be valid for another dimension of Humanitarian Law, related to the use of certain weapons. The international standards applied so far seem to be minimal, for which reason it might be necessary to take into account some initiatives presented by both American and non-American States for the Review Conference to be held in Kampala, Uganda, to eventually consider the possibility of extending the list of crimes, debating, for example, the use of weapons of massive destruction, Mexico's proposal on the threat or use of nuclear weapons, other proposals on anti-person mines, cluster ammunition, chemical and biological weapons, and other weapons which inflict unnecessary suffering and manifestly have indiscriminate effects. It may seem, I repeat, that these crimes should be punished, regardless of the international or domestic nature of the conflict.

All things considered, we are performing some interesting, though challenging, work where the convergence and support of the International

Humanitarian Law is of utmost importance to draft model laws in this field. The mandates received by the International Criminal Court and the International Humanitarian Law are increasingly pointing to a necessary, useful and mutually enriching direction, which constitutes an integrating challenge". (end of quote)

Draft articles

*The rapporteur does not intend to draft his own model law when substantial progress has already been made by the rapporteur on International Humanitarian Law,⁴ additionally considering the hard work carried out by ICRC with several American countries, including the studies conducted by ICRC within said legislative framework. On the contrary, the rapporteur intends to benefit from said draft laws and avoid duplicating efforts. Accordingly, the rapporteur would like to underscore a group of 22 model articles taken from some working documents of ICRC, which could be used as a reference by States, **bearing in mind their own internal features.**⁵*

In the opinion of the rapporteur, in relation to the Rome Statute, the model laws should take into account the following instruments, among others:

- a) Four Geneva Conventions, Articles 49, 50, 51, 129, 130, 146 and 147.
- b) The Third Geneva Convention, Article 130.
- c) The Fourth Geneva Convention, Article 147.
- d) 1984 Convention against Torture and other Cruel, Inhuman or Degrading Treatment of Punishment, Article 1.
- e) Additional Protocol I, Articles 11, 51(5)(a), 75, 85(3), 85(3)(a), 85(3)(b), 85(3)(c), 85(3)(d), 85(3)(e), 85(3)(f), 85(4)(a), 85(4)(b), 85(4)(c), 85(4)(d), 85(4)(e), 86, 86(2), and 87.
- f) Additional Protocol II, Article 6.
- g) Second Protocol to the 1954 Hague Convention for the Protection of Cultural Property in the event of Armed Conflict, Article 15.
- h) 1997 Convention on the prohibition of the use, stockpiling, production and transfer of anti-personnel mines and on their destruction.
- i) 1980 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.
- j) Protocols I, II and IV to the 1980 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.
- k) Optional Protocol of 2000 to the Convention on the Rights of the Child, Articles 1 and 2.
- l) Inter-American Convention on Forced Disappearance of Persons of 1994.
- m) Similarly, the elements of crimes, as far as war crimes are concerned, should be taken into account.

⁴ See, for example, **International Criminal Courts**. OAS. Ser. Q CJI/doc. 349/10 and **War Crimes under International Humanitarian Law**. OAS Ser.Q CJI/doc. 328/09 rev.1.

⁵ See, especially, the working document entitled *Repression of War Crimes in the National Criminal Legislation of the American States*. International Committee of the Red Cross. Advisory Service, Latin American Unit. See also **War crimes, according to the Rome Statute of the International Criminal Court**, based on International Humanitarian Law. Comparative Chart. Advisory Service on International Humanitarian Law, ICRC.

Model texts

Article 1. (Voluntary Manslaughter) Whoever, on the occasion of an armed conflict, deliberately kills a person protected by International Humanitarian Law, shall be punished with ...

Article 2. (Torture and Inhuman Treatment) Whoever, on the occasion of an armed conflict, commits torture or gives any other cruel or inhuman treatment or otherwise causes great pain or suffering to a person protected by International Humanitarian Law, shall be punished with ...

Article 3. (Mutilations and Medical Experiments) Whoever, on the occasion of an armed conflict, mutilates a person protected by International Humanitarian Law or makes him/her undergo medical or scientific experiments or removes tissues or organs for reasons not justified by the medical, dental or hospital treatment that said person is receiving, or for reasons which do not benefit said person, causing the death or seriously endangering the health of said person, shall be punished with ...

Article 4. (Sexual Crimes) Whoever, on the occasion of an armed conflict, engages in acts of rape, sexual slavery, involuntary prostitution, forced pregnancy, involuntary sterilization or in any other form of sexual violence against a person protected by International Humanitarian Law, shall be punished with ...

Article 5. (Apartheid) Whoever, on the occasion of an armed conflict, commits an inhumane act against a person protected by International Humanitarian Law in order to maintain an institutionalized oppression regime or make a given racial group systematically dominate one or more racial groups, shall be punished with ...

Article 6. (Assault on Dignity) Whoever, on the occasion of an armed conflict, performs an act which constitutes an assault on the dignity of a person protected by International Humanitarian Law, particularly through humiliating or degrading treatments, shall be punished with ...

Article 7. (Taking of Hostages) Whoever, on the occasion of an armed conflict, takes a person protected by International Humanitarian Law hostage, shall be punished with ...

Article 8. (Illegal Arrest) Whoever, on the occasion of an armed conflict, illegally deprives a person protected by International Humanitarian Law of his freedom, shall be punished with ...

Article 9. (Delay in Repatriation) Whoever, on the occasion of an armed conflict, delays without justification the repatriation of prisoners of war or civilians, shall be punished with ...

Article 10. (Denial of Judicial Guarantees) Whoever, on the occasion of an armed conflict, deprives a person protected by International Humanitarian Law of his/her right to legitimate and impartial trial, shall be punished with ...

Article 11. (Obligation to Serve in Enemy Forces) Whoever obliges a prisoner of war or another person protected by International Humanitarian Law to serve in the armed forces of a party, which is in an armed conflict with the party on which said persons depend, shall be punished with...

Article 12. (Abolition of Rights) Whoever, on the occasion of an armed conflict, declares the abolition, suspension or inadmissibility before a court of rights and actions that persons belonging to the enemy who are protected by International Humanitarian Law are entitled to, shall be punished with...

Article 13. (Deportation or Illegal Transfer) Whoever, on the occasion of an armed conflict, deports or illegally transfers a person protected by International Humanitarian Law, especially when the population of the occupying power is transferred into occupied territory, or deports or transfers in or outside the occupied territory all or part of the population of that

territory, or if the transfer of the civilian population is ordered, unless it is so required for the security of the civilians involved or by imperative military reasons, shall be punished with...

Article 14. (Prohibited Attacks) Whoever attacks the civilian population or civilians or civil assets; or launches an indiscriminate attack knowing that such attack will result in the loss of lives, injuries to civilians or damage to civilian assets or in extensive, long-lasting, excessive and serious damage to the natural environment; or attacks defenseless cities or villages; or attacks defenseless homes or buildings that are not military targets; or attacks works or facilities containing hazardous substances knowing that this attack will result in casualties or injuries among the civilian population or in excessive damage to civilian assets; or attacks defenseless premises or non-militarized areas; or attacks a person knowing that he is out of action; or attacks health-related buildings, material, units and means of transport or the personnel wearing Geneva Convention identification badges in accordance with International Law; or attacks a protected cultural asset; or attacks buildings used for religion, teaching, arts, science or welfare purposes, as well as those places where ill or injured persons are assembled, provided they are not military targets; or attacks personnel, facilities, material, units or vehicles participating in a mission for the maintenance of peace or humanitarian assistance in accordance with the Charter of the United Nations that are entitled to protection granted to civilians or civil assets, shall be punished with ...

Article 15. (Prohibited Weapons) Whoever uses poison or poisonous weapons; or asphyxiant, toxic or similar gas, or any similar liquid, material or device; or bullets that expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions; or other war weapons, projectiles, materials and methods that, due to their own nature, inflict superfluous damage or unnecessary suffering or indiscriminate effects in violation of international law, shall be punished with ...

Article 16. (Starvation) Whoever intentionally uses starvation upon the civilian population as a method of warfare, depriving them of objects indispensable to their survival, including the fact of willfully impeding relief supplies in accordance with the Geneva Conventions, shall be punished with ...

Article 17. (Treachery) Whoever kills or wounds an enemy soldier using treason shall be punished with ...

Article 18. (Undue Use of Signs) Whoever unduly uses the white flag or the national flag or military insignia or the uniform of the enemy or of the United Nations, as well as Geneva Convention identification badges to inflict death or serious injuries, shall be punished with...

Article 19. (Showing No Mercy) Whoever declares that no mercy will be given shall be punished with...

Article 20. (Human Shields) Whoever uses the presence of a person protected by international humanitarian law to cover for certain areas or military forces from military operations, shall be punished with...

Article 21. (Children) Whoever recruits or enlists children under 18 years of age in the armed forces or groups or uses them to actively participate in hostilities, shall be punished with...

Article 22. (Destruction and appropriation of assets) Whoever destroys or confiscates assets of the enemy without an imperative military need or loots a city or main square, even when it is taken by assault, shall be punished with...

Additional comments and comprehensive proposal:

On this basis, which has been used by various States in the process of adaptation of their domestic law⁶, the rapporteur has deemed it necessary to underscore, on the one hand, certain

⁶ Case of the Nicaraguan and Panamanian Criminal Codes.

additions and provisions taken from certain national texts which, by way of example, he considered interesting to offer as part of this report. In other cases he simply separated certain texts for clarity purposes, as follows⁷:

Article 1. (Voluntary Manslaughter) Whoever, on the occasion of an armed conflict, deliberately kills a person protected by International Humanitarian Law⁸, shall be punished with ...

Article 2. (Torture and Inhuman Treatment) Whoever, on the occasion of an armed conflict, commits torture or gives any other cruel or inhuman treatment or otherwise inflicts great pain or suffering to a person protected by International Humanitarian Law, shall be punished with ...

Article 3. (Mutilations and Medical Experiments) Whoever, on the occasion of an armed conflict, mutilates a person protected by International Humanitarian Law or makes him/her undergo medical or scientific experiments or removes tissues or organs for reasons not justified by the medical, dental or hospital treatment that said person is receiving, or for reasons which do not benefit said person, causing the death or seriously endangering the health of said person, shall be punished with ...

Article 4. (Sexual Crimes) Whoever, on the occasion of an armed conflict, engages in acts of rape, sexual slavery, involuntary prostitution, forced pregnancy, involuntary sterilization or in any other form of sexual violence against a person protected by International Humanitarian Law, shall be punished with ...

Article 5. (Apartheid) Whoever, on the occasion of an armed conflict, commits an inhumane act against a person protected by International Humanitarian Law in order to maintain an institutionalized oppression regime or make a given racial group systematically dominate one or more racial groups, shall be punished with ...

Article XX.- Racial Discrimination⁹. Whoever, on the occasion of an armed conflict, engages in racial discrimination against any protected person, shall be punished with...

Article 6. (Assault on dignity) Whoever, on the occasion of an armed conflict, performs an act which constitutes an assault on the dignity of a person protected by International Humanitarian Law, particularly through humiliating or degrading treatments, shall be punished with ...

Article 7. (Taking of Hostages) Whoever, on the occasion of an armed conflict, takes a person protected by International Humanitarian Law hostage, shall be punished with ...

Article 8. (Illegal Arrest) Whoever, on the occasion of an armed conflict, illegally deprives a person protected by International Humanitarian Law of his freedom, shall be punished with ...

Article 9. (Delay in Repatriation) Whoever, on the occasion of an armed conflict, delays without justification the repatriation of prisoners of war or civilians, shall be punished with ...

Article 10.- (Denial of Judicial Guarantees) Whoever, on the occasion of an armed conflict, deprives a person protected by International Humanitarian Law of his/her right to legitimate and impartial trial, shall be punished with ...

Article 11. (Obligation to Serve in Enemy Forces) Whoever obliges a prisoner of war or another person protected by International Humanitarian Law to serve in the armed forces of a

⁷ With the valuable cooperation of Salvador Herencia who contributed with his comments.

⁸ In general, a person protected by IHL is understood to be protected by the Geneva Conventions and Additional Protocols.

⁹ Text adopted from Art. 137 of the Colombian Criminal Code. Nicaraguan Criminal Code. Art. 491.

party, which is in an armed conflict with the party on which said persons depend, shall be punished with...

Article XX. Plundering¹⁰. Whoever, on the occasion of an armed conflict, strips the corpse or a protected person of their belongings, shall be punished...

Article XX. Failure to Provide Relief and Humanitarian Assistance¹¹. Whoever, on the occasion of an armed conflict and having the obligation to do so, fails to provide relief and humanitarian assistance to protected persons, shall be punished with...

Article XX. Hindering of Health and Humanitarian Tasks¹². Whoever, on the occasion of an armed conflict, hinders or prevents the medical, health or relief personnel or the civilian population from performing health and humanitarian tasks which can and must be performed in accordance with International Humanitarian Law, shall be punished with...

Article 12. (Abolition of Rights) Whoever, on the occasion of an armed conflict, declares the abolition, suspension or inadmissibility before a court of rights and actions that persons belonging to the enemy who are protected by International Humanitarian Law are entitled to, shall be punished with...

Article 13. (Deportation or illegal transfer) Whoever, on the occasion of an armed conflict, deports or illegally transfers a person protected by International Humanitarian Law, especially when the population of the occupying power is transferred into occupied territory, or deports or transfers in or outside the occupied territory all or part of the population of that territory, or if the transfer of the civilian population is ordered, unless it is so required for the security of the civilians involved or by imperative military reasons, shall be punished with...

Article 14. (Prohibited Attacks) Whoever attacks the civilian population or civilians or civil assets; or launches an indiscriminate attack knowing that such attack will result in the loss of lives, injuries to civilians or damage to civilian assets or in extensive, long-lasting, excessive and serious damage to the natural environment; or attacks defenseless cities or villages; or attacks defenseless homes or buildings that are not military targets; or attacks a person knowing that he is out of action; or attacks buildings used for religion, teaching, arts, sciences or welfare purposes, as well as those places where ill or injured persons are assembled, provided they are not military targets, shall be penalized with...

Article XX. Attack to Hazardous Forces¹³. Whoever attacks works or facilities containing hazardous substances knowing that this attack will result in casualties or injuries among the civilian population in or excessive damage to civilian assets, shall be punished with...

Article XX. Attack to Non-Militarized Areas¹⁴. Whoever attacks defenseless premises or non-militarized areas, shall be punished with...

Article XX. Attack to Health Assets and Facilities¹⁵. The attack to or destruction of ambulances or health transportation means, field hospitals or hospital buildings, depots of relief elements, health convoys, assets to be used to assist and provide relief to protected persons,

¹⁰ Text adopted from Art. 151 of the Colombian Criminal Code.

¹¹ Text adopted from Art. 152 of the Colombian Criminal Code. Nicaraguan Criminal Code. Art. 506.

¹² Text adopted from Art. 153 of the Colombian Criminal Code.

¹³ In this case, this text was removed from Art. 14 in order to define a clearer and more concise crime.

¹⁴ In this case, this text was removed from Art. 14 in order to define a clearer and more concise crime. Nicaraguan Criminal Code defines non-militarized areas as the ones which such status has been granted to by verbal or written agreement. Art. 513.

¹⁵ Text adopted from Art. 156 from the Colombian Criminal Code.

health zones and non-militarized areas or health assets or facilities duly marked with conventional Red Cross or Red Half Moon signs, shall be punished with ...

Article XX. Attack to or Illegal Use of Cultural Assets or Places of Worship¹⁶. Whoever attacks and destroys historical monuments, works of art, educational facilities or places of worship, which form part of the cultural or spiritual heritage of the people, or use such assets to support military efforts, shall be punished with...

Article XX. Attack to Humanitarian Missions¹⁷. The attack to the personnel, facilities, materials, units or vehicles participating in a mission for the maintenance of peace or humanitarian assistance in accordance with the Charter of the United Nations and which are entitled to the protection afforded to civilians or civilian assets, shall be punished with...

Article 15. (Prohibited Weapons) Whoever uses poison or poisonous weapons; or asphyxiant, toxic or similar gas, or any similar liquid, material or device; or bullets that expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions; or other war weapons, projectiles, materials and methods that, due to their own nature, inflict superfluous damage or unnecessary suffering or indiscriminate effects in violation of international law, shall be punished with ...

Article 16. (Starvation) Whoever intentionally uses starvation upon the civilian population as a method of warfare, depriving them of objects indispensable to their survival, including the fact of willfully impeding relief supplies accordance with the Geneva Convention, shall be punished with ...

Article 17. (Treachery) Whoever kills or wounds an enemy soldier using treason shall be punished with ...

Article 18. (Undue Use of Signs) Whoever unduly uses the white flag or the national flag or military insignia or the uniform of the enemy or of the United Nations, as well as Geneva Convention identification badges to inflict death or serious injuries, shall be punished with...

Article 19. (Showing No Mercy) Whoever declares that no mercy will be given or that no survivors will remain,¹⁸ shall be punished with...

Article 20. (Human Shields) Whoever uses the presence of a person protected by international humanitarian law obtain cover for certain areas or military forces from military operations shall be punished with...

Article 21. (Children) Whoever recruits or enlists children under 18 years of age in the armed forces or groups or uses them to actively participate in hostilities, shall be punished with...

Article 22. (Destruction and Appropriation of Assets) Whoever destroys or confiscates assets of the enemy without an imperative military need or loots a city or main square, even when it is taken by assault, shall be punished with...

Article XX. (Violation of Truce)¹⁹. Whoever violates an agreed truce or armistice shall be punished with ...

¹⁶ Text adopted from Art. 157 from the Colombian Criminal Code.

¹⁷ Text adopted from Art. 155 from the Colombian Criminal Code.

¹⁸ Panamanian Code, Law No. 14. Art. 441.

¹⁹ Nicaraguan Criminal Code. Art. 499.

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**REPORT ON THE ACTIVITIES ON PROMOTION OF THE
INTERNATIONAL CRIMINAL COURT AND PRELIMINARY DRAFT OF MODEL
TEXTS FOR CRIMES CONTEMPLATED IN THE ROME STATUTE**

(presented by Dr. Mauricio Herdocia Sacasa)

I. MANDATE

In its resolution AG/RES. 2577 (XL-O/10), the General Assembly of the OAS decided:

11. To request the Inter-American Juridical Committee, insofar as it is able and with the support of civil society, to continue promoting, using as a basis the OAS Guide on cooperation with the International Criminal Court, 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 the OAS 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 the next working meeting on the International Criminal Court and to the General Assembly at its forty-first regular session.

12. Also to request the Inter-American Juridical Committee to continue its work of preparing 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 on the progress made at the next working meeting on the International Criminal Court.

II. UPDATE

2.1 Situation of the Instruments

Since the presentation at its last report during the 76th regular session of the Inter-American Juridical Committee held in Lima, Peru, the situation of the countries that have ratified the Rome Statute has remained the same, as follows:

The number of countries in the Inter-American System that have already ratified the Rome Statute¹ stands at 25, namely:

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 Lucia², United States of America, Grenada, Guatemala, Nicaragua and El Salvador.

¹ Following the report made by the rapporteur, Santa Lucía sent the instrument ratifying Rome Statute No. 113, dated 18 August 2010.

² *Idem*.

Ratifications of the APIC

The Agreement on Privileges and Immunities of the IAJC has been ratified by 14 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), Colombia (15 April 2009) and the Dominican Republic (September 2009).

2.2 Meetings

Following the regular session of the Inter-American Juridical Committee held in Lima, three meetings related to the theme of the International Criminal Court deserve special mention:

2.2.1 Meeting in Kampala of the Revision Conference

From 31 May to 11 June 2010, the first Review Conference of the Rome Statute of the International Criminal Court took place in Kampala, Uganda.

Six resolutions and two declarations were adopted at the meeting:

- RC/Res.1, Complementarity
- RC/Res.2, The impact of the Rome Statute system on victims and affected communities
- RC/Res.3, Strengthening the enforcement of sentences
- RC/Res.4, Article 124
- RC/Res.5, Amendments to Article 8 of the Rome Statute
- RC/Res.6, The crime of aggression

Declarations:

- RC/Decl.1, Declaration of Kampala
- RC/Decl.2, Declaration on cooperation

Offers:

Some American countries (Chile, Colombia, Costa Rica, Peru, Venezuela and Mexico) made offers with regard to the next emission of laws on cooperation, implementation or initiatives toward harmonization, as the case may be.

A complete report on this meeting in Kampala, prepared by the Department of International Law of the Secretariat of Legal Affairs of the OAS can be found in Appendix I of this Report³

Given their importance, the definition of Crime of Aggression is reproduced in full, together with the new war crimes added to the Statute for the case of armed conflicts that do not have characteristics of international conflict.

2.2.2.1 Crime of Aggression

Amendments to the Rome Statute of the International Criminal Court related to the Crime of Aggression.

Article 8 bis

Crime of aggression

1. For the purpose of this Statute, “crime of aggression” means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of

³ DDI/Doc.03/10 dated 19 July 2010.

aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.

2. For the purpose of paragraph 1, “act of aggression” means the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations. Any of the following acts, regardless of a declaration of war, shall, in accordance with United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974, qualify as an act of aggression:

a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;

b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;

c) The blockade of the ports or coasts of a State by the armed forces of another State;

d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;

e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;

f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;

g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.

Emphasis should be made that the International Criminal Court can only exercise its competence with regard to crimes of aggression committed one year after ratification or acceptance of the amendments by thirty Member States and that the Court will exercise its competence on Crimes of Aggression in accordance with this article, on condition that a decision is made after 1 January 2017 by the same majority of Member States required to approve an amendment to the Statute.⁴ Likewise, it is important to underscore that acts of aggression, depending on their characteristics, gravity and scale, become crimes of aggression.

2.2.1.2 War Crimes

Amendment to article 8

What follows is a proposed guide of model texts for the crimes contemplated in the Rome Statute, together with the model text on war crimes already presented at the IJC session in Lima, Peru and contained in the Report sent to the Permanent Council on 3 May 2010.

Add the following to item e) of paragraph 2 of article 8:

xiii) Employing poison or poisoned weapons;

xiv) Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices;

⁴ Art. 15 bis and 15 ter Exercise of competence as regards the Crime of Aggression by referral by a State *proprio motu* and referral by the Security Council.

- xv) Employing 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 is pierced with incisions.

2.2.2 Meeting in Mexico

During the International Conference of National Commissions of International Humanitarian Laws of Latin America and the Caribbean held in Mexico City from 30 June to 2 July 2010 under the auspices of the Secretariat of Foreign Affairs of Mexico and the International Committee of the Red Cross, on the invitation made by the Rapporteur, a report was delivered on the work carried out by the IJC on this theme (see Appendix II).⁵

2.2.3 Meeting in El Salvador

Attending to an invitation made by the President of the Federation of Lawyers' Associations of El Salvador, Dr. Pedro Fausto Arieta, the Rapporteur took part in the event: Convention of Lawyers of El Salvador 2010 held in San Salvador on 22-23 July this year, with the aim of promoting knowledge about the International Criminal Court. The event was also attended by Dr. Miriam Spittler, Legal Councilor of the Deputy Attorney's Office of the International Criminal Court, and Dr. Ana Elizabeth Villalta Vizcarra, member of the Inter-American Juridical Committee.

During the event the Rapporteur addressed the theme: International Crime and International Jurisdiction, while Dr. Spittler spoke on Norms of Competence and Procedure of the International Criminal Court. At the end of the Convention, held in the premises of the Ministry of Foreign Affairs of El Salvador, a round table was held, coordinated by Dr. Ana Elizabeth Villalta and with the participation of the Rapporteur – who addressed in detail the work of the IJC on the matter – and Dr. Spittler – who explained the work of the IPC, followed by an intense exchange of comments, questions and answers on the part the participants. The Rapporteur of the round table was Dr. Luis Lobo Castelar.

2.3 Cooperation project

As the Rapporteur pointed out in previous reports, the document “Strengthening the Cooperation of the States with the International Criminal Court on Matters of Legislation” was approved by the Committee on Evaluating Projects (CEP) on 17 December 2009. The Department of International Law of the Juridical Secretariat of the OAS informed the Inter-American Juridical Committee that there is no advance to report on the question of financing the project (August 2010), therefore it is necessary to continue to intensify efforts to procure funds to allow compliance with the steps of the project (seminars and courses).

III. PRELIMINARY DRAFT OF MODEL TEXTS

What follows is a proposed preliminary draft of model texts for the crimes contemplated in the Rome Statute, together with the model text on war crimes already presented preliminary since the IJC session in Lima, Peru and contained in the Report sent to the Permanent Council on 3 May 2010.

3.1 War Crimes

In the “Report on progress on encouraging adoption of a national legislation based on the Guide of Principles of the Inter-American Juridical Committee and training employees of Member States of the OAS to cooperate with the International Criminal Court as well as to prepare model laws for the crimes provided for in the Rome Statute”⁶, the Rapporteur referred to the theme of the model of articles on War Crimes and presented a list of 32 articles, explaining that it was not his *intention to structure his own model legislation when there are already*

⁵ The presentation was delivered, at the request of the Rapporteur, by Dr. Ana Elizabeth Villalta Vizcarra, member of the IJC, as he was unable to attend.

⁶ OAS/Ser.Q CJI/doc.352/10 rev.1

substantial advances in the Rapporteur's work for the themes of the DIH⁷ and the intense work being carried out by the International Committee of the Red Cross with different American countries as well as in the studies carried out by this Committee within this legislative framework. On the contrary, it is in his interest to benefit from these advances, and to make every possible effort to enhance them.⁸ As determined by the Rapporteur, the report informed that the model laws should take into account the following instruments, among others:

- a) Four Geneva Conventions, articles 50, 51, 130 y 147, respectively.
- b) Four Geneva Conventions, articles 49, 51, 129 and 146, respectively.
- c) III Geneva Convention, article 130.
- d) The 1984 Convention against torture and other cruel, inhuman or degrading treatment or punishment, article 1.
- e) Additional Protocol I, articles 11, 51(5)(a), 75, 85(3), 85(3)(a), 85(3)(b), 85(3)(c), 85(3)(d), 85(3)(e), 85(3)(f), 85(4)(a), 85(4)(b), 85(4)(c), 85(4)(d), 85(4)(e), 86, 86(2) y 87.
- f) Additional Protocol II, article 6.
- g) Protocol II of the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, article 15.
- h) The 1997 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction.
- i) The United Nations Conference on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, (Geneva, 10 October 1980).
- j) Protocols I, II and IV of the 1980 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.
- k) Facultative Protocol of 2000 of the Convention on the Rights of the Child, articles 1 and 2.
- l) The 1994 Inter-American Convention on Forced Disappearance of Persons.
- m) Also to be taken into account are the elements of the crimes, in respect to war crimes.

In earlier reports the Rapporteur expressed his conviction that the model to be offered to countries should contain the criminal types of both the Rome Statute and the Geneva Conventions of 1949 and in particular Protocol I, taking into consideration the differences between them in order to obtain the highest possible standard. The States must bear in mind the crimes against administration of justice set forth in Article 70 of the Rome Statute.

As mentioned above, after the report made by the Rapporteur in Lima, the Revision Conference approved three additions to article 8 in the form of Amendments:

- xiii) Employing poison or poisoned weapons;
- xiv) Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices;

⁷ See, for example, **International Criminal Courts**. OAS Ser. Q CJI/doc.349/10 and **War Crimes in International Humanitarian Law**. OAS Ser.Q CJI/doc.328/O9 rev.1.

⁸ See especially the working document **Repression of War Crimes in the National Legislation of the American States**. International Committee of the Red Cross. Advisory Service. Latin American Unit. Also, **War crimes according to the Rome Statute of the International Criminal Court and their basis in International Humanitarian Law**. Comparative Chart. Advisory Service in International Humanitarian Law, ICRC.

- xv) Employing 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 is pierced with incisions.⁹

Such crimes already figure in item b) of paragraph 2 of article 8 as grave violations of the laws and customs applicable to international armed conflicts. What is done now is to incorporate them, but this time in the context of an armed conflict that has no international characteristics and has been related to it.

This double application for these war crimes had already been fully contemplated by the Rapporteur in his earlier Report, and his preliminary proposal of draft model texts applied indistinctly to both situations (international armed conflicts and armed conflicts not of an International nature), and consequently his position was fully validated in Kampala.

Presented below is the preliminary draft of the model texts with some small alterations¹⁰:

Article 1. (Willful killing) Whoever, during an armed conflict, willfully kills a person protected by International Humanitarian Law,¹¹ will be punished with ...

Article 2. (Torture and inhuman treatment) Whoever, during an armed conflict, tortures, treats cruelly or inhumanely, affects seriously the physical integrity or health, or otherwise causes great pain or suffering to a person protected by International Humanitarian Law, will be punished with ...

Article 3. (Mutilation and medical experiments) Whoever, during an armed conflict, submits a person protected by International Humanitarian Law to physical mutilation or medical or scientific experiments of any kind or extraction of tissues or organs which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons, will be punished with ...

Article 4. (Sexual crimes) Whoever, during an armed conflict, commits acts of rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization or any other form of sexual violence against a person protected by International Humanitarian Law, will be punished with...

Article 5. (Apartheid) Whoever, during an armed conflict, commits against a person protected by International Humanitarian Law an inhuman act with the intention of maintaining an institutionalized regime of oppression and systematic domination of one racial group over one or more racial groups, will be punished with...

Article 6. (Racial discrimination)¹². Whoever, during an armed conflict, carries out practices of racial segregation against any protected person, will be punished with...

⁹ In the case of the first two, grave violations of the laws and customs applicable to armed conflicts that lack international characteristics, in accordance with common International Law. In the case of the third, this also constitutes a grave violation of the laws and customs applicable to armed conflicts that lack international characteristics.

¹⁰ From article 18 onwards of the preliminary draft, the phrase implicit in the rapporteur's earlier report "on the occasion of armed conflict" was added.

¹¹ In general, what is understood by "a person protected by the IHL" are those protected by the Conventions of Geneva and their Additional Protocols. Legislations can incorporate an article to identify such people, as Nicaragua did on including the wounded, sick or shipwrecked, sanitary or religious personnel, combatants who have laid down their arms, prisoners of war and people detained during armed conflict, civilians and the civilian population, in accordance with the ratified instruments (Art. 489). Colombia did the same in Law 599 dated 24 July 2000.

¹² Text adopted from Art. 137 of the Colombian Penal Code. Penal Code of Nicaragua, Art. 491.

Article 7. (Outrages against personal dignity) Whoever, during an armed conflict, commits outrage against the personal dignity of a person protected by International Humanitarian Law, especially by means of humiliating or degrading treatment, will be punished with...

Article 8. (Taking of hostages) Whoever, during an armed conflict, takes as a hostage a person protected by International Humanitarian Law, will be punished with...

Article 9. (Unlawful detention) Whoever, during an armed conflict, illegally deprives a person protected by International Humanitarian Law of his or her freedom, will be punished with...

Article 10. (Delaying repatriation)¹³ Whoever, during an armed conflict, unjustifiably delays repatriation of prisoners of war or civil persons, will be punished with...

Article 11. (Denial of judicial guarantees) Whoever, during an armed conflict, deprives a person protected by International Humanitarian Law of his or her right to fair and regular trial, will be punished with...

Article 12. (Obligation to serve in enemy forces) Whoever obliges a prisoner of war or any other person protected by International Humanitarian Law to serve in the forces of a party engaged in armed conflict with the party on which such persons depend, will be punished with...

Article 13. (Looting)¹⁴. Whoever, during an armed conflict, dispossesses a cadaver or protected person of his or her effects will be punished with...

Article 14. (Failing to lend first-aid measures and humanitarian assistance)¹⁵. Whoever, on the occasion of an armed conflict and being obliged to lend humanitarian help and assistance to protected persons, and fails to do so, will be punished with...

Article 15. (Causing obstacles against sanitary and humanitarian tasks)¹⁶. Whoever, during an armed conflict, causes obstacles against or impedes the medical, sanitary or first-aid personnel or the civil population to carry out the sanitary and humanitarian tasks that in accordance with the norms of International Humanitarian Law can and should be carried out, will be punished with...

Article 16. (Abolishing rights) Whoever, during an armed conflict, declares abolished, suspended or inadmissible in a court of law the rights and actions of the nationals of the hostile party protected by International Humanitarian Law, will be punished with...

Article 17. (Deportation or illegal transfer) Whoever, during an armed conflict, illegally deports or transfers a person protected by International Humanitarian Law, in particular when the transfer is to a territory occupied by the population of the occupying power, deports or transfers inside or outside the territory occupied all or parts of the population of this territory, or orders the displacement of the civil population unless this is required for the safety of the civilians involved or for imperative military reasons, will be punished with...

Article 18. (Prohibited attacks) Whoever, during an armed conflict, attacks the civilian population or civilian persons or objects, or launches an indiscriminate attack in the knowledge that such attack will cause loss of life, injuries to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly

¹³ This comes from Art. 85 (4) (b) of Additional Protocol I.

¹⁴ Text adopted from Art. 151 of the Colombian Penal Code.

¹⁵ Text adopted from Art. 152 of the Colombian Penal Code. Penal Code of Nicaragua, Art. 506.

¹⁶ Text adopted from Art. 153 of the Colombian Penal Code.

excessive¹⁷, or attacks cities or villages which are undefended,¹⁸ or dwellings or buildings which are undefended and which are not military objectives, or attacks a person in the knowledge that he has laid down his arms, or attacks buildings dedicated to religion, education, art, science or charitable purposes, as well as places where the sick and wounded are gathered, provided they are not military objectives, will be punished with...

Article 19. (Attacking dangerous forces)¹⁹. Whoever, during an armed conflict, attacks works or installations that contain dangerous forces in the knowledge that such attack will cause deaths or wounds to among the civilian population or possibly excessive damage to civilian objects, will be punished with...

Article 20. (Attacking demilitarized zones)²⁰. Whoever, during an armed conflict, attacks undefended sites or demilitarized zones, will be punished with...

Article 21. (Attacking objects and installations of a sanitary nature)²¹. Whoever, during an armed conflict, attacks or destroys ambulances or sanitary means of transportation, field or permanent hospitals, depots for first-aid material, sanitary convoys, goods meant for assisting and aiding protected persons, sanitary and demilitarized zones or objects and installations of a sanitary nature duly marked with the conventional signs of the Red Cross or Red Crescent, will be punished with...

Article 22. (Attacking or illicitly using cultural objects and places of devotion)²². Whoever, during an armed conflict, attacks and destroys historical monuments, works of art, educational installations or places of devotion that make up the cultural heritage of peoples, or uses such goods to support military efforts, will be punished with...

Article 23. (Attacking humanitarian missions)²³. Whoever, during an armed conflict, attacks personnel, installations, material, units or vehicles participating in a mission of preservation of the peace or humanitarian assistance in accordance with the Charter of the United Nations and entitled to the protection granted to civilians or civilian objects, will be punished with...

Article 24. (Prohibited arms) Whoever, during an armed conflict, employs poison or poisoned weapons, or asphyxiating, poisonous or other gases or any analogous liquid, material or devices, or bullets that expand or flatten easily inside the human body, such as hard-envelope bullets that do not cover the core completely or are pierced with incisions, or any other arms, projectiles, materials and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which have indiscriminate effects in violation of international law, will be punished with...

Article 25. (Causing hunger).²⁴ Whoever, during an armed conflict, intentionally uses starvation of the civilian population as a method of warfare by depriving them of the

¹⁷ The Rome Statute refers to “manifestly” excessive damage with regard to military advantage. Since these qualitative conditions are not found in article 85 (3) (b) of Additional Protocol I, the rapporteur accordingly opts for the more rigorous criminal type.

¹⁸ The Rome Statute adds “and that are not military objectives”. However, Art. 51 (5) (a) of Additional Protocol I prohibits indiscriminate attacks.

¹⁹ In this case the text was taken from Art. 14 in order to make clearer and briefer penal type.

²⁰ In this case the text was taken from Art. 14 in order to make clearer and briefer penal type. The Penal Code of Nicaragua defines demilitarized zones as those granted this status by verbal or written agreement, Art. 513.

²¹ Text adopted from Art. 156 of the Colombian Penal Code.

²² Text adopted from Art. 157 of the Colombian Penal Code.

²³ Text adopted from Art. 155 of the Colombian Penal Code.

²⁴ Argentina also makes it a war crime in conflicts of any nature (Law 26.200).

indispensable means for their survival, including willfully impeding relief supplies as provided for under the Geneva Conventions, will be punished with...

Article 26. (Treachery) Whoever, during an armed conflict, kills or wounds treacherously a combatant adversary, will be punished with...

Article 27. (Improper use of signs) Whoever, during an armed conflict, uses improperly a flag of truce, the national flag or the military insignia or uniform of the enemy or the United Nations, as well as the distinctive emblems of the Geneva Conventions, resulting in death or serious personal injury, will be punished with...

Article 28. (No quarter given) Whoever, during an armed conflict, declares that no quarter shall be given or no survivors remain,²⁵ will be punished with...

Article 29. (Human shields)²⁶ Whoever, during an armed conflict, uses the presence of a person protected by International Humanitarian Law to render certain areas or military forces immune from military operations, will be punished with...

Article 30. (Children) Whoever, during an armed conflict, conscripts or enlists children under the age of 18 years²⁷ into the armed forces or groups or using them to participate actively in hostilities, will be punished with...

Article 31. (Destruction and appropriation of property) Whoever, during an armed conflict, destroys or confiscates enemy property not justified by military necessity, or loots a city or village, even when taken by storm, will be punished with...

Article 32. (Violating a truce).²⁸ Whoever, during an armed conflict, violates a truce or agreed armistice, will be punished by

3.2 Genocide

Article 1.- Genocide²⁹. Whoever, with the intent to destroy, in whole or in part, a national, ethnic, racial or religious group, because of their belonging to same, causes:

- 1 - The killing of members of the group will be punished with...
- 2 - Serious bodily or mental harm to members of the group will be punished with...
- 3 – Forced pregnancy of female members of the group will be punished with...
- 4 – Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part will be punished with...
- 5 – Imposing measures intended to prevent births within the group will be punished with....
- 6 – Forcibly transferring children of the group to another group will be punished with....

Article 2. Apology for genocide³⁰. Whoever by any means makes a direct, public instigation to commit or justify conduct that constitutes genocide, or intends to reinstall regimes that support such conduct will be punished with....

²⁵ Code of Panama. Law n. 14, Art. 441.

²⁶ The rapporteur fails to see why this crime is not considered of the same nature as armed conflict, since people are equally affected in both situations.

²⁷ The 2000 Facultative Protocol to the Convention on Children's Rights establishes the age of 18 years, which is why the Rapporteur preferred to raise the minimum age from 15 to 18. The Argentinean law does the same by implementing the Rome Statute (Law 26.200).

²⁸ Penal Code of Nicaragua, Art. 499.

²⁹ The source for this norm is Art. 101 of the Colombian Penal Code. It adds as a cause: provoking forced pregnancy as a form of genocide. In respect to the groups liable to protection, there exists a tendency to aggregate social and political groups.

3.3 Crimes of lese-humanity³¹⁻³²

Article 1. General provision. The types contemplated in this section will sanction crimes of lese-humanity that are committed in the framework of a generalized³³ or systematic³⁴ attack against the civilian population on the part of a State or organization where the author is aware of or intends his conduct to be part of this attack³⁵

Article 2. Homicide. Whoever kills a person will be punished with...

Article 3. Extermination. Whoever submits a population or part of a population to conditions of life designed to cause their physical destruction, in whole or in part, will be punished with...

Article 4. Slavery. Whoever practices slavery or exercises attributes of property rights over a person, especially women or children, will be punished with...

Article 5. Arbitrary detention. Whoever deprives the personal freedom of a person in violation of the fundamental norms of International Law will be punished with...

Article 6. Deportation or forced transfer of the population. Whoever forcibly deports or transfers a person who finds himself or herself legally in a territory, displacing them to another territory by means of expulsion or other coercive measures in violation of the rules set forth in International Law will be punished with...

Article 7. Torture. Whoever willfully causes physical or mental pain to a person under his custody or control that are not merely the result of the sanctions permitted under International Law, or submits that person to cruel, inhuman or degrading treatment, will be punished with...

Article 8. Sexual crimes. Whoever commits acts of rape, sexual slavery, forced prostitution, forced pregnancy, forced sterilization or any other form of sexual violence will be punished with...

³⁰ The basis for this norm is Art. 25, 3, e) of the Rome Statute. Some Latin America Codes include it (the case of Colombia and the Argentinean and Uruguayan implementation laws, as well as the draft implementation in Ecuador).

³¹ The model observed has been the Rome Statute, the elements of the Crimes of Lese-Humanity, the International Penal Code of Germany and some provisions of the draft implementation of Peru, as well as different conventions, including the Convention on forced disappearance of persons.

³² One point that should be borne in mind is whether one wants to separate some crimes of lese-humanity that can only be committed during a generalized or systematic attack against the civilian population (murder, extermination, deportation, crimes of sexual violence, persecution and apartheid) from those that can be either part of a generalized attack or crimes of lese-humanity, even when committed outside this framework (slavery, torture, arbitrary detention and forced disappearance of persons). In the latter case, when these are committed as part of a generalized or systematic attack, the punishment would increase. The benefit of this last option is that one could codify simultaneously the obligations of States on matters of human rights and international criminal law, but one would be going beyond what is strictly set forth in Art. 7 of the Rome Statute. By way of reference, see the draft law of crimes of Peru and the implementation law of Uruguay.

³³ Here, *generalized* has the meaning of the cumulative effect of a series of inhumane acts or the singular effect of an act of this nature committed with extraordinary dimensions (Criminal Tribunal for former Yugoslavia. The case of Kordic and Cerkez, paragraph 179).

³⁴ Here, *systematic* is understood as the organization of a series of acts that follow a regular pattern based on a common plan or policy involving the use of public or private resources (Criminal Tribunal for Ruanda. The case of Musema, paragraph 24).

³⁵ This last phrase is found in Art. 7, numeral 3 of the Elements of Crimes.

Article 9. Persecution. Whoever persecutes members of a group or community whose identity is based on political, racial, national, ethnic, cultural, religious, gender or other motives recognized as unacceptable by International Law will be punished with...

Article 10. Forced disappearance of persons. Whoever forcibly deprives a person of his or her freedom, whatever this form may take³⁶, followed by refusal to communicate or remain silent about the detention, destination or whereabouts of that person, with the intention of keeping him or her removed from the protection of the law, will be punished with...

Article 11. Apartheid. Whoever commits against a person any of the inhuman acts described herein with the intention of maintaining an institutionalized regime of oppression and systematic domination of a racial or ethnic group over one or more racial or ethnic groups, will be punished with...

Annex

OEA/Sec.Gral.
DDI/doc.03/10
19 de julio 2010
Original: Español

CORTE PENAL INTERNACIONAL: RESULTADOS DE LA CONFERENCIA DE REVISIÓN DEL ESTATUTO DE ROMA

Informe Ejecutivo

Generalidades

1. Entre el 31 de mayo y el 11 de junio de 2010 se llevó a cabo en Kampala, Uganda, la primera Conferencia de Revisión del Estatuto de Roma de la Corte Penal Internacional ["Estatuto", "CR" y "CPI", respectivamente]. El presente documento contiene una breve síntesis de los principales resultados alcanzados en esta reunión.

Documentos aprobados

2. La Conferencia adoptó seis resoluciones y dos declaraciones (anexos al presente Informe), a saber:

Resoluciones:

- RC/Res.1, Complementariedad.
- RC/Res.2, Impacto del sistema del Estatuto de Roma sobre las víctimas y las comunidades afectadas.
- RC/Res.3, El fortalecimiento del cumplimiento de las penas
- RC/Res.4, El artículo 124
- RC/Res.5, Enmiendas al artículo 8 del Estatuto de Roma
- RC/Res.6, El crimen de agresión

Declaraciones:

- RC/Decl.1, Declaración de Kampala
- RC/Decl.2, Declaración sobre la cooperación

³⁶ The formulation of the Rome Statute refers expressly to apprehending, detention or sequestering; however, the formula of the Inter-American Convention on forced disappearance of persons is broader: "whatever the form that this takes" and omits the phrase "for a prolonged period", which is restrictive.

3. El tema más complejo de los que se ocupó la CR fue sin duda el de la enmienda al Estatuto con el fin de incorporar el crimen de agresión como crimen de competencia de la CPI (RC/Res. 6). Adicionalmente, se aprobó una enmienda al Artículo 8, sobre crímenes de guerra (RC/Res. 5) y se examinó la cuestión del Artículo 124 (disposición transitoria, RC/Res. 4). Otros temas considerados por la Conferencia como parte del ejercicio de balance del funcionamiento de la Corte incluyen los de la complementariedad (RC/Res.1), la cooperación (RC/Decl.2) y el impacto de la Corte en las víctimas y las comunidades afectadas (RC/Res.2), así como la relación entre los conceptos de justicia y paz y el cumplimiento de las penas (RC/Res.3).

Agresión – Definición del crimen

4. En relación con el crimen de agresión, el mandato de la CR era doble, puesto que contemplaba tanto la aprobación de una definición del crimen, para efectos del procesamiento de individuos por la CPI, como la determinación de las condiciones para el ejercicio de la competencia de la Corte, las cuales, por mandato del propio Estatuto, deben ser compatibles con la Carta de las Naciones Unidas (Artículo 5 (2)).
5. Con respecto a la definición del crimen, la CR adoptó una disposición mediante la cual se incorpora un nuevo Artículo 8bis al Estatuto de Roma, en el cual se dispone que, a los efectos del Estatuto, una persona comete un “crimen de agresión” cuando, estando en condiciones de controlar o dirigir efectivamente la acción política o militar de un Estado, dicha persona planifica, prepara, inicia o realiza un acto de agresión que por sus características, gravedad y escala constituya una violación manifiesta de la Carta de las Naciones Unidas (RC/Res.6, Anexo I, punto 2).
6. En esta definición básica del *crimen de agresión* se incorporan los siguientes conceptos:
 - i) La noción de que, para efectos penales, la agresión constituye lo que se denomina un “crimen de liderazgo”, es decir que únicamente puede acusarse del mismo a personas que estén en condiciones de controlar o dirigir efectivamente la acción política o militar de un Estado.
 - ii) La noción (consecuencia de la anterior) de que el crimen de agresión (por un individuo) está indisolublemente ligado a un acto de agresión (por un Estado): quien comete el crimen es la persona que “planifica, prepara, inicia o realiza” el acto de agresión que se describe en la definición.
 - iii) La noción de que no todo acto de agresión da lugar a un crimen de agresión, ya que debe satisfacerse un umbral de gravedad muy específico: el acto en cuestión debe constituir, por sus características, gravedad y escala, una “violación manifiesta” de la Carta.
7. Además, en el párrafo 2 del nuevo Artículo 8bis se consagra, por vía ejemplificativa, una definición complementaria del *acto de agresión* que se menciona en el párrafo 1. De un lado, se consagra allí en forma general que
A los efectos del párrafo 1, por “acto de agresión” se entenderá el uso de la fuerza armada por un Estado contra la soberanía, la integridad territorial o la independencia política de otro Estado, o en cualquier otra forma incompatible con la Carta de las Naciones Unidas.
8. Del otro lado, se incluye un listado de actos (7 en total) y se dispone que cualquiera de ellos será caracterizado como un acto de agresión “independientemente de que haya o no declaración de guerra”. Este listado y el lenguaje correspondiente a cada acto fueron extraídos de la Resolución 3314 (XXIX) de la Asamblea General de las Naciones Unidas, de 14 de diciembre de 1974, o “Definición de la Agresión”.
9. Es importante resaltar que estos criterios son pertinentes únicamente respecto de la determinación de que se ha cometido un acto de agresión por parte de un Estado y en contra de otro y no tienen por lo tanto ninguna connotación penal. En otras palabras, los

únicos entes que habrán de considerar si una actuación determinada por parte de un Estado se identifica con una de las conductas descritas en el párrafo 2 del nuevo Artículo 8bis son el Consejo de Seguridad¹ o la División de Cuestiones Preliminares, bajo uno de los sistemas de procesamiento previstos en los nuevos Artículos 15bis y 15ter (Ver párrafos 11-14, *infra*). Bajo ambos sistemas, al Fiscal de la CPI únicamente le corresponderá evaluar si, una vez se ha determinado por otros medios que un Estado ha cometido un acto de agresión, el crimen descrito en el párrafo 1 del Artículo 8bis ha sido cometido por determinado individuo o individuos y, en caso afirmativo, iniciar los correspondientes procesamientos penales.

10. Estos y otros aspectos que se derivan de la definición adoptada son desarrollados además en unos “Elementos de los Crímenes” que también aprobó la CR (RC/Res.6, Anexo II). Adicionalmente, es importante tener en cuenta que la Conferencia también adoptó dos “Entendimientos sobre las Enmiendas Relativas al Crimen de Agresión” que se refieren directamente a la definición descrita. Ellos son los siguientes:

Entendimiento 6

Se entiende que la agresión es la forma más grave y peligrosa del uso ilegal de la fuerza, y que una determinación sobre si un acto de agresión ha sido cometido requiere el examen de todas las circunstancias de cada caso particular, incluyendo la gravedad de los actos correspondientes y de sus consecuencias, de conformidad con la Carta de las Naciones Unidas.

Entendimiento 7

Se entiende que al determinar si un acto de agresión constituye o no una violación manifiesta de la Carta de las Naciones Unidas, los tres elementos de características, gravedad y escala deben tener la importancia suficiente para justificar una determinación de violación “manifiesta”. Ninguno de los elementos puede bastar por sí solo para satisfacer el criterio de violación manifiesta.²

Agresión – Activación de la competencia

11. De otro lado, la determinación de las condiciones para activar la competencia de la Corte con respecto al crimen de agresión fue objeto de una solución considerablemente más compleja. En primer lugar, se adoptaron dos enmiendas separadas al Artículo 15 del Estatuto, que se ocupa de las facultades del Fiscal, a saber, un nuevo Artículo 15bis, que se ocupará de aquellos casos en los que un Estado parte remite a la CPI una situación en la que se parezca haber cometido un crimen de agresión o en los que el Fiscal, *proprio motu*, inicia una investigación en el mismo sentido; y un nuevo Artículo 15ter, que regula la situación en la cual esta remisión es hecha por el Consejo de Seguridad. La diferencia fundamental entre estos dos regímenes radica en que en el segundo caso no se exige el consentimiento del Estado involucrado, lo cual es consonante tanto con la Carta como con el propio Estatuto de Roma.³
12. En todo caso, estos dos sistemas jurisdiccionales tienen dos rasgos comunes, a saber, (uno) que la Corte únicamente podrá ejercer su competencia respecto de crímenes de agresión que sean cometidos un año después de que las enmiendas sean ratificadas por 30 Estados

¹ Conviene recordar que el propósito último de la Resolución 3314 era justamente el de recomendar al Consejo de Seguridad que tuviera en cuenta esa definición “como orientación para determinar, de conformidad con la Carta, la existencia de un acto de agresión” (Párrafo operativo 4).

² Los Entendimientos 4 y 5 también se refieren a la definición del crimen de agresión, pero esta vez con respecto a la falta de efectos de las enmiendas en el plano del derecho internacional general y al ejercicio de jurisdicción nacional respecto del mismo.

³ Esto queda precisado también en el Entendimiento 2.

partes; y (dos) que el ejercicio de esa competencia quedará sujeto a que los Estados Partes adopten una decisión al respecto después del 1 de enero de 2017.⁴

13. En el nuevo Artículo 15*bis* se consagran las condiciones para que la Corte pueda ejercer competencia con respecto al crimen de agresión cuando el asunto no es llevado ante ella por el Consejo de Seguridad (RC/Res.6, Anexo I, punto 3). En primer lugar, se consagra un sistema de exclusión (“opting-out”) con respecto a la aceptación de la competencia de la Corte, consistente en que el Estado parte en el Estatuto que no esté dispuesto a aceptar que la CPI ejerza competencia respecto de un crimen de agresión resultante de un eventual acto de agresión cometido por ese Estado tiene la posibilidad de declarar de antemano que no acepta esa competencia. Si un Estado parte no hace esta declaración, se entenderá que acepta la competencia de la Corte respecto del crimen de agresión. En segundo lugar, se consagra una garantía especial respecto de Estados no partes en el Estatuto: la Corte no ejercerá su competencia sobre el crimen de agresión cuando éste sea cometido por los nacionales de ese Estado o en su territorio. Debe subrayarse que esta disposición individualiza claramente el crimen de agresión respecto de los restantes crímenes de competencia de la Corte, a ninguno de los cuales se aplica esta restricción.
14. El problema más complejo que tuvo que considerar la CR se refería a las competencias del Consejo de Seguridad en materia de agresión bajo la Carta de las Naciones Unidas. La enmienda adoptada como Artículo 15*ter* parte de la base de que si se comete un crimen resultante de un acto de agresión y el Consejo de Seguridad hace la determinación prevista en el Artículo 39 de la Carta, el Fiscal podrá iniciar la investigación respectiva. Pero cuando no se realiza esta determinación y transcurren 6 meses desde la fecha en la que el Fiscal ha notificado al Secretario General que ha llegado a la conclusión de que existe fundamento razonable para iniciar una investigación por este crimen, el nuevo Artículo 15*bis* autoriza a este funcionario a iniciar los procedimientos, aunque sólo si la División de Cuestiones Preliminares emite una autorización a este respecto. Se añade además que esto procede únicamente si el Consejo mismo no decide lo contrario de conformidad con las facultades que ya le confiere el Artículo 16 del Estatuto.
15. Finalmente, en la Resolución adoptada por la Conferencia relativa a las enmiendas a los artículos 5, 8 y 15 del Estatuto se establece con claridad que ellas “estarán sujetas a ratificación o aceptación y entrarán en vigor de conformidad con lo dispuesto en el párrafo 5 del artículo 121 del Estatuto”. En el mismo documento se señala además que la declaración de exclusión (“opting-out”) que se menciona en el Artículo 15*bis* podrá ser depositada por cualquier Estado parte “antes de la ratificación o aceptación”.

Crímenes de guerra – Enmienda al Artículo 8 del Estatuto

16. La CR aprobó también una enmienda al Artículo 8 del Estatuto, en el cual se define la categoría penal de los crímenes de guerra (RC/Res.5, Anexo I). La enmienda afecta el apartado e) del párrafo 2 del Artículo 8, en el cual se enumeran ciertas conductas como constitutivas de “violaciones graves de las leyes y los usos aplicables en los conflictos armados que no sean de índole internacional, dentro del marco establecido de derecho internacional”. La enmienda consiste en añadir a dicho apartado tres nuevas conductas que en adelante se considerarán como crímenes de guerra para los fines del Estatuto cuando sean cometidos en el marco de este tipo de conflictos. Ellas son:
 - Emplear veneno o armas envenenadas (nuevo literal xiii);
 - Emplear gases asfixiantes, tóxicos o similares o cualquier líquido, material o dispositivo análogos (nuevo literal xiv);

⁴ Estas condiciones son acumulativas, tal como se precisa en los Entendimientos 1 y 3.

- Emplear balas que se ensanchan o aplastan fácilmente en el cuerpo humano, como balas de camisa dura que no recubra totalmente la parte interior o que tenga incisiones (nuevo literal xv).

Se aprobó también, en calidad de Anexo II a esta enmienda, los “Elementos de los Crímenes” correspondientes a estos nuevos delitos.

17. Cabe registrar que estas conductas ya constituían crímenes de competencia de la Corte en virtud del apartado b) del párrafo 2 del artículo 8, en tanto que violaciones graves de las leyes y costumbres aplicables a los conflictos armados internacionales. El propósito de la enmienda es el de extender dicha aplicación a los conflictos no internacionales, bajo la convicción –expresada en los considerandos de la resolución respectiva– de que, a la luz del derecho internacional consuetudinario, esas conductas constituyen violaciones graves de las denominadas “leyes y costumbres” aplicables a esos conflictos.

El Artículo 124

18. En el Artículo 124 del Estatuto, titulado “Disposición de transición” se consagró la posibilidad de que un Estado al hacerse parte declarara que no aceptaría la competencia respecto de crímenes de guerra “cuando se denuncie la comisión de uno de esos crímenes por sus nacionales o en su territorio”. Como en la misma disposición se establecía que lo dispuesto en ese artículo sería reconsiderado en la primera Conferencia de Revisión del Estatuto, durante un tiempo esta consideró la posibilidad de suprimir este artículo, teniendo en cuenta que tan solo dos Estados parte se han acogido a esta salvaguardia.⁵
19. Sin embargo, la CR decidió finalmente mantener esta disposición en el cuerpo del Estatuto, en el entendido de que el tema será revisado nuevamente durante el 14 período de sesiones de la Asamblea de Estados partes, que se llevará a cabo en 2015 (RC/Res.4).

Ejercicio de balance de la justicia penal internacional (“Stocktaking”)

20. Finalmente, la CR realizó un ejercicio de balance de la justicia penal internacional hasta la fecha y produjo varias decisiones en las cuales se reafirman las obligaciones derivadas del Estatuto de Roma, se expresa un compromiso claro de los Estados participantes en cuanto a seguir impulsando el desarrollo de la justicia penal internacional y se identifican unas áreas en las cuales se requiere una acción concertada de parte de los Estados y la Corte misma. Estas decisiones se refieren a aspectos de gran importancia, tales como la complementariedad (RC/Res.1); la cooperación de los Estados con la Corte (RC/Decl.2); el impacto de la Corte en las víctimas y las comunidades afectadas (RC/Res.2); y justicia y paz. De otra parte se adoptó una resolución sobre el cumplimiento de las penas (RC/Res.3).
21. la Conferencia adoptó también la “Declaración de Kampala”, en la cual se recogen compromisos programáticos en todas estas áreas. En forma significativa, la CR decidió designar el día 17 de julio, día de la aprobación del Estatuto de Roma en 1998, como “Día de la Justicia Penal Internacional”.

Evaluación preliminar

22. En términos generales, puede decirse que desde el punto de vista jurídico la CR fue exitosa, ya que logró alcanzar consenso en torno a una definición del crimen de agresión que tiene buenas posibilidades de ser aceptada por un elevado número de los Estados partes en el Estatuto. También se obtuvo acuerdo general en cuanto a la determinación de las condiciones para el ejercicio de la competencia sobre este crimen y, aunque la solución alcanzada a este respecto no está exenta de dificultades, parece representar un paquete aceptable para un buen número de Estados. En la medida en que un componente esencial de este paquete está representado por una garantía específica que protege a Estados no partes en el Estatuto contra procesamientos relativos al crimen de agresión que los puedan

⁵ Francia y Colombia.

afectar, es posible también anticipar desarrollos positivos con respecto a la actitud de dichos Estados frente al Estatuto, lo cual puede constituir un logro significativo para la Corte. Sin embargo, la activación definitiva de esta competencia fue aplazada por un plazo mínimo de siete años, cuando los Estados partes adopten una decisión después del 1 de enero de 2017.

23. Con respecto a los crímenes de guerra, que es probablemente la categoría de conductas punibles que presenta mayores dificultades para algunos Estados, se decidió mantener la cláusula de salvaguardia contenida en el Artículo 124, con el compromiso de revisar nuevamente el tema en el año 2015. Como resultado de esto, aquellos Estados que decidan vincularse al Estatuto en los próximos años podrán todavía, si lo desean, beneficiarse de esa salvaguardia y exceptuar la competencia de la Corte sobre crímenes de guerra que los afecten por un período de 7 años. También se amplió el catálogo de crímenes de guerra que se cometen en el marco de conflictos armados sin carácter internacional, en lo que puede interpretarse como un desarrollo positivo del derecho internacional humanitario de índole convencional.
24. Finalmente, un aspecto interesante es que la CR no tomó ninguna decisión con respecto a la ampliación del catálogo de crímenes de competencia de la CPI. Debe recordarse que mediante una Resolución aprobada por la Conferencia de Roma se recomendó que la CR examinara los crímenes de terrorismo y los relacionados con el tráfico de drogas “con miras a llegar a una definición aceptable y a que queden comprendidos en la lista de crímenes de la competencia de la Corte”⁶. La CR no acogió esta recomendación y no se ocupó de esta cuestión.⁷

* * *

Anexo: Resoluciones y Declaraciones aprobadas por la Conferencia de Revisión

⁶ Resolución E de la Conferencia de Roma.

⁷ Esto se hizo de conformidad con una decisión tomada durante la Asamblea de Estados Partes celebrada en La Haya en diciembre de 2009, consistente en diferir la consideración de otros delitos para ser incluidos dentro de la competencia de la Corte a la próxima Asamblea, la cual se llevará cabo a finales de 2010. Hay varias propuestas que serán consideradas en esa oportunidad.

3. 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.

At the 76th Regular Session of the Inter-American Juridical Committee (Lima, Peru, March 2010), it was resolved to postpone the study of the topic.

4. Promotion and strengthening of democracy

Document

CJI/doc.355/10 corr. 1

Promotion and Strengthening of Democracy
(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) corr. 1. 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.

At the 76th regular session of the Inter-American Juridical Committee (Lima, Peru, March 2010), the rapporteur, Dr. Jean-Paul Hubert, explained that the topic arose within the Committee itself, and he asked the other members to offer suggestions, since there was no express mandate from the General Assembly following the adoption of the two resolutions at the CJI's previous session.

Dr. Baena Soares suggested supplementing the rapporteur's work with a document addressing social and economic issues in addition to the precepts set out in the OAS Charter.

Dr. Arrighi explained how the situation in Honduras underscored the matter of early-warning mechanisms. He said that the powers of the Council or, indeed, those of the Secretary General should be strengthened, which could entail amending the Democratic Charter. This proposal was supported by Dr. Herdocia.

The Chairman noted that Dr. Baena Soares' suggestion was different to Dr. Arrighi's but that they both appeared relevant.

Dr. Baena Soares thought that the Democratic Charter could be enhanced by including a reference to the social dimension, and he requested that talk of a social charter be avoided, referring directly to the Democratic Charter instead.

The Chairman recalled the Cartagena de Indias amendments (including, *inter alia*, modifications to the Secretary General's powers, the principle of universality, etc.); he explained how difficult it was to include provisions dealing with integral development but added that the system has been aware of the disagreements in this area.

Dr. Castillo thought that the CJI's work could serve as a good addition to reflection on the issues highlighted by Dr. Baena Soares.

The Chairman asked Drs. Hubert and Baena Soares to prepare a document on the two issues – instrumental and preventive – for the next session.

At the fortieth regular session of the OAS General Assembly (Lima, June 2010), resolution AG/RES. 2611 (XL-O/10) gave the Inter-American Juridical Committee two mandates in this area. Regarding the Inter-American Democratic Charter, it asked that note be taken "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, and working to promote democratic values, practices, and governance, as well as the consideration of the issues in Article 11 of the Inter-American Democratic Charter.” It also assigned a new mandate requesting a legal study into the mechanisms of participatory democracy and citizen participation contained in the laws of some of the region’s countries.

At the 77th regular session of the Inter-American Juridical Committee (Rio de Janeiro, Brazil, August 2010), the rapporteur, Dr. Jean-Paul Hubert, presented report CJI/doc.355/10 corr. 1, “Promotion and Strengthening of Democracy,” and offered an analysis of the situation stressing two relevant points: one related to the preventive issue, and the other instrumental in nature.

The first point, on the preventive aspect, dealt with the Inter-American Democratic Charter’s initial alarm mechanisms in cases of threatened breakdowns in the democratic regime, highlighting shortcomings in the preventive actions available to the Permanent Council for remedying such situations. The limitations of the Democratic Charter were dealt with in depth by Secretary General Insulza in his report, which led to the Juridical Committee’s adoption of a resolution [CJI/RES. 132 (LXXI-O/07)] on the conditions and channels for invoking the Inter-American Democratic Charter and, later, resolution CJI/RES. 159 (LXXV-O/09), in which the Juridical Committee set out the essential and fundamental elements of representative democracy and their ties to collective action under the Democratic Charter, the OAS Charter, and other inter-American instruments. Regarding preventive measures, the rapporteur suggested strengthening the powers of the Permanent Council and Secretary General in defending and supporting democracy.

The second point, on instrumental aspects, dealt with the relationship between democracy and development and the scant usage made of the provisions of the OAS Charter in terms of measures for increasing economic and social development. He also stressed that a lack of development cannot be used as a rationale for a breakdown in the democratic regime and that, currently, the right to development is one of the series of individual rights enshrined in universal instruments such as the 2000 Millennium Declaration and the 2002 Consensus of Monterrey. He added that a combined reading of the Inter-American Democratic Charter and the OAS Charter indicated the ability of any person or group of persons to involve the Inter-American Commission on Human Rights in order to safeguard the right to development.

In consideration whereof, the rapporteur proposed that the Juridical Committee make an effective contribution to overcoming those shortcomings, offering a broader interpretation of the concept of democracy in the Inter-American Democratic Charter, inseparable from integral development and human rights.

At the same time, the member states’ obligation to consolidate democracy and its ties with economic and social development were established in the existing legal instruments of the inter-American system and therefore – in his personal opinion – the adoption of other instruments, or of a social charter, was not warranted.

The rapporteur also spoke of the apparent conflict between the principle of nonintervention and collective action in defense of democracy. In his opinion, that conflict was clearly resolved by Article I of the Democratic Charter, which states that democracy is a right of all peoples and that governments are obliged to defend it. Collective action cannot be seen as intervention when the Member States have empowered the OAS to take action in the event of actual or threatened breakdowns of democracy within the inter-American system.

Another issue addressed by the rapporteur was that of the agents that can call on the Organization to act under the Inter-American Democratic Charter in order to reestablish democracy through collective action. There has been much discussion about expanding the channels for access to the Democratic Charter, but no concrete results have yet been attained. The most recent General Assembly, held in Lima, called for a discussion on the effectiveness of the application of the Inter-American Democratic Charter, a dialogue in which the Juridical Committee should participate and make an effective contribution by presenting proposals that are closer in line with the evolution of democratic institutions and with updating the mechanisms for their defense.

Dr. Baena Soares congratulated the rapporteur for his presentation of the report on the topic and stated that the matter had been dealt with exhaustively by the rapporteur as fully as possible and with academic rigor, and that for that reason it should be removed from the agenda. He also noted his concerns regarding the political role that the proposal would give to nongovernmental organizations (NGOs) within the Organization, which would distort the essentially state-based nature of the OAS by admitting other forms of participation by individuals without the necessary power of representation. Similarly, he voiced concern about the circumstance whereby the judiciary is the only unelected power among the classic branches of government authorized to defend democracy. To strengthen the democratic state, citizen support and commitment toward democracy is needed. He added that efforts to consolidate and strengthen democracy necessarily demand the education of the new generations, which is the basis for any social conquest. The conflict between the principle of nonintervention and the enforcement of collective measures was, he said, a false dilemma, since the OAS member states had accepted the conditions whereby this league of nations would perform its duties on behalf of peace and in defense of democracy, as enshrined in the political instruments that make up the inter-American system.

Dr. Freddy Castillo, after congratulating the rapporteur for the magnificent paper he had presented, said that he did not agree that the Hemisphere had no need to adopt a Social Charter. He thought that the legal system had progressed with the adoption of the OAS Charter, the later resolutions and declarations, and the Inter-American Democratic Charter, and that the adoption of the Social Charter of the Americas would further strengthen the social rights already enshrined in the Protocol of San Salvador. He agreed with Dr. Baena Soares's opinion regarding the scope of NGO involvement: they should be heard, but in no way could they be given the same status as the Member States.

Dr. Mauricio Herdocia noted that the prevention system was not totally resolved, since defense of democracy requires permanent, creative work in anticipating the causes that affect the democracies of the American States. The relationship between democracy and development was a third-generation right, extensively dealt with in the Protocol of San Salvador and thus subject to the IACHR's oversight. Regarding access to the Democratic Charter, he said that the Secretary General enjoyed a margin for maneuvers in referring threats to democracy in the Hemisphere to the Permanent Council. For that reason, he said, the scope of action available to the Secretary General should not be curtailed. At the same time, while he recognized the important and innovative role played by NGOs within the OAS, they could not be given rights similar to those of the Member States.

The Chairman agreed with the Rapporteur that the inter-American system already had enough regulatory instruments governing this issue, and that there was no need to adopt an additional charter to implement the rights set out in the Protocol of San Salvador. He stressed that while the executive branch of government was represented on the Permanent Council that did not mean other branches of government could not be heard. The increasingly active presence of NGOs in many areas could be

seen, and that openness by the OAS to dialogue with NGOs was positive, he said. The great dilemma is that NGOs do not necessarily represent collective interests, but private ones.

Dr. Fabián Novak agreed with the earlier speakers that the right to economic and social development consolidates democracy and was, as such, already enshrined in inter-American system through the Protocol of San Salvador. He suggested that the rapporteur could expand the references to the rulings of the Inter-American Court of Human Rights that safeguarded those rights. Regarding the rapporteur's reference to the Social Charter, he spoke in favor of maintaining a more neutral position and thought that the report could deal with those issues not addressed by the draft Social Charter.

Finally, Dr. Jean-Paul Hubert summarized the points made in the discussion on his report and promised to present a new version incorporating the contributions offered. He nevertheless stated that he wished to maintain his personal position on those points regarding which differing opinions had been expressed.

The following paragraphs set out the document presented by the rapporteur, Dr. Jean Paul Hubert, "Promotion and Strengthening of Democracy," document CJI/doc.355/10 corr. 1.

CJI/doc.355/10 corr.1

PROMOTION AND STRENGTHENING OF DEMOCRACY

(presented by Dr. Jean-Paul Hubert)

Summary

Introduction. 1. The Inter-American Democratic Charter as a more effective instrument in support of social and economic development as an essential element of the defense and strengthening of democracy. 2. Using the Inter-American Democratic Charter to reinforce the capacity for preventive action of the Permanent Council and of the Secretary General in the defense and support of democracy with regard to all of its constitutive elements. 3. Exploring new avenues. Conclusion. *Post Scriptum*.

* * *

Introduction

The Inter-American Juridical Committee last reviewed its agenda item "Promotion and Strengthening of Democracy" during its 76th Regular Session (Lima, Peru, 15-24 March, 2010). On that occasion, this Rapporteur briefly alluded to his two earlier extensive Reports related to the subject, namely *Legal Aspects of the Interdependence Between Democracy and Development*¹ and *Follow-Up on the Application of the Inter-American Democratic Charter*², both of which have been duly transmitted to the OAS Member States and General Assembly. He mentioned that the specific issues raised in those reports as they pertain to the Inter-American Democratic Charter and its application have now been clearly identified; in terms both of their legal implications for the OAS and its Member States, and the underlying political challenges and roadblocks that need to be addressed and resolved if that Charter is to contribute further to the preservation and strengthening of the democratic principles and values it embodies. Those issues not only remain very current, but have been, and still are the object of

¹ CJI/doc.190/05 rev.3, March 20, 2006. Full text on line in the 2006 IACJ Annual Report, at <http://www.oas.org/cji/eng/INFOANUAL.CJI.2006.ING.pdf>, p. 145-243.

² CJI/doc.317/09, February 16, 2009. Full text on line in the 2009 IAJC Annual Report, at <http://www.oas.org/cji/eng/INFOANUAL.CJI.2009.ENG.pdf>, p. 47-83.

continuous attention and debate on the part of the OAS Members and its General Secretariat, as we shall see below.

In Lima, two points were underlined during the brief exchanges that followed the Rapporteur's initial comments.

The first, stemming from the recent situation regarding Honduras, was to the effect that there were obvious shortcomings in the "early warning mechanisms" of the Inter-American Democratic Charter for the safeguarding of democracy in cases of threats to its preservation. Those shortcomings point to a need to reinforce the capacity for preventive action on the part of the Permanent Council and of the Secretary General. One avenue to remedy that situation could be to amend that Charter so as to open new avenues for such preventive action to become feasible, possibly an unlikely prospect.

The second dealt with the obvious need, given the interdependency between democracy and development³, to complement the work done so far by the Inter-American Juridical Committee in relation to the promotion and strengthening of democracy by possibly reinforcing the Inter-American Democratic Charter by way of a better focus on the ample – and under-utilized - provisions of the OAS Charter which deal with social and economic development, principally its well-developed Chapter VII on Integral Development. The objective here, in other words, would be to increase the capacity of the Inter-American Democratic Charter to serve as a **more effective instrument** in support of democracy.

The Juridical Committee was of the view that both approaches, i.e. **preventive** and **instrumental**, could certainly be pursued in parallel. Indeed, as will be seen in the remainder of this Report, the dividing line between the two is at time rather tenuous, if distinguishable at all.

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The Inter-American Juridical Committee has already dealt regularly and quite extensively over the past years with the subject of democracy as it appears in various legal and other instruments of the Inter-American System. The Juridical Committee also contributed to the drafting of the Inter-American Democratic Charter. Since its adoption, it has studied at length issues related to the interpretation, application and follow-up of the Democratic Charter. Most recently, as pointed out above, on the occasion of its review and discussions of this Rapporteur's two previous Reports, namely *Legal Aspects of the Interdependence Between Democracy and Development* and *Follow-Up on the Application of the Inter-American Democratic Charter*. A second look at some of the conclusions of those Reports as well as to the resulting Resolutions adopted by the Inter-American Juridical Committee could prove useful.

1. The Inter-American Democratic Charter as a more effective instrument in support of social and economic development as an essential element of the defense and strengthening of democracy

The presentation of a report on the *Legal Aspects of the Interdependence Between Democracy and Development* was the result of an express mandate issued to the Committee by the 34th General Assembly of the Organization of American States held in Quito, Ecuador, in 2004 in its resolution AG/RES. 2042 (XXXIV-O/04) *Observations and Recommendations on the Annual Report of the Inter-American Juridical Committee*. Some of its chapters dealt with the Inter-American Democratic Charter seen as part of the 'Democratic Architecture' of the OAS, the Inter-American Democratic Charter and the progressive development of international

³ As proclaimed by the Inter-American Democratic Charter; its 6th paragraph of its preamble reads "CONSIDERING that (...) *economic growth and social development based on justice and equity, and democracy are interdependent and mutually reinforcing*"; and its Article 11 "*Democracy and social and economic development are interdependent and are mutually reinforcing*".

law, the interrelationship between democracy and economic and social development, Development as a right and as a human right, the notion of “Integral Development”, and remedies to lack of economic and social development as a threat to democracy.

In light of the above reference to “the underlying political challenges and roadblocks that need to be addressed and resolved if that [Inter-American Democratic] Charter is to contribute further to the preservation and strengthening of the democratic principles and values it embodies”, it is worth recalling that this Rapporteur had indicated that the Juridical Committee had been quick to recognize that the question submitted to it by the General Assembly in the above mandate was not, far from it, devoid of any ‘political’ considerations or overtones. Yet, he had acknowledged that given the Committee’s very nature and vocation, he was not expected to deliver a ‘political’ study; efforts had to be made to skirt the hard-to-avoid political issues and challenges that naturally underlie the putting in practice, promotion and defence of democracy and the attainment of higher levels of development under all of its facets (*i.e.* economic, social, and many others) in our Hemisphere, two central –and so closely interrelated– aims and purposes of the Inter-American System.

Among the several statements and conclusions contained in that lengthy Report that could be considered relevant to the perceived need to better “**instrument**” the Inter-American Democratic Charter in support of social and economic development as an essential element of the defense and strengthening of democracy, the following bear repeating:

- (A) Economic and social development consolidate democracy, but do not ‘condition’ it; the absence or lack of development can and does imperil democracy; yet the absence or lack of development cannot be a justification to suppress or diminish democracy.
- (B) If OAS instruments do proclaim outright that democracy is a right, their approach to development as a right is much more circumlocutory, at best. That being said, Article 45 of the OAS Charter states that “a) All human beings, without distinction as to race, sex, nationality, creed, or social condition, have a right to material well-being”. Worthy of note, whereas in Article 17 of the same Charter the “right to develop” is attributed to the State, in Article 45 the right “to material well-being...” – and here we are assuming that this is equivalent to “development”, is presented as an individual one.
- (C) UN-inspired documents are more forthright in their references to a “right to development”. Thus, as early as in 1986 the United Nations General Assembly adopted a *Declaration on the Right to Development*⁴ “(c) confirming that the right to development is an inalienable human right”. That Declaration further stated that “States should take steps to eliminate obstacles to development resulting from failure to observe civil and political rights, as well as economic, social and cultural rights”, that “States have the duty to co-operate with each other in ensuring development and eliminating obstacles to development”, and that “States should undertake, at the national level, all necessary measures for the realization of the right to development (...)”.⁵ [Those are notions that all can be found repeatedly in many hemispheric documents, including the OAS Charter and the Inter-American Democratic Charter].

⁴ A/RES/41/128 of 4 December 1986 97th plenary meeting; full text at <http://www.un.org/documents/ga/res/41/a41r128.htm>

⁵ The 1993 UN Conference on Human Rights, adopted a *Vienna Declaration and Programme of Action*, which reiterated much of the above. It reaffirmed the “right to development (...) as a universal and inalienable right and an integral part of fundamental human rights”; that “States should cooperate with each other in ensuring development and eliminating obstacles to development” and that “the international community should promote an effective international

- (D) In paragraph 11 of Part III of the 2000 Millennium Declaration, one finds; “(...) We are committed to making the right to development a reality for everyone (...)”; and in paragraph 24 of Part V, interestingly labelled “*Human Rights, democracy and good governance*”, one can read: “We will spare no effort to promote democracy and strengthen the rule of law, as well as respect for all internationally recognized human rights and fundamental freedoms, including the right to development”. In the 2002 Monterrey Consensus, another UN-type document, one can read in part: “(...) Freedom, peace and security, domestic stability, respect for human rights, including the right to development, and the rule of law, gender equality, market-oriented policies, and an overall commitment to just and democratic societies are also essential and mutually reinforcing”. The UNESCO-appointed International Panel on Democracy and Development proclaimed, in 1998, that “the right to development has a natural place among human rights”.

Thus, one can safely assert that there is growing international consensus that a right to development exists and that it can be considered as part of ‘human rights’⁶. If such a notion were accepted, i.e. right to development = human right, and given the universally proclaimed interdependence between democracy and development, then could it not be argued that to the extent that lack of development may be seen as constituting a threat to democracy it should ‘qualify’ as a trigger for action in defence of democracy?

Furthermore:

- (E) Looking at the Inter-American Democratic Charter in conjunction with Chapter III of the OAS Charter, devoted to “Integral Development”:

(a) the OAS Charter proclaims that its “(...) Member States agree that equality of opportunity, the elimination of extreme poverty, equitable distribution of wealth and income and the full participation of their peoples in decisions relating to their own development are, among others, basic objectives of integral development...”⁷. Though there is no direct mention of “democracy” as such here, the reference to “full participation in decisions (...)” can certainly be interpreted as establishing a link between, on one hand, development in its ‘integral’, i.e. all-encompassing form –which naturally incorporates economic and social development- and, on the other hand, democracy;

(b) still in Chapter 3 of the OAS Charter, one finds yet another - this time more direct - reference to democracy at it relates to “integral development”. More precisely in the first part of its Article 31, which establishes that “Inter-American cooperation for integral development is the common and joint responsibility of the Member States, within the framework of the democratic principles and the institutions of the inter-American system...”. It is arguable that such a reference to “within the framework of the democratic principles” of the System can be interpreted as meaning that such common and joint responsibility can only be fully exercised if undertaken by States placing themselves within the ambit of such “democratic principles” as are enunciated by the Charter.

cooperation for the realization of the right to development and the elimination of obstacles to development”.

⁶ But there are well-known international legal experts who assert that whereas development is on the international agenda, but it is pre-mature to discuss it as a legal right”. Some of the arguments in support of their positions are outlined in my Report on the Legal Aspects of the Interdependence Between Democracy and Development (see Ch. 5, on “Development as a ‘right’ and as a ‘human right’”).

⁷ Article 34.

In a chapter entitled “*Democracia y Derechos Humanos*” from a recently published article “*El Sistema Interamericano y la defensa de la democracia*”⁸, Dr. Jean-Michel Arrighi, OAS Secretary for Legal Affairs, after having quoted Articles 7⁹ and 8¹⁰ of the Inter-American Democratic Charter, writes the following:

Reading those within the general context of the Democratic Charter opens up the possibility of a larger interpretation. Indeed, one could conclude that any person or group of persons that would consider that some of the elements necessary for their life in a democracy are missing or being violated could then have recourse, on the basis of Article 8, to the instances for human rights protection foreseen in inter-American instruments. I offer this as a possible interpretation (...).¹¹

As Arrighi points out, though, the Inter-American Human Rights Commission has yet to be seized of requests based on those Articles from the Inter-American Democratic Charter, and therefore it is not known yet what interpretation it would give them. On the other hand, he quotes the Inter-American Court of Human Rights which wrote, in the case *Catañeda Gutman vs. Estados Unidos Mexicanos*:

142. Within the Inter-American System the relation between human rights, representative democracy and political rights in particular has been acknowledged in the Inter-American Democratic Charter.

143. The Court considers that the effective exercise of political rights is an end in itself, while at the same time constituting a fundamental means whereby democratic societies guarantee the other human rights inscribed in the Convention.¹²

Which leads Arrighi to conclude, quite rightly so, that the Court thus reaffirmed, at the highest jurisdictional level, the linkage between democracy, human rights and international law in the inter-American legal order.

The Rapporteur therefore suggests, on the basis of points (A) to (E) above, that in the pursuit of a more effective instrumentation and application of the Inter-American Democratic Charter, interpreting the concept of ‘democracy’ in relation to its promotion, strengthening, defense and restoration (where called for) as inseparable from those of ‘integral development’ and ‘human rights’, could well serve the acknowledged need to remedy some of the perceived shortcomings of that Charter.

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A sub-chapter of the report *Legal Aspects of the Interdependence Between Democracy and Development* was entitled “Remedies to lack of economic and social development as a threat to democracy”. Some of the discussions that had preceded the drafting of that report during working sessions of the Inter-American Juridical Committee had naturally focussed on Chapter IV (Articles 17-22) of the Inter-American Democratic Charter, which enunciates specific actions which Member States, the OAS itself and its Secretary General are empowered

⁸ In *Agenda Internacional*, Año XVI, n. 27, 2009, p. 69-94.

⁹ “Democracy is indispensable for the effective exercise of fundamental freedoms and human rights in their universality, indivisibility and interdependence, embodied in the respective constitutions of states and in inter-American and international human rights instruments”.

¹⁰ “Any person or group of persons who consider that their human rights have been violated may present claims or petitions to the inter-American system for the promotion and protection of human rights in accordance with its established procedures. Member States reaffirm their intention to strengthen the inter-American system for the protection of human rights for the consolidation of democracy in the Hemisphere”.

¹¹ At p. 90, as translated by the Rapporteur.

¹² As translated by the Rapporteur.

to take and implement in the promotion, defence and restoration of democracy in the Americas. Members of the Juridical Committee had wondered whether it was the apparent lack of a more visible or readily identifiable parallel avenue or avenues for the achievement of higher levels of “social and economic development” –especially if and when such absence of development came to be perceived as putting democracy in danger– that had led to the request made by the General Assembly for the study at hand to be undertaken.

Some of the conclusions then offered by the Rapporteur in his Report were:

- (F) With regard to the application of the Inter-American Democratic Charter: it would seem at first glance that the possibility Article 17 gives the government of a member state to “*request assistance from the Secretary General or the Permanent Council for the strengthening and preservation of its democratic system*” if it considers “*that its democratic political institutional process or its legitimate exercise of power is at risk*” was not, originally at least, meant to be triggered by the fact that such a member state came to view its lack of economic and social development as constituting such a risk unless remedied. That, in spite of the broadly recognized and often proclaimed interdependence between democracy and economic and social development.
- (G) The same applies to the possibility Article 18 gives the Secretary General or the Permanent Council, with prior consent of the government concerned, to take action to “*analyze the situation*” arising in a member state “*that may affect the development of its democratic political institutional process or the legitimate exercise of power*”, eventually leading to the adoption by the Permanent Council, of “*decisions for the preservation of the democratic system and its strengthening*”, in the event that the Secretary General or the Permanent Council came to view that lack of economic and social development in the country concerned constituted such a risk to democracy, unless remedied.
- (H) Neither Article 17 nor Article 18 was seemingly meant to offer the remedy to such situations. Those two articles can be seen as of an “immediately preventive” nature aimed at avoiding the kind of situation envisaged under Articles 19 and 20, i.e. an actual ‘breach of democracy’ which automatically becomes “*an insurmountable obstacle*” to participation and triggers a possible “*collective assessment*” and remedial action.

So the answer has to be found somewhere else, including possibly in a broader interpretation of the Inter-American Democratic Charter. For there are undeniable and unequivocal duties and obligations, stemming from the OAS Charter and the basic principles and essential purposes it embodies and are reaffirmed in countless other Hemispheric Declarations and Resolutions, that befall the OAS and its political bodies, its Member States and the Secretary General to take action to promote, defend and protect democracy, including where lack of development runs the risk of adversely affecting said democracy. The OAS’s ‘mission’ to defend democracy is clearly accompanied by that of preventing and anticipating the ‘causes’ that affect democracy, lack of development being widely acknowledged as one of such causes.

When it adopted the Declaration of Florida *The Benefits of Democracy* in 2005, the General Assembly encouraged the negotiation of a “Social Charter of the Americas”¹³ that would “strengthen existing OAS instruments on democracy, integral development, and the fight against poverty”, thus linking such a future instrument to the existing Inter-American

¹³ Heads of State and Government of the Americas, in the Declaration of Mar del Plata, adopted at the Fourth Summit of the Americas (2005), and the Declaration of Commitment of Port of Spain of the Fifth Summit of the Americas (2009), reiterated their support for the objectives of the Social Charter of the Americas and its Plan of Action.

Democratic Charter. A link that was even more clearly stated by AG/RES. 2542 (XL-O/10) *Social Charter Of The Americas: Renewal Of The Hemispheric Commitment To Fight Poverty In The Region* adopted in Lima in June of the current year.¹⁴ In the context of the need being discussed in the present Report to better 'instrument' the Inter-American Democratic Charter, the statement in its Article 13 to the effect that "the promotion and observance of civil, political, economic, social, and cultural rights are inherently linked to integral development and to equitable economic growth" adds weight to the proposition that looking at and interpreting the Democratic Charter from a human rights angle could, even without the adoption of a Social Charter, contribute significantly its more effective use for the attainment of its purposes.

In relation to an eventual Social Charter, and given the difficulties it poses, the Rapporteur still is of the opinion, expressed in his earlier Report, but not shared by all members of the Committee:

- (I) that with regard to democracy on one hand, social and economic development on the other, and their interdependence, the rights and obligations of OAS Member States, as well as the duties of the OAS itself and of its bodies, are already and adequately established in hemispheric documents as they now exist, and more specifically the OAS Charter and the Inter-American Democratic Charter, and therefore;
- (J) that no additional formal instrumentation dealing with such rights, obligations and duties is needed.

That being said, and in the event that current efforts at negotiating a Social Charter come to fruition, the Rapporteur suggested that:

- (K) such a "*Social Charter of the Americas*", would naturally need to find its foundation in the OAS Charter and take into account the Inter-American Democratic Charter; the rights and obligations it could spell out would therefore need to take into consideration the basic differences therein in the generally accepted legal parameters attached to the interrelated notions of "democracy" on one hand, and "economic and social development" on the other, especially with regard to the respective rights, duties and obligations that can be attributed to the peoples of the Americas, OAS member states and their governments, and the OAS itself.

In adopting resolution CJI/RES. 106 (LXVIII-O/06) *Legal Aspects On Interdependence Between Democracy And Economic And Social Development* after concluding its discussion and review of the Report, the Inter-American Juridical Committee subscribed to the above suggestion by concluding, among other things, that "the obligation toward democracy and the obligation to cooperate with development have different legal effects, regardless of their interdependence stated in the OAS Charter and Inter-American Democratic Charter".

The Rapporteur therefore suggests, on the basis of points (F) to (K) above, that in the pursuit of a more effective instrumentalization of the Inter-American Democratic Charter, ample remedies to lack of economic and social development as a threat to democracy have already been provided in existing instruments within the Inter-American System; such remedies can notably be found in the Democratic Charter as it presently stands, and its use in support of the provisions of Chapter VII of the OAS Charter on Integral Development.

* * *

¹⁴ The preamble of AG/RES. 2542 (XL-O/10) reads in part: "TAKING INTO ACCOUNT: That the Inter-American Democratic Charter states that democracy is essential for the social, political, and economic development of the peoples of the Americas; That the Inter-American Democratic Charter also states that poverty, illiteracy, and low levels of human development are factors that adversely affect the consolidation of democracy; (...)."

2. Using the Inter-American Democratic Charter to reinforce the capacity for preventive action of the Permanent Council and of the Secretary General in the defense and support of democracy with regard to all of its constitutive elements

At their 2005 General Assembly OAS Member States, guided by their perceived need for procedures that would facilitate compliance “with the standards and principles contained in the *Inter-American Democratic Charter*” so as to enable it to “contribute effectively to the preservation and consolidation of democracy” in the Hemisphere, asked the Secretary General: (i) to present the Permanent Council with a report describing the manner in which the Inter-American Democratic Charter has been implemented since its entry into force in 2001; and (ii) “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 *Charter IV of the Inter-American Democratic Charter*”.¹⁵

That led to the presentation to the Permanent Council in April, 2007 of “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)”.¹⁶ Some time thereafter, the Secretary General reviewed and expanded upon that Report for the benefit of the participants to the XXXIV Course on International Law of the Inter-American Juridical Committee¹⁷. Following which he was received by the Juridical Committee, for a general discussion on present day challenges relating to the implementation of the Democratic Charter. The issues raised by the Secretary General in his Report prompted the Committee, in use of the prerogatives given to it by Article 100 of the OAS Charter, 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”.¹⁸ That in time resulted in the presentation by this Rapporteur, in 2009, of the above-referenced comprehensive Report entitled *Follow-Up on the Application of the Inter-American Democratic Charter*.

The diagnostic posed by the Secretary General in his 2007 Report on the shortcomings of the Inter-American Democratic Charter is well known. Describing the Democratic Charter as “the hemispheric benchmark for the preservation of democracy”, he considered that when put to the test in existing or potential crisis situations it has revealed “some limitations as to its legal, operational, and preventive scope”. More concretely, he referred to: (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.

It is as if the test of evolving political realities was not allowing the Charter to be used to the full extent of its promises in the areas of those “constructive, preventive and proactive measures” some had read into it as enabling “creative diplomacy” to play its role, especially with regard to crisis prevention.¹⁹

¹⁵ Resolution AG/RES. 2154 (XXXV-O/05) “Promotion of regional cooperation for implementation of the Inter-American Democratic Charter”, adopted by on June 7, 2005.

¹⁶ OEA/Ser.G, CP/doc.4184/07, original Spanish, 4 April 2007.

¹⁷ *Palabras de inauguración del XXIV Curso de Derecho Internacional*, (2008) v. 27 XXXIV Curso de Derecho Internacional, i-xiv.

¹⁸ CJI/RES. 132 (LXXI-O/07) of August 9, 2007.

¹⁹ For example LEGLER, Thomas, LEAN, Sharon L. and BONIFACE, Dexter B., “The International and Transnational Dimensions of Democracy in the Americas”, in *Promoting*

The Rapporteur's most recent Report delved extensively in the three issues identified in the Secretary General, 2007 Report. Finding answers to each of the different but inter-related sets of difficulties they pose would no doubt contribute a lot to reinforce the capacity for preventive action of the Permanent Council and of the Secretary General in the defense and support of democracy with regard to all of its constitutive elements. And translating them into actually usable tools will remain, in definitive, the political prerogative of the Member States. Here is a brief review of those among our earlier considerations that would appear particularly relevant.

(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

As the Secretary General pointed out in his 2007 Report, "if the principal asset to be safeguarded is democracy, how can we do so without clearly defining when and how it is imperiled?"

The Inter-American Juridical Committee, in its early "*Observations And Comments Of The Inter-American Juridical Committee On The Draft Inter-American Democratic Charter*"²⁰, considered that the Member 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 legitimacy from the government concerned. But that in itself does not 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. Many scholars have attempted to define of the concept of "unconstitutional alteration or interruption" of the democratic order²¹. And in so doing they have developed the now well accepted theory that opposes "horizontal accountability" to "vertical accountability" as applied to democracy. Those correspond to the distinction that Secretary General Insulza makes between "democracy of origin" (vertical) and "democracy as practiced" (horizontal)²². There can be no doubt that the Inter-American Democratic Charter covers and protects both.

Democracy in the Americas, ed. by Dexter B. Boniface, Sharon L. Lean and Thomas Legler, John Hopkins University Press, 2007.

²⁰ CJI/doc.76/01, 15 August 2001, and CJI/RES. 32 (LIX-O/01), 16 August 2001.

²¹ Some illustrative examples were given in the Rapporteur's 2009 Report. Often quoted is political scientist Robert Dahl's view that 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. 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" (see the Secretary General's 2007 Report at p. 11-12).

²² In Spanish, he uses "*democracia de origen y democracia de ejercicio*". The Rapporteur shares the views of those who consider that what has been called "the deficit of horizontal accountability" constitutes by itself one of the greatest threats to democracy in the Americas, and that if not addressed it may render the Inter-American Democratic Charter irrelevant.

As we wrote before, the Secretary General himself doubted 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. 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.

Discussions of the above within the Inter-American Juridical Committee has led directly to the unanimous adoption by its members in August of 2009 of a resolution²³ which this Rapporteur considers to be of fundamental and utmost importance for the interpretation that is to be given to the provisions of both the OAS and the Inter-American Democratic Charters dealing with the defense and promotion of democracy; and for their effective application. That pronouncement by the Juridical Committee is worth quoting in almost its entirety:

The Essential and Fundamental Elements of Representative Democracy and their Relation to Collective Action within the Framework of the Inter-American Democratic Charter

(...)

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”;

(...)

REAFFIRMING Resolution CJI/RES. I-3/95 in which it is stated that: “The principle of nonintervention 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;

(...)

²³ CJI/RES. 159 (LXXV-O/09).

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)].”

The Rapporteur therefore suggests that making full use of the Inter-American Democratic Charter to reinforce the capacity for preventive action of the Permanent Council and of the Secretary General in the defense and support of democracy entails or requires that what the above-quoted pronouncement on the part of the Inter-American Juridical Committee establishes as “the essential elements of representative democracy and the fundamental components of same” be made amenable to timely evaluation.

*

(B) The obvious tension between the principle of non-intervention and the possibility of protecting democracy through collective mechanisms

In his 2007 *Report to the Permanent Council* the Secretary General succinctly described the second of the three main “criticisms” leveled at the Inter-American Democratic Charter as follows: “The OAS Charter itself prohibits all states from intervening ‘directly or indirectly, for any reason whatever, in the internal or external affairs of any other State’, and affirms, later on, that ‘every State has the right to choose, without external interference, its political, economic, and social system and to organize itself in the way best suited to it. How can we reconcile that 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?”²⁴ Legler²⁵ 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

²⁴ 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”.

²⁵ *Op. cit.*, p. 123.

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”.

As discussed at length in his 2009 Report, the Rapporteur believes that this issue can be considered as settled, and therefore does not need to be developed at length in the present Report. As pointed out by the Secretary General in his 2007 Report, 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”²⁶.

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 Member 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 cannot be deemed to be acting in violation of other rights or principles protected under the Inter-American System.

The Rapporteur therefore reiterates his earlier suggestion that the Inter-American Juridical Committee subscribe to the proposition that 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”²⁷.

*

(C) Problems of access for those seeking to avail themselves of the Charter's mechanisms

This has been, and remains, the most difficult, as well as the most politically sensitive issue confronting the Inter-American Democratic Charter and its application. It constituted the entire overall backdrop of the Rapporteur's 2009 Report. Not much new can be added.

As very succinctly described by the Secretary General in his 2007 *Report to the Permanent Council*, 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 18²⁸); or (iii) when in the event of an alteration of constitutional order in a member

²⁶ At p. 13 of his Report.

²⁷ Expression taken from Arrighi's book *OEA* (São Paulo: Manole, 2004), p. 118. In fact, the Committee has already done so when, in its resolution CJI/RES. I-3/95 “Democracy in the Inter-American System” of March 23, 1995, 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*”. A position reaffirmed, as seen above, in its Resolution 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* of August 2009.

²⁸ In which case the prior consent of the government of the State concerned is needed if, as a result, *in situ* visits or other actions are considered before a report can be made to the Council for a collective assessment of the situation and, where necessary, if decisions are to be adopted for the preservation of the democratic system and its strengthening.

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

Each of those three channels leads to the Permanent Council. 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.

This has led many observers to conclude that in the end, implementing the Charter depends on the political will of the ‘governments’ of Member States.

For the means of access to the mechanisms spelled out in the Inter-American Democratic Charter to be broadened, thus allowing the satisfaction of the perceived need to reinforce the capacity for preventive action of the Permanent Council and of the Secretary General –in fact of the OAS– in the defense and support of democracy with regard to all of its constitutive elements, would require a wider interpretation to be given to the notion of ‘government’. That is, to expand its meaning beyond that of the executive branch alone, so as to enable all branches of state to turn to the OAS, using the provisions of the Democratic Charter, to denounce or warn of the disruption or breakdown of democratic institutions in their country. The prerogative of the Member States would still be preserved in that in the end it will of course be up to the Permanent Council to determine whether a complaint is valid or a real threat exists, and remedial or preventive actions are called for.

But for such a broader meaning to be given to the notion of ‘government’ as it appears in the Democratic Charter would, for reasons that should by now seem quite obvious, certainly require a political decision on the part of the Member States. A political decision that, realistically speaking, everyone still agrees is unlikely to become possible, at least in the short term. A look at the recent resolution adopted by the General Assembly in Lima on June 8, 2010 on *Promotion and Strengthening of Democracy: Follow-Up to the Inter-American Democratic Charter*²⁹ is quite illustrative of that unchanged situation, as seen in the following extracts³⁰:

RESOLVES:

1. To continue promoting democratic cooperation in order to support Member States, at their request, in their efforts to strengthen democratic institutions, values, practices, and governance, fight corruption, enhance the rule of law, bring about the full exercise of human rights, and reduce poverty, inequity, and social exclusion.

(...)

8. To request the General Secretariat to provide assistance to Member States that so request in the implementation of recommendations contained in the reports of OAS electoral observation missions.

(...)

10. To recommend to the General Secretariat that it support the modernization and strengthening of democratic institutions in the Member States that so request, and promote cooperation and dialogue between these institutions as a means to build capacity and share experiences, including in the field of information and communications technology (ICTs) and e-government.

(...)”.

²⁹ AG/RES. 2555 (XL-O/10).

³⁰ Underlining added.

Some encouragement can be derived, though, from the fact that that same resolution is (i) requesting the General Secretariat and the member states “to continue to promote a hemispheric discussion of issues related to democratic governance, through dialogue, forums, and seminars”; and (ii) instructing the Permanent Council “to organize and carry-out a dialogue on the effectiveness of the implementation of the Inter-American Democratic Charter and to submit the results and/or progress of the same during 2011, to commemorate the 10th anniversary of its adoption”.

Hopefully the Inter-American Juridical Committee will be invited to take part in such dialogue.

* * *

3. Exploring new avenues

If one looks at the historical development of the OAS one can see that it has travelled an impressive road in relation to the place occupied by democracy, its defense, promotion, and strengthening since the Charter of Bogota was first adopted in 1948. One need only mention the successive improvement in the means it gave itself towards a better achievement of the democratic ideal as it developed through the years, some turbulent and marred by ideological confrontations and Cold War vicissitudes, others more propitious for consensual understanding.

The amendments made to the OAS Charter by the 1985 "**Protocol of Cartagena de Indias**" can be considered a marker on that road from which we have witnessed a remarkable acceleration towards that goal. Indeed, as pointed out by Maristela Rodrigues Roget and Charles Leben in their book *Le système interaméricain et les principes démocratiques : l'évolution de son engagement*³¹, one of the effects of that Protocol was to elevate democracy from a ‘principle’ to a ‘purpose’³²; an amendment which, in their views, should be seen as the expression of a desire on the part of the Member States to confer a new *élan* to their Organization. The next important steps along the same trajectory were of course the 1991 *Santiago Commitment to Democracy and the Renewal of the Inter-American System, & Resolution 1080 on Representative Democracy*; the 1992 *Protocol of Washington and the 2001 Inter-American Democratic Charter*. Each one of those documents evidencing on the part of its Member States a recognition of the need to adapt existing instruments to new and evolving realities, and their resulting willingness to improve upon, and refine further, the capacity for the OAS and its institutions to better achieve its high aims and purposes as they relate to democracy.

As we have indicated before, it is the political will of the Member States that will determine whether, in light of what are now seen as obvious shortcomings, the ‘progress’ evidenced by that string of developments is taken another step further. And whether such further step takes the form of either amendments to the OAS and/or the Inter-American Democratic Charters, or the adoption of new charters and/or resolutions, or is simply achieved by way of new interpretations given to existing texts³³. A process that the Inter-American Juridical Committee would certainly be prepared to be associated with, and contribute to, as has been done in the past.

In the recent months, the present Secretary General of the OAS, whose 2007 *Report to the Permanent Council* stands at the origin of this and past studies by the Committee, has on several occasions reflected upon the challenges facing the OAS, its Member States and himself with regard to the promotion, strengthening and defense of democracy. As well as in respect to

³¹ Paris: L’Harmattan, 2009, at p. 210.

³² Article 2 (b) of the current OAS Charter.

³³ In his speech before the Lima General Assembly on June 6, 2010, the Secretary General considered that amending the OAS Charter would be “*dangerous and impractical*”, calling instead for “*improving it and expanding its application*”.

the relationship between democracy and development. In so doing, he has enriched further the on-going discussions on improvements to the application of the Inter-American Democratic Charter. The Rapporteur has deemed it useful to consider some of his thoughts, which in many ways reflect the considerations put forward so far in the present Report.

On May 6, 2010, he presented to the Permanent Council his *Report of the Secretary General Concerning Compliance with Operative Paragraph 3 of Resolution AG/RES. 2480 (XXXIX-O/09) "Promotion and Strengthening of Democracy: Follow-Up to the Inter-American Democratic Charter"*³⁴. After having summarized to the "most frequently cited limitations" of the Democratic Charter already identified in his 2007 Report³⁵, he had this to say on the problems of access to that charter: "*No branch of government other than the Executive can invoke the IADC to prevent a breakdown of democracy, much less a civil society organization, for example. Naturally, if the Executive itself is threatening democratic institutions, in the judgment of the other branches, it can be blocked only by the Permanent Council once the interruption has occurred. Hence, it is crucial to strengthen the capacity of the General Secretariat to assist member states in pre- and post-crisis responses, which includes monitoring, negotiation, dialogue, and political agreements; as well as national reconciliation and strengthening political institutions, parties, and organizations and civil society.*"

On the same subject, to be more explicit, he wrote: "*Therefore, making the OAS' multilateral resources available to any branch of government that believes that the country's Constitution is being violated would be a major improvement*³⁶. *It would enable the General Secretariat to take preventive action before a crisis erupts; to define much more explicitly what constitutes a serious disruption or interruption of the democratic process; and to respond to it through a battery of measures rather than just suspension*".

In an earlier address before the Permanent Council³⁷, he had used the example of the case of Honduras, where by the time that country invoked the Democratic Charter the disruption of democracy had already become inevitable, to be more specific about some of his suggestions. A case which in his views exemplified the need, in order to strengthen our democracies, to devise ways of applying the inter-American Democratic Charter "*before, and not after, crises erupt*", the need "*to examine swifter and more flexible procedures for acting prior to crises, drawing on the lessons learned from this one, which is still an open wound and has harmed us all*". He further added: "*We need to be more flexible in our interpretation of the situations where, in reliance on the Inter-American Democratic Charter, the General Secretariat could respond to potential instability in some member States*". In other words, as he spelled out later in his latest Report to the Permanent Council, he argues that on-going political developments in the Hemisphere (of the kind that first led to the adoption of Resolution 1080, and then to that of the Democratic Charter) warrant a review of the Charter's usefulness for purposes of strengthening and preserving democratic institutions in the Hemisphere, and that its mechanisms need to be updated.

In many of his recent public statements the Secretary General refers to the August 2009 Resolution *The Essential And Fundamental Elements Of Representative Democracy And Their Relation To Collective Action Within The Framework Of The Inter-American Democratic Charter* adopted the Inter-American Juridical Committee³⁸ in support of some other key points that must be kept in mind in the use and interpretation of the Democratic Charter if it is to preserve its relevance. For example, "*it is no longer enough to be elected democratically; you*

³⁴ OEA/Ser.G, CP/doc.4487/10, 4 May 2010 (Original: Spanish).

³⁵ Extensively analyzed in the Rapporteur's 2009 Report (see footnote 2, *supra*, and reviewed in the present Report.

³⁶ Underlined by the Rapporteur.

³⁷ On March 3, 2010.

³⁸ Extensively quoted above.

have to govern democratically”, he wrote, adding that he considers that therein lies “*the essence*” of our Inter-American Democratic Charter³⁹. He sees the principal challenges today are “*to ensure that the elected governments govern democratically and that the citizenry is able to demand for itself the benefits that representative democracy affords (...)*”⁴⁰. And, naturally, no sight is ever lost of the need to keep in mind that interdependence between democracy and social and economic development, two “mutually reinforcing” concepts (and realities), to quote Article 11 of the Inter-American Democratic Charter. We must “*strike a better balance between our democracy-building and our integral development efforts*”, he wrote⁴¹.

Before concluding, the Rapporteur would like to suggest that building upon the meaning and interpretation of Article 110 of the OAS Charter might offer a way to increase the capacity of the Organization to better anticipate threats to democracy and to defuse potential crisis.

Article 110 reads: “*The Secretary General, or his representative, may participate with voice but without vote in all meetings of the Organization. The Secretary General may bring to the attention of the General Assembly or the Permanent Council any matter which in his opinion might threaten the peace and security of the Hemisphere or the development of the Member States. The authority to which the preceding paragraph refers shall be exercised in accordance with the present Charter*”. Added to the OAS Charter by the 1985 Protocol of Cartagena de Indias, that language constituted an enlargement of the Secretary General’s role. In their previously quoted book *Rodrigues and Leben*, after recalling how reticent up to that moment the Member States had been to attribute ‘political functions’ the Secretary General, consider the change brought about by Article 110 marked a turning point in the institutional history of the OAS. For, in their opinion, the new political attributes thereby conferred upon the Secretary General provided him with the possibility to act in a preventive fashion in such areas as international peace and security, and the development of the Member States. According to them, the expression “development of the Member States” opens up the possibilities for action of the Secretary General to the point where those are now broader than those of the Secretary General of the United Nations⁴².

* * *

Conclusion

As outlined by the Secretary General as well as in previous reports and studies by the Inter-American Juridical Committee, there is room for innovations in the quest to make existing hemispheric instruments, including of course the Inter-American Democratic Charter and the OAS Charter itself, more effective with regard to the democratic ideals and purposes enshrined in those same instruments. Innovations that could, as seen above, take many forms. But the obstacles remain formidable, for that is “a complex balancing process, that will call for the utmost sensitivity and intelligence on the part of the member states”⁴³.

In the introduction to his 2009 Report *Follow-Up on the Application of the Inter-American Democratic Charter* this Rapporteur had written:

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.

³⁹ March 3, 2010 address before the Permanent Council.

⁴⁰ May 2010 Report to the Permanent Council.

⁴¹ June 6, 2010 address before the Lima General Assembly.

⁴² See p. 224 of their previously referenced book.

⁴³ As stated by the Secretary General in his 2009 Report to the Permanent Council.

It is the Rapporteur's hope that the present Report will contribute further to that reflection.

* * * *

Post Scriptum

As the present Report is being drafted, the Rapporteur notices that in Resolution AG/RES. 2611 (XL-O/10) *Observations and Recommendations on the Annual Report of the Inter-American Juridical Committee* adopted on June 8, 2010 in Lima, Peru the OAS General Assembly resolved:

To take 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, and working to promote democratic values, practices, and governance, as well as the consideration of the issues in Article 11 of the Inter-American Democratic Charter.

As indicated at the outset of the present Report, Article 11 of the Inter-American Democratic Charter reads "*Democracy and social and economic development are interdependent and are mutually reinforcing*". The Rapporteur's previously mentioned 2006 report "Legal Aspects of the Interdependence between Democracy and Economic and Social Development" has dealt at length with several aspects of that issue.

* * *

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

Documents

CJI/doc.328/09 rev.1	War Crimes in International Humanitarian Law (presented by Dr. Jorge Palacios Treviño)
CJI/doc.357/10	International Humanitarian Law (presented by Dr. Ana Elizabeth Villalta Vizcarra)

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.

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

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.

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 XXXIX 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.

At the 76th Regular Session of the Inter-American Juridical Committee (Lima, Peru, March 2010), Dr. Jorge Palacios, the rapporteur for the topic, explained the General Assembly's mandate and reported on the communications received from five countries: Bolivia, Ecuador, El Salvador, Mexico, and Suriname. He also noted that the General Assembly's deadline for submitting notifications expired in November 2009.

Regarding Bolivia's note, he asked the Department of International Law to thank the country for the information sent and to record the Committee's willingness to provide any advice deemed necessary in the future.

Regarding Ecuador's communication, asking that work be carried out on defining war crimes, he suggested forwarding a document from the International Committee of the Red Cross dealing with that issue.

In addition, he said that El Salvador proposed the topics of drafting model laws for the preservation of cultural property, determining sanctions for damage to the emblem, and the protection of those assets at times of natural disasters. In turn, the proposal presented by Mexico dealt with the protection of cultural property during times of armed conflict.

Since legislation on this matter already existed, he proposed sending those countries the International Committee of the Red Cross document “Practical Advice for the Protection of Cultural Property.”

The information submitted by the Republic of Suriname was, he explained, focused on laws on cooperation with the International Criminal Court.

The Rapporteur then presented a paper on “War Crimes in International Humanitarian Law,” document CJI/doc.328/09 rev. 1, and another on “International Criminal Courts,” document CJI/doc.349/10.

Dr. Miguel Pichardo thanked Dr. Palacios for the document and regretted that the information sent by his country’s foreign ministry through its Permanent Mission to the OAS had not been received.

Dr. Mauricio Herdocia thanked Dr. Palacios for his work, which offered specific recommendations for replying to each of the countries. He also noted that as the rapporteur for the topic of the International Criminal Court, he was making use of Dr. Palacios’s work.

Dr. Dante Negro explained that the Committee’s mandate is to prepare draft model laws based on the information on priority topics submitted by the Member States. He noted that the States had failed to comply with the mandate, either because their replies were not clear or because only a minimal number of countries had replied.

Dr. Jean-Paul Hubert expressed his disagreement with this mandate, which was repeated every year, and said it could be discontinued if there was no interest in the topic.

Dr. Elizabeth Villalta asked the rapporteur whether he would be able to draft a model law with the scant information submitted. On this point, Drs. Negro and Palacios explained that no list of priority topics existed.

Dr. Jorge Palacios interpreted the absence of requests from the States as indicating that they did not need the Committee’s support. As he saw it, the work was finished. Drs. João Clemente Baena Soares and Miguel Pichardo supported the rapporteur for the topic. At the end of the discussion, the rapporteur agreed to submit a list of the priority topics that the Member States had requested.

The Vice Chairman suggested that Dr. Hubert’s concern regarding the repetition of mandates in the continuation of which the States appear to have no interest be included in the verbal presentation to be given by the CJI’s Chairman to the Committee on Juridical and Political Affairs.

Under other business, Dr. Dante Negro spoke about the Special Meeting on international humanitarian law held by the CAJP on January 29, 2010, in conjunction with the course organized annually by the Department of International Law, which took place the previous day and was attended by the CJI’s rapporteurs Drs. Palacios and Herdocia, who gave excellent presentations on their respective topics. He added that the initiative of having representatives of the Juridical Committee attend other events besides the presentation of the Annual Report had been well received and that the practice should continue to the extent that the available resources allowed.

On April 14, 2010, the Department of International Law received a communication from the Permanent Mission of Paraguay to the OAS, dated April 12, stating that it was placing priority on the bill to amend the Military Civil Code in line with the obligations entered into by the Paraguayan State.

At the fortieth regular session of the OAS General Assembly (Lima, June 2010), the Committee was asked, on the basis of the proposals on priority topics submitted by the Member States, to continue preparing and proposing model laws to support the efforts undertaken by the Member States in

implementing their obligations under international humanitarian law treaties; see resolutions AG/RES. 2575 (XL-O/10) and AG/RES. 2611 (XL-O/10).

On July 7, 2010, Dr. Elizabeth Villalta presented a report – document CJI/doc.357/10, “International Humanitarian Law” – dealing with the Committee’s participation at the International Conference of Latin American and Caribbean National International Humanitarian Law Commissions.

At the 77th Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, Brazil, August 2010), the rapporteur, Dr. Jorge Palacios, was not in attendance. However, Dr. Elizabeth Villalta presented report CJI/doc.357/10 on the topic, noting that although she was not the rapporteur, she had attended, as a member of the Juridical Committee, the International Conference of Latin American and Caribbean National International Humanitarian Law Commissions, held in Mexico City the previous June, and at which she had made a statement on the “Ratification and implementation of international humanitarian law treaties,” thus furthering the Juridical Committee’s outreach work on the issue.

The following paragraphs contain transcriptions of the documents presented by Drs. Palacios and Villalta, respectively: documents CJI/doc.328/09 rev.1 and CJI/doc.357/10.

CJI/doc.328/09 rev.1

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.

VIII. The Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, dated 1954, and its Protocols dated 1954 and 1999.¹

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.

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 Additional Protocol I to the Geneva Conventions as well as the Rome Statute that established the International Criminal Court [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

¹ 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.

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 sensitization 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".²

As for Article 1 of the Rome Statute, this 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". Likewise, 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. As for war crimes, 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".

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 serious 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

² 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).

hostages; the destruction and seizure of property not justified by military needs and conducted illicitly and arbitrarily on a large scale.³

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”. 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” (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”.

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”, 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 of their own country or in any other State”, 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”. It follows from the above that universal jurisdiction allows a State to persecute and punish any author of a war

³. 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.

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, and that 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, par. 6). 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”. 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 circumstances 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. Precisely speaking, the exceptional situations referred to in article 17 are those that led the international community of States to 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”, as stated in the third paragraph of the Bylaws of the ICC.

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*).⁴

According to what has been expressed so far, the following hypotheses can be presented concerning war crimes:

a) 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, as stated earlier, 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”;

b) On the other hand, if a war crime dealt with in any of these treaties is committed in a State that is Party to the Geneva Conventions, to the Additional Protocol I and to the Rome Statute, this State has primary jurisdiction to judge and punish this crime, in accordance with said treaties. Likewise, any other Party States to said legislation could judge this crime, such competence being based on universal jurisdiction. But if none of these States with the jurisdiction to judge a crime based on the Geneva legislation, on universal jurisdiction or on the Rome Statute does not punish the crime, or else 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 consequences that can result from the different situations 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. This hypothesis would be based on application of the rule. 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.

It is understandable that the principle referred to could apply, seeing that both the Geneva Conventions, Additional Protocol I and the Rome Statute are successive treaties on the same matter. However, in the case under examination, it is considered that a situation exists that

⁴ BROOMHALL, Bruce. *Corte Penal Internacional: una guía para su implementación nacional*. International Association of Criminal Law, 1999, p. 118.

precludes applying the above-mentioned rule, namely that a war crime that is provided for both in the Geneva legislation and the Rome Statute lies within the competence of two jurisdictions. One is the national court of the Party States to the Geneva Conventions, since in the first instance these have the authority to judge the crimes provided for in these Conventions. The other jurisdiction is that of the ICC, created by the collective will of the international community of States through the Rome Statute and whose functions are in keeping with the rules set forth in said Statute, namely that if a State that is Party to the Geneva Conventions accepts the Rome Statute, then it also accepts the complementary jurisdiction that the ICC has to punish the serious crimes described in the Statute that created it. To this effect, it must include in its domestic law, as alternatives, both the crimes provided in the Geneva legislation and those dealt with in the Rome Statute, without this enabling the Rome legislation to change the Geneva legislation (although it is more recent), because although the States can and should judge the crimes provided for in both the Geneva and the Rome legislation, the ICC can only judge in a complementary fashion the serious crimes provided for in the Statute that created it, that is to say, when the State with the status of primary jurisdiction has not judged them or has failed to judge them appropriately. Consequently, the ICC lacks the competence to judge the crimes provided for solely in the Geneva legislation, which makes it necessary that both the war crimes set forth in the Geneva legislation and in the Rome Statute remain unaltered, alongside one another, in the legislation of the States that have accepted both legislations, that is, that of Geneva and that of Rome, so that the States concerned can know which crimes can and should be judged and which the ICC should judge if the States fail to do so. In conclusion, the ICC is a complementary instance of the jurisdiction of the States that is ruled by the legislation that created it, the Rome Statute, on 17 July 1998, for the purpose of judging “the most serious crimes of international importance” which represent “a threat to the peace, security and welfare-being of humanity”.

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 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.

Based on the above, it can be concluded 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 - the war crimes provided for in said international treaties, as well as the elements of the war crimes referred to in article 9 of the Rome Statute which were approved in 2002 by the members of the assembly of the States Parties to the Statute, since, as seen above, 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, in the understanding that the State could judge the crimes dealt with in all international treaties, but if it does not judge a crime provided for in the Geneva Conventions as well as in the Rome 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”.⁵

⁵ 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).

CJI/doc.357/10

INTERNATIONAL HUMANITARIAN LAW

(presented by Dr. Ana Elizabeth Villalta Vizcarra)

Resolution AG/RES. 2611 (XL-O/10), “Observations and Recommendations on the Annual Report of the Inter-American Juridical Committee”, adopted on 8 June 2010 at the 40th regular session of the General Assembly of the OAS, paragraph 5, refers to “...the efforts undertaken by member states to fulfill obligations under international humanitarian law treaties,...”.

In this sense the Inter-American Juridical Committee took part in the “International Conference of National Committees on International Humanitarian Law of Latin America and the Caribbean” held in Mexico City from 30 June to 2 July 2010 under the sponsorship of the International Committee of the Red Cross (ICRC) and the Mexican Secretariat of Foreign Affairs. The author participated as a Member of the Inter-American Juridical Committee, presenting the lecture entitled “Ratification and Implementation of the Treaties of International Humanitarian Law”, as follows:

**RATIFICATION AND IMPLEMENTATION OF THE TREATIES
OF INTERNATIONAL HUMANITARIAN LAW**

Ambassador Ana Elizabeth Villalta Vizcarra¹

International Humanitarian Law is the ensemble of norms that for humanitarian reasons is designed to limit the effects of armed conflicts, protect people who do not or no longer participate in combats, and control the means and methods of waging war. It is comprised of agreements and treaties signed between States, international common law and the general principles of law.

International Humanitarian Law has been defined by Christophe Swinarki as “international treaties or customary rules which are specially intended to resolve matters of humanitarian concern arising directly from armed conflicts, whether of an international or non-international nature; for humanitarian reasons those rules restrict the right of the parties to a conflict to use the methods and means of warfare of their choice, and protect people and property affected or liable to be affected by the conflict”.

In this sense, international humanitarian law covers practically two spheres: protection of people who do not or no longer participate in the hostilities and a series of restrictions concerning the means of war, especially with weapons, and the methods of war, such as certain military tactics.

These restrictions refer to international humanitarian law prohibiting the military means and methods from failing to distinguish between people who participate in combats and those who take no part in them, in order to respect the life of the civil population (both people and goods), and prohibiting military means and methods that cause superfluous damage or unnecessary suffering, and serious lasting damage to the environment.

Governments must adapt international humanitarian law to new circumstances, especially as regards the evolution of methods and means of combat, in order to guarantee more effective protection and safety to victims of armed conflict, since various regions in the world still violate international humanitarian law.

In this sense, international instruments of international humanitarian law endeavors to limit those means and methods of attack that cause unnecessary suffering to the victims of

¹ Member of the Inter-American Juridical Committee.

conflicts, such as the use of anti-personnel mines or chemical and bacteriological weapons. The humanitarian mission currently in effect materializes through the action of the International Committee of the Red Cross (ICRC) and the National Committees on Application of International Humanitarian Law, the purpose of which is to protect the life and dignity of victims of war and internal violence by lending due assistance as well as promoting and strengthening international humanitarian law.

International Humanitarian Law is principally contained in the four Conventions of Geneva of 12 August 1949, complemented by the Additional Protocols of 1977 relating to protection of victims of armed conflict. At present there are other conventions that prohibit the use of certain weapons and military tactics, including the following:

- The Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare (1925).
- The Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons, and on their Destruction (1972).
- 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 (1980), and its five Protocols, namely: the Protocol I on Non-Detectable Fragments; the Protocol II on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices; the Protocol III on Prohibitions or Restrictions on the Use of Incendiary Weapons; the Protocol IV on Blinding Laser Weapons, and the Protocol V on Explosive Remnants of War.
- The Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (1993).
- The Convention on the Prohibition of the Use, Stockpiling, Manufacturing and Transfer of Anti-personnel Mines and on their Destruction (1997).
- The Convention on Cluster Munitions (2008).

It is gratifying to note that most of the Member States of the Organization of American States (OAS) are signatories to these international instruments. For example, the Protocol for Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases and Bacteriological Methods of Warfare (1925), is signed by 26 Member States of the American region; the Convention on Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons, and on their Destruction (1972) is signed by 33 States in the region; 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 (1980) is subscribed by 21 States; the Convention on the Prohibition of Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (1993) is signed by all the Member States of the Organization of American States (OAS), that is to say, the 35 States of the region; the Convention on the Prohibition of the Use, Stockpiling, Manufacturing and Transfer of Anti-personnel Mines and on their Destruction (1997) enjoys the adherence of 33 States of the region, while the States of the region have initiated the necessary negotiations with their respective governments as regards signing the Convention on Cluster Munitions (2008).

Notwithstanding the fact that most of the Member States of the Organization of American States (OAS) take part in the treaties on weapons in international humanitarian law, the Organization is tireless in exhorting Member States to participate in all the international instruments of international humanitarian law, as verified in the text of its resolutions on the matter.

It is necessary to strengthen the norms of international humanitarian law by ratifying the treaties on the issue, as well as their subsequent execution and implementation, diffusion across all sectors of society, and effective application within the States.

International humanitarian law only applies to armed conflict and does not cover situations of internal tension or internal disturbance such as isolated acts of violence, but it is applicable when a conflict is triggered and applies equally to all parties, without taking into account who started the trouble. International humanitarian law distinguishes between international armed conflict and armed conflict of a non-international nature. The former involves at least two States and essentially entails application of the Conventions of Geneva of 1949 and its Additional Protocol I of 1977, whereas armed conflict of a non-international nature involves confrontation within the territory of the same State between the regular armed forces and dissident armed groups, which principally calls for application of the provisions of article 3 common to the four Conventions of Geneva of 1949 and Additional Protocol II of 1977.

All the States are obliged to take measures to guarantee that the use of weapons is in keeping with the norms existing in international humanitarian law. In this sense, it is prohibited to use weapons that cause extensive, lasting and serious damage to people and the natural environment, which refers to certain weapons such as those of a biological, chemical, blinding-laser or incendiary nature, as well as bullets that explode or scatter easily in the human body.

Accordingly, international humanitarian law contains norms that prohibit or restrict the use of certain conventional weapons such as anti-personnel mines, booby-trap weapons and explosive remnants of war, and urges all States to prohibit nuclear weapons totally and eliminate them.

It should be mentioned that through resolution 63/240 of the General Assembly of the United Nations (UN), many States agreed to establish a treaty to control international transfer of conventional weapons. This resolution bears the title: "Toward an Arms Trade Treaty: Establishing Common International Standards for the Import, Export and Transfer of Conventional Arms".

The States have expressed the advisability of this treaty being based on international law, international humanitarian law and the international law on human rights. The debate on this treaty marked a historical moment in the United Nations, since the future international treaty on the weapons trade will be negotiated in a series of meetings to culminate at a Diplomatic Conference in 2012 for which a Working Group has been set up as a Preparatory Committee.

Negotiating this treaty is of utmost importance for the international community, since the international transfer of weapons contributes to armed conflicts, displacement of people, organized delinquency, terrorism, violations against peace, security, democracy, sovereignty and sustainable development.

The topic of weapons is of such importance in the Americas that at the 40th General Assembly of the Organization of American States (OAS) held recently in Lima, Peru, on 6-8 June 2010, the Ministers of Foreign Affairs of the Member States of the OAS adopted the "Declaration of Lima: Peace, Security and Cooperation in the Americas", which stated a firm commitment to promote transparency in arms acquisitions, as well as promoting a propitious environment for control of armaments, limitation of conventional weapons and non-proliferation of weapons of mass destruction, which would enable each Member State to allocate a greater amount of resources to economic and social development, as well as to maintaining international peace and security.

This Declaration also urges the States in the region to consider signing or ratifying, as the case may be, the Inter-American Convention on Transparency in Conventional Weapons Acquisitions, as well as the Inter-American Convention against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives, and other Related Materials (CIFTA).

Ratification of international treaties represents the first significant step toward applying international humanitarian law, which is complemented by national measures being taken in applying these treaties.

In order to enable all these norms in the treaties to be applied, they have to be known to the States, especially if some complementary action needs to be taken through legislative or regulatory measures. The States must pledge to implement all these treaties or conventions so as to put an end to the suffering caused by weapons and in this way prevent future violations of international humanitarian law.

In order for international humanitarian law to be concretely applied, the measures for national application in each State must continue to be pushed ahead. These may be legislative, regulatory and administrative measures, such as implementing Model Laws, adapting national criminal legislation to international treaties, identifying protected individuals, signaling protected sites and properties, translating instruments of international humanitarian law into local languages, diffusing the norms of international humanitarian law to the armed forces and the forces of public security and above all to society in general, sanctionary measures for serious violations of international humanitarian law, and adopting administrative measures in executing the international treaties in place.

To facilitate implementation of these treaties or conventions and thus attend to the requirements of international humanitarian law, such as complying with their norms, the States have created inter-ministerial and in some inter-institutional National Committees comprised of those State institutions that are competent to aid governments by contributing to the promotion and application of international humanitarian law. These are sometimes limited only to Executive bodies, in particular involving the Ministries of Foreign Affairs, Defense, Justice, Public Security, Health, Culture, Education, the Interior and in some cases more fully integrated by the Legislative and Judicial Powers. In all of these bodies, the International Committee of the Red Cross (ICRC) is associated with their work, principally through juridical counseling.

At the moment, the Inter-American system has instituted 19 National Committees, active in Argentina, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Dominican Republic, Trinidad and Tobago and Uruguay. In all these States, their presence has enhanced application of international humanitarian law, in this way advancing adoption of national measures by enabling rationalization of resources and concentration of normally dispersed competences.

The main aim of these Committees is to defend and promote respect for the norms, principles and institutions of international humanitarian law, as well as compliance with international commitments through its implementation in national legislations, in this way helping the States to comply with their obligations in respect to the various international treaties on the issue.

These National Committees also facilitate compliance with the obligations derived from international instruments, legislative standardization, as well as diffusion and teaching of international humanitarian law among government and civil-society personnel.

The following feature among the main functions of the Committees:

- To assist and support the States with regard to subscribing and adhering to treaties dealing with international humanitarian law.
- To evaluate the existing national legislation as regards the obligations set out in the instruments of international humanitarian law.
- To diffuse and promote the application of international humanitarian law and permanently check on its compliance.
- To propose adoption of a secondary legislation on the matter, as well as reforms or amendments to the legislation in effect.

- To coordinate adoption of administrative regulations and harmonize their content.
- To lend guidance as to the interpretation and application of the norms of international humanitarian law.
- To investigate compliance with the essential guarantees due to victims of armed conflicts.

It is appropriate for the National Committees to set up relations with other Committees and with the International Committee of the Red Cross (ICRC) in order to exchange good practices and experiences.

The following are among the legislative measures most adopted by the States in implementing these norms: laws that provide for sanctioning the war crimes defined in the Convention of Geneva of 1949, the Additional Protocol I of 1977 and in the Rome Statute that created the International Criminal Court in 1998. States must adapt their criminal legislation as regards typifying war crimes, universal jurisdiction on these serious violations and the responsibility of superiors for the acts of their subordinates, establishing laws relating to criminal and military procedures or instructions for the civil population in times of war and other armed conflicts. Some States have incorporated laws to implement the Rome Statute.

Many States have included in their national legislation a national weapons policy in which they prohibit transferring, importing, exporting and transporting weapons and ammunition to governments that systematically violate human rights, as well as prohibiting transferring, importing, exporting and transporting weapons and ammunition when agreements on control or non-proliferation of weapons are violated. Other States have established national policies on integral action against anti-personnel mines, non-explosive ammunition and improvised explosive artifacts, and measures to control chemical substances that can be used to make chemical weapons. Other legislations effectively regulate the problem of small and light weapons and are adopting laws addressed to reinforce control over the illicit manufacture and traffic of fire weapons and other similar materials.

The Armed Forces of the States must orientate their actions based on the norms of international humanitarian law, especially so as to guarantee protection of persons and property in the case of armed conflict. In this sense, the norms and principles of international humanitarian law must be contained in the military doctrines and manuals, in education and in the training of the Armed Forces so that they can count on the necessary means and mechanisms for their effective application.

So, it can be seen that many States of the Americas pay heed to compliance with the diffusion and teaching of international humanitarian law on all levels of the armed forces, conducting courses to train military instructors on the subject and even preparing manuals on international humanitarian law. In other States, the Ministry of Defense has created within its structure General Directorates on Human Rights entrusted with diffusing and promoting the International Law on Human Rights and international humanitarian law in the doctrine, instruction and training of the armed forces.

Some States have prepared primers for application of international humanitarian law that contain the most relevant principles and norms, and have held workshops and seminars in order to improve the concrete application of international humanitarian law in military operations. Other States have appointed the Sub-Chief of the Joint Chiefs of Staff as Officer in Charge of International Humanitarian Law. Still others have signed Conventions on Inter-institutional Cooperation with the Red Cross to incorporate international humanitarian law in the Armed Forces and have also set up Inter-institutional Committees for the Study and Application of International Humanitarian Law and International Law of Human Rights as part of the doctrine and instruction of the Armed Forces.

All this has meant integration and diffusion of international humanitarian law on all levels of the armed forces of the American continent, and has contributed especially to training

and awareness-raising on the matter. As a matter of fact, approval was given to setting up a Training Course at the Conference of Central-American Armed Forces (CFAC - Guatemala, Honduras, El Salvador, Nicaragua and Dominican Republic), as well as a workshop with the Joint Chiefs of Staff of the Armed Forces of the Community of Caribbean States (CARICOM).

In addition to complying with the international treaties on the matter and their respective national legislations, it is advisable that States respect the Code of Conduct for personnel responsible for enforcing the law and the Basic Principles on the use of force and firearms, both instruments being international norms of the United Nations.

It is also necessary to integrate international humanitarian law with academic teaching, since States, by signing treaties on the matter, pledge to diffuse and promote it. In this sense it is especially necessary to diffuse it in Law Schools or at post-graduate level, since academic teaching is the vehicle for informing important sectors of society.

Many Universities on the American continent offer courses in international humanitarian law at the Master's or Doctoral level, as well as in Political Science Law, Social Sciences, Journalism and International Relations courses, in this way contributing to the integration and diffusing of international humanitarian law in academic teaching. This also favors research and the training of specialists on the subject who contribute through their papers to the work carried out in the National Committees on international humanitarian law, as well as the work of the Armed Forces.

There is a need to strengthen the norms of international humanitarian law by means of its universal acceptance and widest diffusion and adoption of national measures for its due implementation, which is why States must adapt their criminal legislation for the purpose of complying with the obligations provided in the Conventions of Geneva of 1949, as well as its Additional Protocol I of 1977, in respect to typification of war crimes, universal jurisdiction on serious violations and the responsibility of superiors for acts of their subordinates.

It is equally advisable to diffuse and promote the norms of international humanitarian law among the entire population, especially among judges and lawyers and all those who work in the sector of Justice, which is why it should be taught in universities and secondary schools. It is necessary to diffuse it in times of peace so that its protector role can be put to effect in times of war.

The States must also adopt legislative measures to strengthen the national institutions and foster cooperation among them, as well as regional and sub-regional cooperation, in this way allowing codes of conduct and codes of professional ethics for the scientific and industrial community to be adopted and developed, especially in the case of the Biological Weapons Convention of 1972 and the Chemical Weapons Convention of 1993.

Also in this respect, the States must establish examination procedures to determine at the moment of studying, developing, acquiring or adopting a new weapon or new means and methods of combat, whether its use, manufacture, stockpiling, exporting or transfer stand in opposition to international humanitarian law, and if so, to prohibit their use by the Armed Forces and their manufacture for such purposes.

Accordingly, States should enact measures in their internal legislation to forbid the use of anti-personnel mines, which represent a serious threat to the safety, health and life of the civil population and can cause a humanitarian impact of very grave consequences, making their elimination an obligation and necessary condition for the development and integration of peoples. In this sense, recognition must be made of the efforts made by the Central-American region on declaring the zone free of mines, as well as the efforts being made by the States of the American continent to free their territories from anti-personnel mines and convert the Americas into the first zone rid of such mines in the world, thereby complying with the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-personnel mines, and on their Destruction (the Ottawa Treaty).

In this sense it is satisfying to note the progress made by the States as far as application of international humanitarian law is concerned, as well as the measures taken on all levels in order to apply, diffuse and enforce this law.

Respecting international humanitarian law is not possible if international obligations are not met on the national level through regulatory legislative measures and necessary practices in order to incorporate it to the internal juridical system of the States. Here an extremely efficacious role has been played by the National Committees and the organizations that advise and support the national authorities in applying, developing and diffusing international humanitarian law.

In implementing these legislative and regulatory measures to apply international humanitarian law in the internal juridical systems of the States, the participation of the advisory service in international humanitarian law of the International Committee of the Red Cross (ICRC) has proved relevant, carrying out counseling work and raising the awareness of the competent national authorities on the matter, supporting the States committed to applying this law on the national level so that the technical assistance can be put to use in the following fields: a) promoting international humanitarian law treaties through signing, adhering and ratifying; b) supporting the translation of these treaties into the local national languages; c) lending technical assistance in drawing up draft laws, regulations or administrative measures to implement international humanitarian law; d) supporting the diffusion and teaching of international humanitarian law; e) assessing the work of the National Committees on International humanitarian Law; f) holding seminars, workshops and national or regional encounters, as well as meetings of specialists, aimed at exchanging good practices and experiences; g) preparing and providing documents and publications, among other items. The primordial interest in all this work is to improve assistance and protection of victims of armed conflicts and certain situations of internal violence.

In conclusion, respecting international humanitarian law implies adopting various juridical measures such as signing, adhering to and ratifying the international instruments on the subject, as well as approving proper legislation and regulation on the part of each State and diffusing and teaching their content so as to ensure respect for their principles and norms.

6. Cultural Diversity in the Development of International law

Documents

CJI/doc.351/10	Cultural Diversity and Development of International Law (presented by Dr. Freddy Castillo Castellanos)
CJI/doc.364/10	Recommendations Based on the Previous Report on 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 XXXIX 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.

At the 76th regular session of the Inter-American Juridical Committee (Lima, Peru, March 2010), Dr. Freddy Castillo, the rapporteur for the topic, presented a new report: "Cultural Diversity and Development of International Law" (CJI/doc.351/10). He spoke of the legal bases underpinning it, such as Articles 3.m and 52 of the OAS Charter. In his view, the Charter consolidates inter-American understanding through culture.

The rapporteur also reported on the Convention on the Protection and Promotion of the Diversity of Cultural Expressions, ratified by 22 nations of the Americas. He suggested the following recommendations:

- Diversity should be recognized as cultural heritage;
- Different cultural expressions should be promoted;
- Cultural goods should be considered spiritual assets and not merely as merchandise;
- Educational spaces should be developed to consolidate collective awareness about cultural diversity; and,
- Public and private initiatives should be promoted to reflect on problems caused by the recognition of diversity and its impact in the field of international law.

Dr. Hubert thanked Dr. Castillo for his reading of the OAS Charter and spoke about the positive and negative aspects of the cultural exception referred to in Dr. Castillo's document.

Dr. Herdocia noted his support for the rapporteur's work and emphasized the importance of the topic of cultural diversity, particularly at universities. He requested that the rapporteur address the issue of sustainable development. He also urged him to prepare a document to add additional value to the terms already set forth in the aforesaid Convention, in light of the OAS Charter and subregional integration processes. Dr. Villalta supported the idea of preparing a "set of guiding principles" or a "draft practical declaration." In turn, Dr. Hyacinth Lindsay proposed an initiative to support programs in the Caribbean countries on this topic.

The rapporteur thanked the reception given to the report and the contributions made for the preparation of a complete report in the month of August. With regard to cultural exception, he noted the importance of striking appropriate balances. He also agreed to prepare a set of guiding principles for the Committee's next session.

The Vice Chairman thanked the rapporteur for his report and encouraged Dr. Castillo to submit a final document at the Committee's August session.

At the fortieth regular session of the OAS General Assembly (Lima, June 2010), the Committee was asked to report on the gradual progress with the topic in the development of international law AG/RES. 2611 (XL-O/10).

At the 77th Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, Brazil, August 2010), Dr. Freddy Castillo presented his supplementary report on the topic, titled "Recommendations based on the Previous Report on Cultural Diversity and the Development of International Law" (CJI/doc.364/10), in which he recommended the adoption of measures to protect endangered languages, the recovery of areas destroyed by natural disasters, and the creation of diversity observatories. Regarding the language issue, he said that the Americas had a wide range of native languages, which are disappearing as communities' older members die and because their cultures are not preserved. Recovering those languages would therefore require effective action in the field of education. Similarly, the recovery of areas destroyed by natural disasters demands joint actions with the solidarity of other countries, in order to promote the reconstruction of lost historical heritage. The rapporteur also spoke of the problem of Haiti, which has lost its historical heritage and which has its people's memories for reconstructing its cultural patrimony. He also proposed an additional agency, possibly within the OAS structure: a kind of diversity observatory, to observe and raise the profile of threatened cultural expressions and to record the measures or actions adopted to strengthen them.

Dr. Mauricio Herdocia supported the idea of recording threatened languages, without the need to involve the OAS but rather on account of its intrinsic value.

Dr. Miguel Pichardo spoke about Haiti's intangible cultural heritage, a very current topic, given the destruction of museums and universities, and he added that the Dominican Republic was carrying out an assistance program to recover Haitian cultural heritage.

Dr. Jean-Paul Hubert reminded the meeting that the topic was addressed by an international convention that had been signed by an impressive number of countries. Given that fact, he queried the Committee's goal in dealing with the matter. In his opinion, defending cultural diversity was a significant challenge that was rendered more difficult by economic difficulties. Finally, he noted that the rapporteur had presented specific and highly relevant ideas regarding the preservation of languages.

Dr. Freddy Castillo proposed taking a first step with implementing a register of endangered languages and agreed to continue working on the proposal and to submit a report at the next period of sessions.

CJI/doc.351/10

CULTURAL DIVERSITY AND DEVELOPMENT OF INTERNATIONAL LAW

(presented by Dr. Freddy Castillo Castellanos)

1. The Charter of the Organization of American States and cultural diversity.

In order to further clarify the legal framework governing this topic within the Juridical Committee, let us briefly refer to the articles of the Charter of the Organization of American States which directly address the culture of our countries.

In the first place, the chapter that deals with Principles (Article 3, item "m") refers to the "cultural values of the American countries" and the respect that they deserve and demand, as follows:

m) The spiritual unity of the continent is based on respect for the cultural values of the American countries and requires their close cooperation for the high purposes of civilization.

We believe that the above provision was ahead of what most part of the doctrine has proposed during the last few years in relation to cultural diversity: unity and diversity are not conflicting but rather complementary concepts. According to the provisions set forth in the Charter of the OAS, the spiritual unity precisely results from the acknowledgment of and respect for the individuality of countries which, as we should infer, is varied and diverse, although enormous similarities exist due to geographical, language, religious, ethnical and other reasons. Diversity unites us, but only if we accept and respect it. It also imposes a duty of cooperation for the attainment of the “high purposes” of culture. That is, from multiple perspectives and realities, we are connected to each other by the same condition: our human capacity. Then, item “n” of Article 3 includes justice, freedom and peace within these high purposes, providing that education should be directed towards the attainment of these high purposes.

In the second place, Article 52 of the Charter makes more explicit reference to the diversity of our cultures. Let us recall its text:

The Member States, with due respect for the individuality of each of them, agree to promote cultural exchange as an effective means of consolidating inter-American understanding; and they recognize that regional integration programs should be strengthened by close ties in the fields of education, science, and culture.

The above provision, besides ratifying the acknowledgment of the cultural diversity of our people (with their own “individualities”), clearly provides that cultural exchange is an effective means of consolidating ties. Today we know that said exchange is nothing else but intercultural action supported by the principles of justice and fairness, applicable not only between countries, but also between the various cultures which co-exist within countries. Promoting “cultural exchange”, as contemplated in the above provision of the Charter, means, strictly speaking, promoting “diversity” and “interculturality”, although these words have not been used in the language of the treaty. But, as we know, the scope of provisions is not bound by their letter, even more so if we bear in mind the fact that letter and spirit are interrelated.

One of the most interesting (and perhaps most celebrated) phrases of the Spanish version of the article in reference is “*comprensión interamericana*” (inter-American understanding). Thus, according to the text of the Charter, cultural exchange is indispensable “to consolidate understanding” among our people. We are aware that the term “*comprensión*” means more than just “understanding”. But let’s consult the terms “*comprensión*” and “*comprender*” (comprehension and comprehend) in the dictionary (at least in Spanish version).

Comprensión (Comprehension) (lat. *comprehensio*) f. Action of comprehending. Faculty, ability or insight to understand and get to the bottom of things. // Lóg. Group of notes included in a concept; d. t. Connotation.

Comprender (Comprehend) (lat. *comprehendere* – cf *cum y lat. *prehéndere*: asir) tr. Contain, include something in itself: My house comprises three bedrooms; ú. t. c. r. – Understand, reach, penetrate.

I then consider that “inter-American understanding” is not just the action of understanding ourselves as people, but also the act of including or apprehending ourselves as different parts of the continental unity. For the Charter, this broad comprehension is consolidated through culture, which is also the basic tool for all integration programs.

2. Materialization of the Paradigm of Cultural Diversity in the Americas

Until one month ago, 22 countries of the Americas had ratified the Convention on the Protection and Promotion of the Diversity of Cultural Expressions. There is no doubt that an overwhelming majority of countries that make up the Inter-American system are obliged to materialize in concrete actions the principles enshrined in this Convention and to develop the

norms, whether cultural or not, of our Charter in accordance with these principles. In this sense, and without limitation, we may refer to the following recommendations:

- Recognize diversity as cultural heritage in itself and grant it adequate and effective juridical protection.
- Promote and protect the different cultural expressions in equal conditions.
- Regardless of the legal economic use given to them, consider cultural assets as assets of the spirit and not as simple merchandise.
- Develop educational forums aimed at promoting and consolidating collective awareness on cultural diversity and the need to attain interculturality as an adequate means of coexistence.
- Promote and support public and private initiatives for permanent reflection on the issues raised in connection with the recognition of cultural diversity and its incidence on the sphere of International Law.

CJI/doc.364/10

**RECOMMENDATIONS BASED ON THE PREVIOUS REPORT
ON CULTURAL DIVERSITY AND THE
DEVELOPMENT OF INTERNATIONAL LAW**

(presented by Dr. Freddy Castillo Castellanos)

Recognition of diversity as a cultural heritage in itself that requires proper and effective judicial protection.

In order to turn make the initial recommendation formulated in the report presented at our sessions in Lima into something more concrete, we might now propose the following as immediate tasks: protecting cultural heritage under threat (language in the process of extinction, for example), recuperating areas destroyed by natural disasters, and creating observatories for diversity.

Languages

Let us recall the importance of so-called intangible cultural heritage, within which we include languages. The Americas are an example of language plurality decimated across the centuries, yet a significant variety still remains. In some countries, not only have the languages been preserved but others that were on the point of disappearing are being recuperated. This work has been made possible (I am familiar with the case of Venezuela) by means of educational processes that include workshops and courses administered by native speakers, linguists and specially trained teachers. This, together with a bilingual intercultural education, could prove to be one of the paths to follow in order to preserve our language treasury.

Recuperating areas destroyed by natural disasters

With regard to loss of cultural heritage due to natural catastrophes, the case of Haiti could be a good opportunity for us to install a form of reconstruction that takes cultural diversity into account. The work of rebuilding the country should be based not only on the contributions made by other cultures but also on the existence of a rich Afro-Caribbean tradition that is basically Haiti's intangible cultural heritage. To this effect, the recommendation could be made that the action of international solidarity should include setting up an inter-disciplinary working group designed specifically to activate the cultural heritage of that nation, emphasizing its immaterial heritage as a guide to the country's material reconstruction.

Observatories for diversity

In order to promote and protect the various expressions of culture, it is indispensable that they be rendered visible and studied. So-called observatories or watches could be appropriate to this end. The objective will be to contribute to strengthening cultural diversity by identifying those sound, successful initiatives that can be taken as examples of good intercultural practice.

(The above is only a sample of the concrete recommendations that could be included in the report on Guide of Principles that this rapporteur ship is preparing).

7. Migratory Topics

Documents

CJI/doc.345/10	Migratory Topics: Follow-Up of Opinions issued by the Inter-American Juridical Committee (presented by Dr. Ana Elizabeth Villalta Vizcarra)
CJI/doc.358/10	Migratory Topics (presented by Dr. Ana Elizabeth Villalta Vizcarra)
CJI/RES. 170 (LXXVII-O/10)	Protection of the Rights of Migrants

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.

At the 76th Regular Session of the Inter-American Juridical Committee (Lima, Peru, March 2010), the joint rapporteur, Dr. Elizabeth Villalta, proposed changing the title from "Migratory Topics: Follow-up on the opinions of the Inter-American Juridical Committee," to "Migratory Topics," since there was no pending follow-up. In addition, she presented a summary of her report, document CJI/doc.345/09, setting out her participation at the "Regional Conference on the Protection of Refugees and International Migration in the Americas – Protection Considerations in the Context of Mixed Migration," which took place in San José, Costa Rica, on November 19 and 20, 2009. The joint rapporteur also suggested maintaining the Committee's involvement in activities to promote and disseminate the topic, in light of its importance in our Hemisphere and the situation of several nations that have become transit countries. She therefore urged the representative of the Committee who lives

in Washington, D.C., to attend the meeting called by the Committee on Juridical and Political Affairs for April 6 of this year.

Dr. Herdocia supported the change to a more general title. He said that the Committee should establish more precise terminology, given the absence of legal instruments applicable to the matter.

Dr. Stewart pondered on the possibilities open to the Committee, either through conducting a study of the migrant phenomenon at the individual level (their rights) or something of a more general nature (the migration phenomenon). He also reported that a symposium was to be held the following month, at Georgetown University law school, on the individual rights of migrants.

Dr. Hubert noted that the previous period of sessions in Rio de Janeiro had agreed to keep the topics of refugees separate from that of migration; he also acknowledged the lack of information regarding the request in the General Assembly's resolution.

The Chairman noted the various forms that an analysis of this topic could take, given the absence of clarity in the resolution's mandate. He said he thought the Georgetown seminar could cast some light on the issue, and he invited Dr. Stewart to represent the Committee at that event.

Dr. Herdocia backed the initiative and emphasized the enormous potential of the topic in a juridical sense. He thus suggested focusing the study on "migration and human rights." Dr. Hubert asked that consideration be given to the situation in the Council of Europe and the European Union.

The Chairman pointed out that the IACHR has a rapporteur for the topic of migrants and that there was an international instrument on the issue: the UN Convention on the rights of migrants. In turn, Dr. Dante Negro reminded the meeting of the existence of the Special Committee on Migration Issues within the OAS. He proposed a meeting between Dr. Stewart and that Committee's Chair. He also spoke of the existence of the follow-up mechanism.

Dr. Novak noted the importance of the topic by speaking of the enormous migratory flow of nationals from various countries of the Hemisphere. He proposed that Drs. Stewart and Villalta meet with the office of the International Organization for Migration (IOM) in Lima. Dr. Palacios asked to join the group and stated his view that the topic should remain on the agenda.

The Chairman asked Dr. Stewart for a summary of the event in Washington, D.C., while the rapporteurs would meet with people from the IOM in Lima in the following days. The topic would remain on the agenda for the August period of sessions.

At the 77th Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, Brazil, August 2010), the joint rapporteur for the topic, Dr. Elizabeth Villalta, noted that the Inter-American Juridical Committee did not have a specific mandate from the General Assembly for the topic, even though the members had deemed it an important matter and, as a result, they had been working on it in conjunction with Dr. Jorge Palacios Treviño. She recalled the work carried out on migration issues, such as the booklet on the rights of migrant workers and their families, the CJI's Opinion on the Return Directive of the European Union and, more recently, the press release. All of that was done bearing in mind the causes behind mass migrations – such as economic and social inequalities, political, religious, or other forms of persecution, wars, natural disasters, organized crime, and trafficking in persons – which made it necessary to ensure that States uphold the rights of migrants, basic guarantees, and human rights, including due legal process in cases in which migrants are arrested by reason of their status alone.

The rapporteur's document offers an analysis of different forms of migration and the positive and negative consequences of human displacement for both countries of origin and destination countries.

She also emphasized the role played in this area by various international agencies, particularly the program developed within the framework of the OAS's "Inter-American Program for the Promotion and Protection of the Human Rights of Migrants, including Migrant Workers and Their Families" and Advisory Opinion OC-16/99, "The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law," issued by the Inter-American Court of Human Rights on October 10, 1999.

Dr. Elizabeth Villalta also noted the regulations that stand in opposition to those principles, such as the aforesaid Return Directive, the Italian Security and Immigration Law, and the U.S. State of Arizona's recent SB1070 legislation, which contain severe measures against irregular and undocumented migrants.

Finally, Dr. Elizabeth Villalta called on the Juridical Committee to give a statement on those two laws, which could worsen the racial discrimination problem faced by migrants.

The Chairman took the floor to congratulate the rapporteur on the conceptual clarity, educational approach, and currency with which she had dealt with such a complex topic that, for reasons already well known, affects the people of Latin America.

Dr. João Clemente Baena Soares congratulated Dr. Villalta and ratified his interest in keeping the topic on the agenda, in light of the growing xenophobia found in the world, which further underscored the need to improve the existing instruments. As he saw it, the Committee should reaffirm its humanistic interest, whereby people are the main purpose of its discussions and, in the specific case of migrants, they cannot be treated as if they were all potential criminals.

Dr. Mauricio Herdocia supported the idea of a resolution on the Arizona Law, which had already provoked negative reactions from the Secretary General, the Permanent Council, and the President of the United States. In its role as the legal conscience of the Americas, the Juridical Committee must make its opinion known, as it has done in earlier situations involving violations of migrants' human rights.

Dr. David Stewart said that in legal terms, a number of issues involving migrant workers that had already been discussed had to be taken separately. He noted that all countries have regulations prohibiting migration which, in most states, is considered a civil offense, and as a crime in others, which leads to the deportation of illegal migrants. He suggested collecting information on how the Hemisphere's countries deal with the topic of illegal migrants and also on the structures existing in those countries to protect migrants' rights, particularly those of illegal or irregular migrants. He stressed the complications of forced migration, which is the type that causes greatest problems for destination countries. In his opinion, the Juridical Committee's approach should be limited to the lack of legal protection for the human rights of migrants.

He added that he had coordinated a seminar, attended by several international agencies, and that a group of students from Georgetown University had proposed drafting a set of legal principles on migrants' rights from an international viewpoint. He said he would report the results of that seminar to the Committee, as complementary information, and, at the same time, he invited the Committee to give its opinion on that project.

Regarding the Arizona Law, he thought there was insufficient information about it, since the Federal Court had suspended its enforcement eight days ago, which would lead to the filing of remedies by both sides. He therefore thought it was premature for the Juridical Committee to give its opinion on a law that had not yet come into force and had been temporarily suspended, with the final decision still in the balance.

He continued by pointing out that the legal power of the Arizona Law was that it empowers the local or state police to determine the migratory status of any person who is legally stopped by such an authority, be that person a citizen or not. The wording “legally stopped” has posed numerous doubts regarding its interpretation. Under the Arizona Law, if a person is asked for his papers and he is unable to produce them, that is what constitutes the misdemeanor and not the person’s illegal presence in the country. The measure to be adopted at the state level is to refer undocumented people to the federal authorities. That includes all persons, even citizens not carrying their papers when required to present them. He agreed that the law did have a great potential for discriminatory actions, although its use for the purposes of discrimination was expressly prohibited. At the same time, the regulation of immigration matters is within the jurisdiction of the federal government and the Arizona Law has given rise to an unconstitutionality suit. For that reason, he insisted on proceeding with caution in connection with this situation that had not yet been resolved by the courts.

Dr. Freddy Castillo proposed the creation of a working group composed of Drs. Villalta, Stewart, and Herdocia, in order to draft a text for future study by the Committee.

Dr. Jean Paul Hubert also congratulated the rapporteur for the excellent quality of her report. Regarding the topic, he was also in favor of keeping it on the agenda, because of both its complexity and its currency. He noted that all countries have the sovereign right to enact migration laws for their territories, but that they must also ensure the fundamental rights of the people involved. He supported Dr. Stewart’s proposal but thought it was important for the Committee, in some way, to note its concern regarding the problems that could arise from the Arizona Law.

Dr. Mauricio Herdocia agreed with the opinions regarding caution, but he added that in light of the statements made by the highest political levels of the OAS, it was relevant for the Committee to state a general position regarding the legislation.

The Chairman suggested that the Working Group draft a text for consideration by the Committee, and he asked Dr. Elizabeth Villalta to keep the Committee informed of developments with the Arizona Law.

The Working Group presented the draft resolution “Arizona Immigration Bill – Law SB 1070,” (CJI/doc.363/10 rev. 1). Dr. Mauricio Herdocia noted that it was a general proposal setting out the Committee’s position as regards the protection of human rights, which should be observed by all the Member States. Thus, the aim was not to set precedents regarding the Committee’s potential interference in matters of a State’s exclusive and sovereign competence. The other members agreed with Dr. Stewart regarding the caution the Committee should observe in dealing with the topic. However, since it was an extremely delicate issue that could have a serious impact on the rights of migrants, it was necessary for the Committee to give a statement on it. Dr. João Clemente Baena Soares said that the draft resolution did not attempt to analyze the law; he therefore proposed a change of title for the document, to “Protection of the Rights of Migrants.” With the suggested modification, the draft was adopted by means of CJI/RES. 170 (LXXVII-O/10).

The following paragraphs contain transcriptions of the adopted documents as presented by Dr. Elizabeth Villalta, documents CJI/doc.345/10 and CJI/doc.358/10, and the resolution referred to above.

CJI/doc.345/10

**MIGRATORY TOPICS: FOLLOW-UP OF OPINIONS ISSUED BY THE
INTER-AMERICAN JURIDICAL COMMITTEE**

(presented by Dr. Ana Elizabeth Villalta Vizcarra)

The Inter-American Juridical Committee discussed this topic at its 75th regular session held in August 2009, in Rio de Janeiro, Brazil, making special reference to resolution AG/RES. 2502 (XXXIX-O/09) adopted by the OAS General Assembly held in San Pedro Sula, Honduras, and approved on June 4, 2009, entitled “Human rights of all migrant workers and their families”, which takes into account resolution CJI/RES. 150 (LXXIII-O/08) entitled “Opinion of the Inter-American Juridical Committee on the Directive on Return approved by the Parliament of the European Union”, adopted by the Inter-American Juridical Committee on August 8, 2008.

During the 75th regular session it was considered that it was not enough to forward reports only to the political organs of the Organization but that a better participation of rapporteurs in the meetings was indispensable and that dissemination work should be carried out by both the members of the Inter-American Juridical Committee and the General Secretariat. It was determined to continue addressing the topic in this sense.

Accordingly, and as established by the Inter-American Juridical Committee and in compliance with OAS General Assembly resolution AG/RES. 2502 (XXXIX-O/09), the following report of the rapporteur is presented.

In view that both the Juridical Committee and the above-referenced resolutions establish the importance of having a greater participation in the meetings where this the topic is discussed, and cooperate in exchanging information and experiences, within the framework of the Regional Conference on Migration, the South American Conference on Migration, the Specialized Forum on Migration of MERCOSUR, the Andean Forum on Migration and the Special Committee on Migration Issues (CEAM) of the OAS, for the purpose of bridging the gap on migration issues.

In my capacity as member of the Inter-American Juridical Committee and rapporteur on migration topics, I was invited with all expenses paid, by the Office of the United Nations High Commissioner for Refugees (UNHCR) to participate in the “Regional Conference on Refugee Protection and International Migration in the Americas – Protection Considerations in the Context of Mixed Migration”, which was held in San Jose, Costa Rica, on November 19 and 20, 2009. My attendance was authorized by the Chairman of the Inter-American Juridical Committee, and the Secretary of the IAJC was also informed of my participation in this Conference.

The Central Panel of the Conference on November 19th was “Protection Considerations within mixed migration flows, good practices of States” and the following Working Groups were set up: Respecting the human rights of migrants irrespective of their migratory status; identifying and providing international protection to refugees; the protection needs of victims of human trafficking; the protection of smuggled and irregular migrants.

In connection with the rapporteur work the Inter-American Juridical Committee has performed on this topic, I participated in the Working Group “Respecting the human rights of migrants irrespective of their migratory status”, which broadly discussed Advisory Opinion OC-16/99 entitled “The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law”, dated October 1, 1999; Advisory Opinion OC-18/03 entitled “Legal Status and Rights of Undocumented Workers”, dated September 17, 2003, both issued by the Inter-American Court of Human Rights.

This Working Group also analyzed the Judgment of March 31, 2004 in the Case concerning *Avena* and Other Mexican Nationals, as well as the decision dated January 19, 2009, reaffirming the obligations contained in the *Avena* Judgment.

On November 20, the Central Panel of the Conference was: “Protection Considerations in the Context of Mixed Migration – perspective of International Organizations”, and the following Working Groups were set up: Identification, profiling and referral mechanisms; protection of extra-regional and stranded migrants and refugees; protection of unaccompanied children and adolescents; strengthening the protecting of migrants and refugees through regional mechanisms. I also participated in the last Working Group in connection with the work of the Committee.

The Conference concluded with the adoption of Recommendations and Conclusions, which were based on the document entitled “Protection of Refugees and Mixed Migration: 10 Point Plan”.

This report has kept in mind the world nature of the Migration phenomenon, as well as the importance of cooperation and dialogue at the international, regional and bilateral levels in this regard, and the need to protect the human rights of migrants, particularly in view of the increase in the migration waves in this globalized world, overwhelmed by new security threats.

Furthermore, it has been taken into account that almost all countries of the American Continent are States of migrant origin, transit and destination. For this reason, there must be adequate rules in place that conform to the applicable international law, including the international human rights law, in order to ensure that they will be given humane and dignified treatment with proper and adequate protection and that full respect for human rights and their fundamental freedoms will be assured.

In this sense, a matter of concern is the existence of legislations that may restrict the human rights and fundamental freedom of migrants, or consider an individual’s migratory status as a crime in itself, or for that reason adopt measures of a penal nature or for the equivalent effect.

Along the same lines, the migratory status of a person cannot affect in any way the labor rights of migrants, as established in Advisory Opinion OC-18/03 issued by the Inter-American Court of Human Rights “the migratory status of a person may not be used as grounds to deny the exercise of human rights, including those of a labor nature”.

1. Likewise, the “Opinion of the Inter-American Juridical Committee on the Directive on Return approved by the Parliament of the European Union” must also be taken into account. when its resolute paragraph no. 3 expressly provides: “*To reiterate categorically that no State can consider as a crime in itself an individual’s migratory status or for that reason adopt measures of a criminal nature or for the equivalent effect*”.

In view of the foregoing, it is convenient that organs, bodies, entities pertaining to the Organization, international organizations and other interested parties continuously follow-up the “Inter-American Program for the Promotion and Protection of Human Rights of Migrants including Migrant Workers and their Families” and the corresponding “Work Plan”, presented by the Secretary General of the OAS, on February 12, 2007 through document CP/CAJP-2456/07.

Furthermore, the convenience of cooperating, during this regular session in exchanging information and experiences, within the framework of the Regional Conference on Migration, the South American Conference on Migration, the Specialized Forum on Migration of MERCOSUR, the Andean Forum on Migration (CEAM) of the OAS, for the purpose of bridging the gap on migration issues.

Determine the convenience of the participation of the Inter-American Juridical Committee in the Meeting to be summoned by the Committee on Juridical and Political Affairs (CJPA) during the first half of 2010, with the participation of government experts,

representatives or organs, bodies and entities of the Inter-American System, of other international organizations and of civil society, for the purpose of exchanging best practices and activities carried out in the Program, and evaluating new proposals that may be included therein, to serve as a guideline for the work of the Committee on this topic.

CJI/doc.358/10

MIGRATORY TOPICS

(presented by Dr. Ana Elizabeth Villalta Vizcarra)

The Inter-American Juridical Committee has dealt with this theme both at its 76th regular session held in Lima, Peru on 15-24 March 2010 and at its 75th regular session held Rio de Janeiro, Brazil in August 2009, based on resolution AG/RES. 2502 (XXXIX-O/09), adopted by the General Assembly of the OAS at its 39th regular session held in San Pedro Sula, Honduras in June 2009, entitled “Human Rights of all Migrant Workers and their Families”, which took into account the resolution of the Inter-American Juridical Committee CJI/RES. 150 (LXXIII-O/08) entitled “Opinion of the Juridical Committee on the Directive on Return approved by the Parliament of the European Union”, adopted by the Committee on 8 August 2008.

In this sense, the author presented a preliminary report at the 76th regular session of the IJC, which contained the consideration that it would be appropriate to go on dealing with the theme and that it was indispensable for the rapporteurs to participate more in the meetings addressing the subject, as well as divulging the matter.

This report has borne in mind the global nature of the migratory phenomenon, as well as the importance of cooperation and dialogue in this respect on the regional, international and bilateral level, besides the need to protect human rights of migrants, in particular in the face of the increase in migrant currents in today’s globalized world, burdened even further by the new threats in terms of security.

Also taken into consideration was the fact that nearly all countries of the American continent are States of the origin, transit and destination of migrants, which is why we should have proper norms in accordance with applicable international law, including international law of human rights, international humanitarian law and international law of refugees, so as to assure them of humane and dignified treatment with all due and appropriate protection so that they can enjoy the full respect for human rights and their fundamental freedom.

In this sense it is worrisome to see the existence of legislations capable of restricting the human rights and fundamental freedom of migrants, or of treating a person’s migrant status as a crime and for that very reason try to adopt measures of a criminal or equivalent nature.

Antecedents

Migration applies to the movements of people from one place to another, such displacements meaning a change of residence that can be temporary or definitive. Migration presents two facets: **emigration**, when people leave a determined country, region or place and go to somewhere else, and **immigration**, which is when people born in or proceeding from one country enter another.

In this sense, migrations must be seen either from the point of view of the country of entry, since immigrants are not always made welcome in these countries, or else analyzed by the countries of exit, with particular attention to their motives.

The massive movements of people who install themselves provisionally, seasonally or definitively in search of a better quality of life are called migratory flows. These massive

movements or displacements of people have provoked other forms of migrations, among which can be mentioned the following:

- **International migration** is the movement of people who leave their country of origin or where they have their habitual residence habitual to settle temporarily or permanently in a country other than their own, to do which they have to cross a border.
- **Internal migration** refers to the displacement of people between one region and another in the same country for the purpose of establishing a new residence, either temporary or permanent.
- **Orderly migration** is the movement of people from their country of origin or usual residence to a new place, in compliance with the laws and regulations both of the country of origin and the receiving country.
- **Irregular or non-documented migration** is the displacement of a person to another country using irregular means, that is, without travel documents or a valid passport, or else not complying with the required administrative conditions.
- **Forced migration** refers to the displacement of persons from one place to another for reasons beyond their control and in order to safeguard their life and subsistence, whether by escaping from armed conflict, a situation of violence, threat, persecution, violation of their rights, natural disasters or disasters caused by man.
- **Labor migration** involves the displacements made by people who move to other cities or regions for economic reasons, in search of work opportunities.
- **Return migration** is the movement of people who return to their country of origin or habitual residence after remaining in another country for at least a year.

The following can be considered to be among the main reasons for people to migrate:

- **Political:** provoked by the political crises and movements that take place in some countries and make people afraid of political persecution or vengeance, which leads them to abandon their country of origin or residence and movement elsewhere.
- **Cultural:** people decide to migrate to countries with a solid cultural base, above all the young adult population looking for better life prospects.
- **Socioeconomic causes:** in practice, these are the fundamental reasons in all migratory processes, seeing that most of the people that emigrate do so for economic motives, seeking a better quality of life, so there is a direct relation between under-development and emigration.
- **Family causes:** family ties are also an important factor in the decision to emigrate, since people want to reunite or regroup their family by joining the relatives who have already emigrated before them.
- **War causes and other international conflicts:** these have given rise to massive displacements of people and constitute a veritable source of forced migrations of people fleeing from extermination and political persecution.
- **Generalized catastrophes:** whether natural disasters such as earthquakes, floods, prolonged droughts, cyclones, tsunamis, epidemics or disasters caused by man, these have caused large displacements of human beings in all periods of history.

On the whole, the causes of world migration are multiple, complex and heterogeneous. In the case of Latin America and the Caribbean, the economic factor is primordial, as well as the difference in development between the country of origin and that of destination, the divergences between the work markets in our countries, together with the natural aspiration to overcome poverty and inequality. These are all the main causes that lead our people to emigrate.

As regards the consequences of migration, these have to be analyzed from the point of view of the countries of emigrants, as well as that of the countries of immigrants, to ascertain whether these consequences are positive or negative.

Accordingly, **positive** consequences for the countries of **emigration** are: solution of problems of over-population; investment of the remittances sent by emigrants; solution of problems of unemployment; increased productivity; export of products to the countries that receive emigrants, while the **negative** consequences are: emigration of the young population, breakup of family groups, diminished public revenue, and the “brain drain”.

For the **immigration**, the **positive** consequences are as follows: rejuvenation of the population; enhanced cultural diversity; more manpower; technological innovation; absorption of people qualified in their field; increased consumption. **Negative consequences:** introduction of more cultural diversity, with the formation of completely segregated and marginal groups; imbalance in the level of wages, since immigrants usually accept lower wages than those of the local population; increase in services, especially social assistance and education; remittances of money to the countries from where the immigrants proceed; and intensification of the discrimination problem.

In this theme of migration, it is also appropriate to use certain related concepts, especially if they can be seen as the effects of irregular migrations. Thus, **deportation** refers to the act by means of which a foreign person is removed from a country after being denied admission or if permission to stay there has terminated. This removal can take place at the border of the country of origin, of the last country where the person arrived, or at the point of entry and may be airborne or by land. Deportation is the result of an administrative sanction. **Expulsion** is the act of a State Authority for the purpose and effect of ensuring the departure from the territory of that State one or more foreigners against their will, this being practically a prohibition to stay in the territory of that State. **Devolution** is the return of migrants to their place of origin.

The illicit traffic of immigrants is facilitating the illegal entry of persons into a State of which they are not nationals or permanent residents, by obtaining directly or indirectly financial benefit or some other material benefit. Such traffic is regulated by the Additional Protocol against the Illicit Traffic of Migrants by Land, Sea and Air of the United Nations Convention against Organized Transnational Delinquency (Convention of Palermo).

Traffic of people is the traffic or commerce of persons practiced mostly by fraudulent means for the purposes of exploiting forced labor. The Additional Protocol against Illicit Traffic of Migrants by Land, Sea and Air of the United Nations Convention against Transnational Organized Delinquency defines such practices as “the capture, transportation, transfer, welcome or reception of persons, resorting to threats or the use of force or other forms of coercion, kidnapping, fraud, deceit, abuse of power or situations of vulnerability or else granting or receiving payment or benefits to obtain the consent of someone with authority over another for the purpose of exploitation.”

State of destination: the country to which the migrants arrive with the intention to settle on a temporary or permanent basis to look for opportunities to work.

State of origin: the country where the migrant persons originally come from.

State of transit: the country through which the migrants often travel on their way to the State of destination.

Consular protection: the consular function that entails the assistance that the State bestows on its citizens outside its territory through the consular offices accredited in another State.

Repatriation: the process by which States return to their country of origin migrants found in their territory under illegal conditions.

Migrant worker: any person about to undertake, undertakes or has undertaken any remunerated activity in a State of which he or she is not a citizen.

These concepts are part of a whole terminology that has presently been established to help face the current migration problem, nourished as it is by globalization, which has broken down national frontiers, globalization that also reaches as far as the organized transnational delinquency that plans and carries out its criminal activities worldwide. This creates concern with regard to security, which is directly related to the migration phenomenon, which is seen on different levels depending on whether the States are territories of origin, destination or transit for migrants, which is an ever acute problem when a State already presents two or three of these elements.

That is why the theme of human rights is particularly relevant in the migration problem, which calls for policies, actions and agreements on the migration issue, as well as establishing that the human being has to be at the center of any migration policy. Consequently, these policies must not discriminate against or criminalize migrants, who should be treated in a dignified fashion.

In this sense, any migration policy should have the following aims: to facilitate the documentation of migratory flows; to protect and ensure the human rights of migrants; to guarantee dignified treatment for the migrant population; to contribute effectively to guarantee border security; and to count on a proper legal framework and technological structure.

This sort of policy can ensure more control and checking of entries and exits, improve migration services, qualify the migration authorities, create mechanisms for safe, orderly repatriation, combat transnational organized crime, especially corruption, traffic of people, all within the framework of full respect for the human rights of the migrant.

To achieve these ends, it is also necessary to be able to count on the collaboration and commitment of international organizations such as the International Organization for Migration (OIM), the Organization of American States (OAS), the Inter-American Committee for Human Rights (CIDH), the Inter-American Court of Human Rights (CourtIDH), the Inter-American Institute of Human Rights (IIDH), the Inter-American Committee for Women (CIM), among others.

Only in this way will the human rights of the immigrant be protected, based on non-commercialization of migration, respect for human rights regardless of the migrant's status, responsibility shared between the countries of origin, transit and destination to attend to the migratory phenomenon in an integral fashion.

Acknowledgment has to be made of the work carried out by the Organization of American States (OAS) in promoting and protecting the human rights of immigrants and their families. To this end, the Special Committee on Migration Matters (CEAM) has been set up in order to analyze the migration phenomenon from an integral perspective based on what is set forth in international law and in particular the international law of human rights, also bearing in mind that migration is a reflection of the processes of integration and globalization and that the member States of the OAS are countries of origin, transit and destination of migrants.

The work of the Special Committee for Migration Matters (CEAM) involves exchanging experiences and information on the regional processes related to the theme of migration, especially with the Regional Conference on Migration (CRM), the South-American Conference on Migrations, the Specialized Forum of Mercosur, the Andean Forum on Migration, among others. This helps to way an updated interchange of good practices with the International Organization for Migration (OIM) and with the Ibero-American General Secretariat. It is therefore also appropriate that the bodies, organisms and corresponding entities of the OAS, as well as other international organizations and interested parties continue to follow up on the "Inter-American Program for the Promotion and Protection of the Human Rights of Migrants, including Migrant Workers and their Families".

It is essential that States promote and protect effectively the human rights and fundamental freedom of migrants, whatever their migratory status, and especially women and children. Likewise, unfair and discriminatory treatment of migrants must be combated, especially where workers and their families are concerned.

In this sense it is necessary to act against legislation and measures perpetrated by some States to restrict the human rights and fundamental freedom of migrants, in order to put an end to the arrests and detentions of an arbitrary nature and in this way comply with the Vienna Convention on Consular Relations, in particular as regards the right of all foreign citizens, regardless of their migratory status, to communicate with a consular employee of the State of origin in case of arrest, detention, jailing or preventive imprisonment, and the obligation of the receiving State to immediately inform foreign citizens of their rights according to the Convention.

This obligation has been included in Consultative Opinion OC-16/99 entitled “The Right to Information on Consular Assistance in the Framework of the Guarantees of Due Process of Law”, emitted by the Inter-American Court of Human Rights on 10 October 1999.

There exist State legislations that restrict the human rights and fundamental freedom of migrants so severely that they even reached the point of criminalizing the situation of those without documents. In this area we have the Italian law called the Law of Security and immigration, the Directive of Return approved by the Parliament of the European Union, and recently Law SB1070 or Law of Arizona, which are analyzed briefly below.

A) ITALIAN LAW ENTITLED “LAW OF SECURITY AND IMMIGRATION”

This law has been considered very severe on immigrants, and some have qualified it as xenophobic, racist and hate-filled, since it restricts the immigration of “extra-community” citizens. The law provides for establishing a crime of “illegal immigration and permanence”, and although it does not stipulate jail for those “without documents or papers”, it does provide for up to three years of prison for those who rent living quarters to those without documents. This law places Italy among the hardest countries in Europe in the fight against illegal immigration. The law establishes that permission to take up residence in Italy will only be granted to those extra-community foreigners who have a work contract processed abroad (in Italian embassies and consulates), such permission lasting only two years, and if the immigrant loses his job within that period, he has to leave the country. The law also sets special severe sanctions for those who offer work to irregular immigrants, as well as those involved in the trafficking of such immigrants.

The law has been much criticized and even considered to be “racist discrimination”, as it also establishes that immigrants must be identified by their fingerprints; likewise, it provides for the formation of local civilian patrols dedicated to circulate through the streets of their neighborhoods in support of the security forces and denounce any suspicious attitude or movement on the part of the citizens. This law puts in jeopardy the human fundamental rights of foreigners, who cannot attend school, go to the doctor, get married or even register children born to immigrants without documents.

In the light of the above, this law has been described as unjust, filled with hate, intolerant and racist. Its defenders claim that it is a law that fights against clandestine practices, so they see it as a law that is absolutely necessary for the security of the State.

B) DIRECTIVE OF RETURN APPROVED BY THE PARLIAMENT OF THE EUROPEAN UNION

The purpose of this Directive is to establish uniform procedures and norms for the States of the European Union in respect of the return of non-documented immigrants to their countries of origin, and also sets forth that the migration policy of a State or group of States is essentially regulated by internal or community law within the limits set by international law.

Said Directive has been analyzed and commented on by the Inter-American Juridical Committee through resolution CJI/RES. 150 (LXXIII-O/08) dated 8 August 2008, a resolution that expressed concern about how the contents of this Directive can be applied so that it not consistent with the international instruments on respect for and protection of the human rights of immigrants, for the following reasons: it fails to adequately ensure due process for migrants liable for expulsion; it implies mechanisms of internment that are inconsistent with the principles of international law and the provisions contained in the internal juridical systems of the principles; it offers insufficient protection to migrants in vulnerable conditions, especially when it refers to children and adolescents or when it refers to situations that could affect family union; it entails situations of detention in penal units, thus affecting the basic guarantees of migrants by comparing them with persons accused of or condemned for crimes; it implies measures of internment that are proportionate neither to the situation of the migrants nor to international instruments of human rights on the issue; the norms related to the prohibition to entry are so broad that they could be applied in an arbitrary, inflexible manner, which tends to stigmatize the people expelled by equating them with delinquents and opening the way to deny them future exercise of essential rights, such as the right to asylum or family reunion; the existence of lacunas, imprecision and ambiguity that affect the clarity of the Directive of Return and unduly widen the space for interpretation and clarification.

In their Opinion, the Inter-American Juridical Committee expressed in resolution paragraphs 3 and 4: “To reiterate categorically that no State must treat as a crime in itself a person’s migratory status, or for that reason adopt measures of a criminal nature or for the equivalent effect” and “to manifest the need to use appropriate means to avoid undue interpretation or application of the Directive of Return approved by the Parliament of the European Union in a manner inconsistent with international obligations on the matter, both of a conventional and customary nature”.

This opinion also considered Consultative Opinion OC-18/03 entitled “The juridical condition and rights of non-documented migrants” emitted by the Inter-American Court of Human Rights on 17 September 2003, which established that: “general obligation to respect and guarantee the human rights binds the States, regardless of any circumstance or consideration, including the migratory status of a person” and that “the right to due process of law must be recognized as one of the minimum guarantees that should be offered to any migrant, irrespective of his migratory status”, and that “the migratory status of a person cannot constitute a justification to deprive him of the enjoyment and exercise of human rights.”

C) LAW SB1070, IMMIGRATION LAW OF THE STATE OF ARIZONA

First of all, in analyzing the federal action filed by the Obama administration against Law SB1070, known as the Law of Arizona, we see that this action was presented by the Department of Justice (DOJ) on 6 July 2010 before the Federal Court of Phoenix, District of Arizona, in the name of the Departments of State, Justice and Internal Security, these being the Departments entrusted with administrating migratory laws on the federal level. This action aims to declare Law SB1070 as unconstitutional, as well as to suspend provisionally and definitively its coming into effect, which is programmed for 29 July this year, the objective being to avoid any jeopardy for the United States.

The action is specifically intended to declare Law SB1070 unconstitutional, suspend provisionally and definitively such Law from coming into effect, and invalidating sections 1 to 6 of Law SB1070.

The juridical basis of the action centers on the fact that in the juridical system of the United States, federal legislation is hierarchically on a higher level than state legislation, therefore Law SB1070 legislates on matters that belong to the federal authority, violates the clause of supremacy set forth in the Constitution of that country, since the federal authority is precisely the body in charge of implementing migration policies in the United States and Law

SB1070 of Arizona grants the State authority such capacity, that is, to implement federal migration laws.

The application of Law SB1070 would also imply deviating resources of the federal agencies from the priority themes for the country, such as detention of foreigners involved in acts of terrorism, the drug trade and organized crime. Similarly, it stands in opposition to the federal policy with regard to the regulation and permanence of foreigners in the country, just as it ignores humanitarian questions provided for in the federal legislation. In such a way that it even interferes with the foreign policy of the United States and its interests as regards national security, as well as with federal priorities when it plans to siphon off resources to carry out the Law's objectives, thereby violating the clause of constitutional supremacy.

Given all the above, the action of the federal government establishes that Law SB1070 has caused and will go on causing irreparable and substantial damage to the interests of the United States, for which reason the only juridical remedy available to the government is to resort to the Federal Court.

The federal action concludes by asking: That sections 1 to 6 of Law SB1070 be declared invalid, null and without effect because they violate the clause of Supremacy; That it be established that federal legislation, as well as the obligations of the United States on matters of foreign policy, are hierarchically found on Law SB1070 in said sections; That section 5 of Law SB1070 be declared invalid, restricting as it does the transit of foreigners between States in the United States, in contradiction of article 1, section eight of the Constitution of that country; That provisional and definitive suspension against the State of Arizona be granted, as well as against its officers, agents and employees, so as to prevent that the afore-mentioned Law comes into effect.

This action took place because Law SB1070 of Arizona is the strictest law against immigrants, since under this law, to remain illegally in the country passes from a merely civil offense to a criminal offense.

This Law gives the Arizona police the right to detain people under reasonable suspicion of being in the United States illegally, and also grants Arizona citizens the right to file action against the State police agencies or entities if they fail to enforce the Law.

Under this law, not having legal residence papers, not carrying the green card in your wallet, or transporting a non-documented immigrant in your car, even if he is a relative, becomes a crime in Arizona.

This law is practically taking under its charge the execution of migration laws that are solely the business of the federal government, which is why it contradicts constitutional precepts, since the local police lack the authority to execute them.

This is why the federal government of the United States has asked a court in Arizona to suspend applying Law SB1070, to declare it null for being in opposition to the Constitution, and to impede its application provisionally and permanently, since the Arizona authorities have invaded federal attributions on the migration issue. Although the States can carry out policies that have an incidental or indirect effect on foreigners, they cannot create their own migration policy or apply State laws that interfere with federal laws on the matter.

This being so, the Law ignores humanitarian themes such as protection that the Federal Law grants to foreigners who undergo persecution in their country or have been victims of a natural disaster. The clause on supremacy in the Constitution forbids States of the Union to enact laws contrary to this higher norm.

In this sense, Law SB1070 creates bases for racial discrimination, which is considered unacceptable, besides establishing that illegal migration is a State offense by constituting the strictest measure against migrants.

Law SB1070 also interferes in matters of foreign policy, as well as in questions of vital importance for the interests of national security, which are also the exclusive responsibility of the federal government.

Consequently, it is necessary to count on a federal law on immigration that is fair and integral and respects the fundamental human rights of migrants, so as to avoid promulgation of State laws.

The content of this Law has been the object of analysis on the part of the member States of the Organization of the American States who met in Permanent Council to manifest their concern about the Arizona Immigration Law. The Secretary General of the Organization, in a Press Communiqué of the OAS on 28 April 2010, pointed out: “This is an issue of concern to all citizens of the Americas, beginning with the citizens of the United States, a country with a very rich tradition of immigration and respect for the migrants who have come to lead a better life”, to which he added: “the rich tradition we all admire, of recognizing immigrants in the United States, has been harmed, undermined” ... “This has been a painful moment, difficult for everyone and it is why we recognize and salute with energy the way in which the government of President Barack Obama has reacted faced with this fact. For our part, we are going to follow-up and always act with greater unity of purpose, because I believe that all of us here present share the problems that this law creates”.

These three regulations: Law SB1070 of Arizona, the Italian Law on Security and Immigration, and the Directive of Return approved by the Parliament of the European Union, all contain severe regulations against irregular and non-documented immigrants, which even puts at risk their fundamental human rights and freedom, which is why it is necessary that the States preserve and strengthen the framework of basic guarantees in the treatment of migrants and that international bodies and organizations take appropriate measures in this respect.

CJI/RES. 170 (LXXVII-O/10)

PROTECTION OF THE RIGHTS OF MIGRANTS

THE INTER-AMERICAN JURIDICAL COMMITTEE,

TAKING NOTE of the decision of the Inter-American Juridical Committee adopted in 2007 to include migration matters in its agenda;

ALSO TAKING NOTE of the declarations of the Secretary General of the Organization of the American States (OAS) in respect to Law SB 1070 adopted by the State of Arizona;

CONSIDERING the lawsuit entered by the Government of the United States of America questioning the constitutionality of the Law and the decision of the federal judge to suspend enforcement of same;

ALSO CONSIDERING the points of view expressed in the Permanent Council on Law SB 1070,

RESOLVES:

1. To reiterate that all member States of the OAS have the obligation to protect the human rights and fundamental freedom of migrants, without any discrimination whatsoever.
2. To continue to follow up on the status and evolution of Law SB 1070 through the rapporteurs appointed by the Inter-American Juridical Committee for the theme of migration.

This resolution was unanimously adopted at the session held on August 11, 2010, by the following members: Drs. Miguel Aníbal Pichardo Olivier, Mauricio Herdocia Sacasa, Hyacinth Evadne Lindsay, Fabián Novak, João Clemente Baena Soares, Freddy Castillo Castellanos, Guillermo Fernández de Soto, David P. Stewart and Jean-Paul Hubert.

8. Refugees/Asylum

Documents

CJI/doc.346/10	Refugees (presented by Dr. Ana Elizabeth Villalta Vizcarra)
CJI/doc.356/10	Refugees [Asylum] (presented by Dr. Ana Elizabeth Villalta Vizcarra)

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.

At the 76th Regular Session of the Inter-American Juridical Committee (Lima, Peru, March 2010), the rapporteur, Dr. Ana Elizabeth Villalta Vizcarra, presented a report, document CJI/doc.346/10, titled “Refugees.” The document contained background information on the topic, the problem of refugees in the Americas, and the notions of asylum, refuge, internally displaced persons, and statelessness as a first approach to the issue.

The rapporteur noted the semantic differences between the various concepts in the nations of the Americas. Asylum is essentially political, in that it is granted to people who have committed political crimes or for political reasons, and can be diplomatic or territorial in nature. Refuge, in contrast, is humanitarian in nature and is granted to people for reasons of their politics, race, social condition, etc.

Unlike the situation in Latin America, U.S. law assures asylum to people who meet the requirements for refuge but who are physically present in the United States. Refuge is offered to people in a similar situation but who are not on U.S. territory.

The rapporteur also spoke of the various international instruments that protect asylum, including the Treaties of Montevideo, the Universal Declaration of Human Rights, and the American Declaration of the Rights and Duties of Man. Refuge is provided for universally through such instruments as the Convention Relating to the Status of Refugees and its protocol, which were intended to protect people displaced during the Second World War. Within the inter-American system, she spoke of the Cartagena Declaration on Refugees and the creation of the International Conference on Central American Refugees (CIREFCA), which arose in response to the various internal conflicts in the Central American region, followed by other legal instruments that establish specific measures for assisting refugees. He also noted the series of problems that involve displaced and stateless people.

He reported on the work carried out under the aegis of the OAS, noting several resolutions adopted by the General Assembly and the Course on International Refugee Law, jointly organized by the Department of International Law and the UNHCR, intended for staff members of permanent missions to the OAS, the General Secretariat, and other interested parties.

In addition, she spoke about her attendance, as a member of the CJI, at the "Regional Conference on the Protection of Refugees and International Migration in the Americas – Protection Considerations in the Context of Mixed Migration." That conference also dealt with the topic of trafficking in human lives. She emphasized the importance of the Juridical Committee's presence at that event, and said that she had been able to participate actively in the debates as a representative of the Committee.

She concluded by saying that the General Assembly's mandate to the Committee did not appear clear; it reads: "To [prepare] a study on the issue of asylum in the Americas taking into account the importance of the matter and the work being conducted by the Committee on Juridical and Political Affairs and UNHCR." She recalled that the Committee had dealt with the topic of refugees in conjunction with that of migrants and displaced persons, but that at the previous period of sessions, the topics had been separated. In addition, the UNHCR has been studying the issue of economically driven migrations within the framework of refuge. With those comments, the Committee asked her to give some pointers in order to continue with the study of the topic.

Dr. Hubert agreed that the topic had been extensively debated in several forums. The figure of the economic refugee, however, had not been addressed. Canada has no problems with extending refuge for reasons of religion, race, or health, but there is some resistance toward protecting economic refugees, and he was unaware of the existence of a legal response to the problem.

Dr. Pichardo remarked that in Latin America there was a clear distinction between refuge and asylum, while in Europe no such distinction was made. Recently, there has been a clear intent to unify the two concepts at the regional level, but he restated his opinion in favor of maintaining the Latin American tradition of defining asylum in terms of its two dimensions: territorial and diplomatic. In connection with the debate on economic considerations, he said that a solution must be reached bearing in mind the two positions: that of the country of origin of the economic migrants and that of the State that receives them.

Dr. Stewart noted that the U.S. system provides for temporary protection in the event of environmental disasters and armed conflicts, which should perhaps also be studied in the next report because they represent an important aspect of the topic.

Dr. Herdocia added that the most recent inter-American instruments had removed the possibility of asylum when crimes such as corruption and terrorism are in play, pursuant to the Inter-American

Convention against Terrorism and the Inter-American Convention against Corruption. He suggested that the Committee's report could include figures on what is really taking place in the Americas, according to the studies carried out by the UNHCR.

Dr. Negro suggested that use be made of the opportunity offered by the Course of International Law to invite the representative of the UNHCR to visit the Committee in order to provide additional details on progress in this area.

Dr. Novak said that the UNHCR had a wealth of information on each of the countries and that, in his view, the Committee should wait until the meeting with the UNHCR representative before presenting its report to the next General Assembly in 2011. He suggested that the rapporteur meet with the refuge office at the Peruvian foreign ministry to learn about the problem in Peru and in the wider Andean region.

Dr. Villalta replied to the comments and noted that the report was not yet ready for submission to the General Assembly. She remarked that "economic refuge" was unknown in Latin America. She also expressed concern about the situation of people seeking refugee status in Central America but who do not intend to remain in the region, but instead to continue north. Another problem is that not all the applicants are from the Americas: some are from other regions of the world.

The Chairman asked the rapporteur, in consideration of the discussions that had taken place, to emphasize one or two key aspects of the General Assembly mandate in order to focus the topic.

At the fortieth regular session of the OAS General Assembly (Lima, June 2010), the Committee was asked to report on its progress with preparing a study on the situation of asylum in the Americas AG/RES. 2611 (XL-O/10), "Observations and Recommendations on the Annual Report of the Inter-American Juridical Committee".

At the 77th Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, Brazil, August 2010), Dr. Elizabeth Villalta presented a new report, document CJI/doc.356/10, "Refugees." She recalled the background information on the topic and the mandates handed down by the General Assembly through its resolutions in the two previous years: AG/RES. 2515 (XXXIX-O/09) and AG/RES. 2611 (XL-O/10). In her presentation, Dr. Villalta gave an analysis of the mechanisms of refuge and asylum in the inter-American system, saying that they were closely related but with different emphases in different countries. She suggested unifying the generic concept covering both mechanisms – refuge and asylum – either by adopting the refugee regime in accordance with the inter-American instruments or by embracing the refugee regime contained in universal instruments, taking into account those international instruments that deal with human rights, international humanitarian law, and international criminal law. In her view, a formula should be sought to prevent confusion and to support states in enforcing the corresponding principles, and effective protection must be extended to the victims of persecution.

Dr. Fabián Novak suggested expanding the focus and investigating the problems facing the region's countries. For example, a list could be made of the shortcomings in assessment boards, the authorities' lack of preparation for responding to people applying for refuge, the economic burden on the receiving country, the discrepancies between the universal and regional instruments, the topic of statelessness, and the issue of trafficking in persons, which is reported by some countries receiving large numbers of refugees. Then, on the basis of that list, the Committee could make its recommendations. He said that the creation of a generic approach covering refuge and asylum seemed very difficult to him, in light of the existing international instruments.

Dr. Mauricio Herdocia recalled the attempts to define the concepts of diplomatic asylum and territorial asylum within the United Nations. Diplomatic asylum was not accepted by a significant

number of states, while the Convention dealing with territorial asylum was adopted unanimously. Another element to be taken into consideration was the draft Inter-American Convention prepared by the Juridical Committee in 1966, which was not adopted. He also spoke of other more modern conventions on terrorism and corruption that contain provisions denying the granting of asylum or refuge to individuals who have committed such crimes. Finally, he suggested that the next report cover the practical application of those concepts by the States.

Dr. João Clemente Baena Soares said that the generic concept would be the best solution, but that it was necessary to further develop or rethink the obstacles it faced; he also supported Dr. Novak's motion to continue to make progress with the topic.

Dr. David Stewart reminded the meeting that the notions of refuge and asylum date back to the aftermath of the Second World War. The Hemisphere is currently facing many problems, to which traditional concepts no longer offer a full response. He noted that the United States use the same definition of refugees for both mechanisms, refuge and asylum, although the legal figure of diplomatic asylum does not exist in U.S. law. He also enquired about the approach that should be followed in the next report, in addition to the definitions of asylum or refuge and the conditions for granting them.

Dr. Miguel Pichardo suggested that the members assist the rapporteur by providing data from their home countries. At the same time, it could enquire whether the existence of diplomatic asylum – found in all the American states, with the exception of the common law countries – was justified, when efforts were underway to reduce diplomatic immunity. At the same time, in light of the breadth now enjoyed by territorial asylum, diplomatic asylum could well be eliminated.

Dr. Freddy Castillo agreed with the analysis of the problems described and proposed adopting an instrumental document – either regulations, a declaration, or a guide – for practical use by the agencies involved in granting refuge. He also said he supported Dr. Villalta's recommendation to propose a generic definition, but one that could serve as a guide for dealing with the different cases of asylum-seekers and refugees, similar to the U.S. doctrine that makes no distinction between the mechanisms.

Finally, it was agreed that the rapporteur would compile the comments in order to present a new report on the issue at the next period of sessions.

The following paragraphs set out the documents prepared by Dr. Ana Elizabeth Villalta Vizcarra:

CJI/doc.346/10

REFUGEES

(presented by Dr. Ana Elizabeth Villalta Vizcarra)

In point 8 of resolution AG/RES. 2515 (XXXIX-O/09) entitled Observations and Recommendations on the Annual Report of the Inter-American Juridical Committee approved on June 4, 2009 during the 39th Regular Session of the General Assembly of the Organization of American States (OAS) held in San Pedro Sula, Honduras, the Inter-American Juridical Committee (IAJC) was requested to prepare a study on the refugee issue in the Americas, taking into account the importance of this matter in the light of the work being performed by the Committee on Juridical and Political Affairs (CAJP) and the United Nations High Commissioner for Refugees (UNHCR), in accordance with their respective mandates.

During the 75th regular session of decisions of the Inter-American Juridical Committee held in Rio de Janeiro, Brazil, in August 2009, the Committee designated Dr. Ana Elizabeth Villalta Vizcarra as rapporteur for the new topic.

In accordance with this mandate, the undersigned presents the following rapporteur's report, which addresses the Refugee issue in the Americas, as well as the concepts of Asylum-Seekers, Refugees, Internally Displaced Persons, Stateless Persons and other issues related to this topic.

Background:

In the Inter-American System, the institutions of Asylum and Refugee protection have had different connotations among the States that make up such system, in such a way that **Asylum** has been understood as an institution of a political nature, granted to individuals who claim they are being persecuted solely for political reasons or motives. In turn, **Refugee** protection is conceived as an institution of a humanitarian nature and is granted to individuals with justified fear of being persecuted not only for political reasons but also on account of race, gender, religion or social condition.

In the United States of America, a conceptual difference also exists between Asylum and Refugee protection, in such a way that **Asylum** is granted to those persons who are physically present within the United States and may seek asylum, provided they fall under the definition of refugee. In turn, **Refugee** protection is granted to a person who is prevented from or is not willing to return to his/her country of origin owing to well founded fear of being persecuted or because the life of that person is in danger. Moreover, in order to request the status of refugee, the person requesting this status must be physically located outside the United States. In both cases, one year after the person has legally received Asylum or Refugee protection in the United States, he/she may apply for a Green Card and eventually become a US citizen.

In the universal context, Asylum is regulated in Article 14 no. 1 of the Universal Declaration of Human Rights: *"Everyone has the right to seek and to enjoy in other countries asylum from persecution."*

In the regional or Inter-American context, Asylum is regulated in Article XXVII of the American Declaration of the Rights and Duties of Man, under the title, "Right of Asylum", which provides: *"Every person has the right, in case of pursuit not resulting from ordinary crimes, to seek and receive asylum in foreign territory, in accordance with the laws of each country and with international agreements"*.

In both Declarations, Asylum is regulated in general terms, not making reference to Refugee protection in any one of them. Now then, this conceptual distinction between Asylum and Refugee protection has resulted in both being regulated by different international juridical instruments.

The regional or Inter-American System has had a generous tradition of granting Asylum, which has even preceded the adoption of the international universal instruments and dates back to before the creation of the Organizations of American States (OAS) in 1948 in the Bogota Pact. This System consists of numerous international American treaties that make up the Inter-American juridical heritage, among which the following are worth mentioning: 1889-1890 Montevideo Treaties on International Criminal Law; the Convention on Asylum adopted by the Sixth International Conference of American States, Havana, Cuba, 1928; the Convention on Extradition and the Convention on Political Asylum, both of 1933, adopted by the Seventh International Conference of American States held in Montevideo, Uruguay; the Treaty on Asylum and Political Refugees originating from the Montevideo Treaties of 1939-1940; the 1954 Conventions on Territorial Asylum and Diplomatic Asylum, adopted by the Tenth International Conference of American States held in Caracas, Venezuela and the American Convention on Human Rights or San Jose Pact of 1969.

Asylum in Latin America has had two objectives, namely: a) protect the life, freedom or security of persons persecuted for political crimes and b) ensure the respect of the fundamental rights of man.

It has been considered that Asylum does not contravene the Principle of Non-Intervention. This was also considered by the Hispanic-Luso American Institute of International Law when it stated the following in its First Congress held in Madrid in 1951: "Asylum granted in keeping with specified conditions cannot be considered as a violation of the sovereignty of the territorial State, or as an intervention in its internal affairs ..."

The Right of Asylum was recognized for the first time in America in the 1889-1890 Montevideo Treaties on International Criminal Law. Article 1 of the 1928 Havana Convention on Diplomatic Asylum prohibited asylum for common delinquents, allowing it only for political delinquents.

In 1965, within the Inter-American context, there was an initiative to prepare a Regional Convention on Refugees, entrusted to the Inter-American Juridical Committee, which prepared a Draft Convention.

It was precisely the Second Special Inter-American Conference, which met in Rio de Janeiro, Brazil in 1965, which under Resolution XXI entrusted the Inter-American Juridical Committee with the preparation of a Draft Inter-American Convention on Refugees.

In compliance with its mandate, the Inter-American Juridical Committee considered that the main aspects that should be analyzed were the following: a) juridical situation, including the definition of refugees, their rights and duties, their personal status and labor situation; b) the granting of a travel document for refugees; and c) coordination of assistance to and protection of refugees. The Inter-American Juridical Committee completed the Draft, but the matter was no longer addressed by the political organs of the Organization of American States.

Refugees:

Prior to the Decade of 1970, the rules on Diplomatic Asylum and Territorial Asylum were sufficient to address these issues in Latin America. Thereafter, the existence of internal conflicts in the Continent gave rise to the refugee issue due to the fact that the American States were not prepared to receive a massive refugee population.

The topic of Refugees as an autonomous institution different from Asylum, as conceived in American Law, is regulated within the universal context in the 1951 Convention relating to the Status of Refugees within the framework of the United Nations, as well as in its Protocol known as 1977 Protocol on the Status of Refugees. These instruments were aimed at protecting displaced persons during World War II and thereafter, which gave rise to the creation of another sister institution for Displaced Persons.

Under these universal instruments, the term refugee applies to any person who, due to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

After these instruments, others were adopted particularly in the American Continent for the protection of the refugee issue in the continent. These instruments are: the "1984 Cartagena Declaration on Refugees", which broadened the scope of refugee to apply to displacement originating from generalized violence, as in the case of internal conflicts or other events seriously disturbing public order, during which massive violations of human rights occur. In this sense, the Cartagena Declaration recommended the inclusion of persons who have fled their countries because their lives, security or freedom have been threatened by generalized violence,

external aggression, internal conflicts, massive violations of human rights or other events seriously disturbing public order .

The International Conference on Central American Refugees (CIREFCA) was organized in 1989, as a result of several internal conflicts occurred in the Central American region. The CIREFCA adopted the “Principles and Criteria for the Protection of and Assistance to Central American Refugees, Returnees, and Displaced Persons in Latin America”. The San Jose Declaration was adopted in 1994 and the Tlatelolco Declaration was adopted in 1999. Both Declarations also address with concern the problem of refugees in the region. The Mexico Declaration and Plan of Action was adopted in 2004, focusing on the problems caused by forced displacement and proposing a series of specific measures to provide assistance to refugees.

In view that refugees are considered “De Facto Stateless Persons” because they are persecuted by their own States and practically have no nationality, this topic is also related to the topic of Stateless Persons which is regulated by the 1954 UN Convention Relating to the Status of Stateless Persons and the 1961 UN Convention on the Reduction of Statelessness.

The Refugee issue has constantly been a topic of concern within the Inter-American System, for which reason the Organization of American States has taken and continues to take specific actions to cope with this issue.

Accordingly, the Refugee issue has been addressed in several resolutions adopted by the OAS General Assembly, entitled “Protection of Asylum Seekers, Refugees and Returnees in the Americas”. At the beginning, the topic of refugees and internally displaced persons was addressed in the same resolution entitled “The Situation of Refugees, Returnees and Internally Displaced Persons in the Americas”, but it is now addressed in separate resolutions

Although it is true that both institutions are closely related to each other, the difference mainly lies in the fact that internally displaced persons, as a general rule, stay in their territory, that is, they do not cross international borders.

From these resolutions, it is worth stressing the relevance and importance of the 1951 Convention relating to the Status of Refugees and its 1967 Protocol, which are the major universal instruments which provide protection to refugees.

Moreover, said instruments urge OAS Member States that have not yet done so, to consider signing, ratifying or acceding to the international instruments on Refugees, besides promoting the adoption of institutional procedures and mechanisms for their effective implementation.

Concerning resolution AG/RES. 2402 (XXXVIII-O/08), entitled “Protection of Asylum-Seekers and Refugees in the Americas”, adopted on June 3, 2008 by the OAS General Assembly, it is worth highlighting the it instructed the Permanent Council of the Organization, through the Committee on Juridical and Political Affairs (CAJP), with support from the Department of International Law of the Secretariat for Legal Affairs of the Organization of American States and with collaboration from the United Nations High Commissioner for Refugees (UNHCR) to organize a Course on International Refugee Law for staff of the Permanent Missions of OAS Member States, the General Secretariat, and other interested parties during the second half of 2008.

Resolution AG/RES. 2511 (XXXIX-O/09) adopted by the General Assembly of the Organization of American States on June 4, 2009, entitled “Protection of Asylum Seekers and Refugees in the Americas”, stressed the importance of the “First Course on International Refugee Law”, carried out on February 19, 2009.

In said resolution, Member States were also urged to analyze the possible link between human trafficking and the international protection of refugees and to give the victims of human trafficking and other people who cannot return to their country of origin, in accordance with their domestic law, some type of subsidiary protection or give international refugee protection to

people who meet the requirements established in the definition of refugee of the 1951 Convention relating to the Status of Refugees and its 1967 Protocol.

Concerning Internally Displaced Persons, the OAS General Assembly has also been concerned about the importance of protecting internally displaced persons, adopting resolutions entitled “Internally Displaced Persons” where it urges Member States to address the causes of internal displacement in order to prevent it, to undertake to protect and provide assistance to people affected by displacements, and to find long-lasting solutions to the problem.

In my capacity as member of the Inter-American Juridical Committee and rapporteur on the Refugee topic, I was invited with all expenses paid by the Office of the United Nations High Commissioner for Refugees (UNHCR) to attend the “Regional Conference on Refugee Protection and International Migration in the Americas”, “Protection Considerations in the Context of Mixed Migration” held in San Jose, Costa Rica, on November 19 and 20, 2009. My attendance was authorized by the Chair of the Inter-American Juridical Committee and the Secretary of the IAJC was also informed of my participation in this Conference.

The Central Panel of the Conference on November 19th was “Protection Considerations in the context of mixed migration, good practices of States”, and the following Working Groups were set up: Respecting the human rights of migrants irrespective of their migratory status; identifying and providing international protection to refugees; the protection needs of victims of human trafficking; the protection of smuggled and irregular migrants.

In connection with the rapporteur work the Inter-American Juridical Committee has performed on this topic, I participated in the Working Group “Respecting the Human Rights of Migrants Irrespective of their Migratory Status”, which broadly discussed Advisory Opinion OC-16, Advisory Opinion OC-18, both issued by the Inter-American Court of Human Rights, and the International Court of Justice judgment dated March 31, 2004, in the case concerning Avena and Other Mexican Nationals, as well as the decision dated January 19, 2009, reaffirming the obligations contained in the Avena Judgment.

On November 20th, the Central Panel of the Conference was: “Protection Considerations in the Context of Mixed Migration: Perspective of International Organizations”, and the following Working Groups were set up: Identification, profiling and referral mechanisms; protection of extra-regional and stranded migrants and refugees; protection of unaccompanied children and adolescents; and strengthening the protection of migrants and refugees through regional mechanisms. I also participated in the last Working Group in connection with the work of the Committee.

The Conference concluded with the adoption of Recommendations and Conclusions, which were based on the document entitled “Refugee Protection and Mixed Migration: A 10-Point Plan of Action”.

This rapporteur’s report is intended to take a step forward in relation to the problem of refugees in the continent, in accordance with the provisions set forth in OAS General Assembly resolution AG/RES. 2515 (XXXIX-O/09).

CJI/doc.356/10

REFUGEES [ASYLUM]

(presented by Dr. Ana Elizabeth Villalta Vizcarra)

Pursuant to resolution AG/RES. 2515 (XXXIX-O/09), entitled “Observations and Recommendations on the Annual Report of the Inter-American Juridical Committee” adopted on 4 June 2009 at the 39th regular session of the General Assembly of the Organization of American States (OAS) held in San Pedro Sula, Honduras, on which occasion the Inter-

American Juridical Committee (CJI) was asked to prepare a study on the issue of asylum in the Americas, bearing in mind the importance of the matter in the light of the work being carried out by the Committee on Juridical and Political Affairs (CAJP) and the High Commissioner of the United Nations for Refugees (UNHCR), in keeping with their respective mandates, as rapporteuse of the topic at the 76th regular session of the IAJC held in Lima, Peru, from March 15 to 24 of this year, I presented a preliminary report on the subject with a view to completing it at the 77th regular session of the IAJC to be held in Rio de Janeiro, Brazil.

This report is also in compliance with resolution AG/RES. 2611 (XL-O/10), entitled "Observations and Recommendations on the Annual Report of the Inter-American Juridical Committee" adopted on 8 June 2010 at the 40th regular session of the General Assembly of the OAS held in Lima, Peru; whose paragraph 7 asks "the CJI to report on progress made on the preparation of a study on the issue of asylum in the Americas taking into account the importance of the matter and the work being conducted by the Committee on Juridical and Political Affairs (CAJP) and the Office of the United Nations High Commissioner for Refugees (UNHCR), pursuant to their respective mandates".

In accordance with the mandates assigned by both resolutions and as rapporteuse of the topic, the undersigned presents the following complementary report on the issue of refugees [asylum] in the Americas.

Antecedents

The institution of the **refugee** in the Inter-American system cannot be analyzed without also reviewing that of **asylum**, since both are closely connected, making it necessary to determine the practice and scope of both concepts in order to offer more protection to those concerned.

These institutions have had different connotations in the States that belong to the system, asylum being understood as an institution of a political nature which is granted to people who allege persecution for purely political reasons or motives. On the other hand, refuge is seen as an institution of a humanitarian nature granted to people who are justifiably afraid of being persecuted not only for political reasons but also for questions of race, sex, religion or social status.

In this sense, the concept of asylum has been related to the Latin American system and that of asylum (refugee) to the United Nations system. Nonetheless, asylum is conceived as a generic term, a common root to determine the protection to be granted to persecuted persons.

Accordingly, the generic concept of asylum should be understood as that embraced by the institution of asylum in Latin America, just as refuge is understood in the United Nations, so that this concept of asylum not only covers the conventional and common norms of asylum in Latin America but also the principles and norms of international law on refugees, international law of human rights, international humanitarian law and international criminal law.

Asylum is a very old institution in international law, but one that has been most intensely regulated in Latin America, where there is a centenary tradition with regard to asylum, regulated on the conventional and common level, since in the Latin American region there has always existed the awareness that protection of people persecuted for political motives of crimes is justified, with the distinction being made between Diplomatic or Political Asylum and Territorial Asylum, the former granted to a diplomatic mission or the private residence of the head of such a mission, the latter being conceded in the territory of a State when someone who is persecuted for political reasons or crimes in their State asks for protection.

This shows that Latin America is a region with a pioneer and centenary tradition on the issue of asylum, since this appears in the first conventions that regulate the topic, namely the treaties of Montevideo of 1889-1890, specifically the treaty on international criminal law, following which a series of American international instruments arose on the subject, making Latin America a region whose governments practiced hospitality toward the politically

persecuted. Under this norm, asylum has constituted a representative institution of the American system of protection of the persecuted for political reasons or crimes.

The regional or Inter-American system has counted on an old, generous tradition of asylum which even preceded the adoption of universal international instruments and even appeared before the creation of the Organization of American States (OAS) in 1948 in the Pact of Bogotá, in numerous American international instruments that make up the Inter-American juridical corpus, among which mention can be made of the Treaties of Montevideo on International Criminal Law of 1889-1890; the Convention on Right of Asylum signed at the 6th American International Conference of American States in Habana, Cuba in 1928; the Convention on Extradition and the Convention on Political Asylum, both dating from 1933 as a result of the 7th American International Conference of American States held in Montevideo, Uruguay; the Treaty on Asylum and Political Refuge resulting from the Treaties of Montevideo of 1939-1940; the American Declaration of the Rights and Duties of Man of 1948; the Conventions on Territorial Asylum and Diplomatic Asylum of 1954, signed at the 10th American International Conference of American States held in Caracas, Venezuela, and the American Convention on Human Rights (the San José Pact) of 1969.

Asylum in Latin America has served: a) to protect the life, freedom or safety of people persecuted for political crimes, and b) to guarantee respect for man's fundamental rights. Both in positive law and in Latin American doctrine, two forms of asylum have been distinguished: diplomatic asylum and territorial asylum. They have both evolved together and in parallel, and up to now they have been seen as two different manifestations of the same generic institute – asylum - while at the same time constituting means of protecting and defending human rights.

Latin America is the only region in the world where asylum is recognized as such and receives a conventional, common regulation to determine its juridical status, since the attempts to have the right to asylum accepted universally have been fruitless, which is why it is viewed as an exclusively Latin American institution.

Asylum is considered not to stand in opposition to the Principle of Non-intervention, which was also the view of the *Instituto Hispano-Luso Americano de Derecho Internacional* (IHLADI in Spanish), when it expressed at its 1st Congress held in Madrid in 1951 that: "Asylum granted in accordance with specific conditions cannot be considered as a violation of the sovereignty of the territorial State nor as an intervention in its internal affairs ..."

The Right to Asylum was recognized for the first time in America in the Treaties of Montevideo of 1889-1890 on International Criminal Law. The first article of the Convention of Habana of 1928 on Diplomatic Asylum prohibited asylum for common delinquents, permitting it only for political delinquents, but using the expression "political refugees" as synonymous with political exiles. Similarly, the Treaties of Montevideo of 1939 refer to territorial exiles as "refugees" and article 9 of the Convention of Caracas of 1954 on Territorial Asylum uses the expression "refugee" as being synonymous with territorial asylum. Nevertheless, the status of territorial exile in the American system does not coincide fully with the status of refugee in the universal system. In this sense, asylum has been understood as a representative institution of the Latin American system, and refuge as an institution related to the universal system of protection for refugees.

Refuge has in turn been considered as a universal conventional institution by means of which a person abandons the country of which he is a citizen on grounds of being afraid of persecution not only for political motives but also because of race, religion or social status, and cannot return to his country because of the risks to his life and physical integrity. Fundamental elements of Refuge are the Principles of Non-Refoulement and Non-Expulsion, as well as the Right to Family Unity, which determines refuge as an institution of a humanitarian nature.

The principal international instruments adopted by the United Nations system for the protection of refugees are the Convention Relating to the Status of Refugees of 1951 and the

Protocol Relating to the Status of Refugees of 1967, which thus determine such protection as an institution of the universal system.

Through these universal instruments, the refugee is considered to be “a person who owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it”.

In this sense, refuge is considered as a juridical institution through which a foreigner is granted recognition as a “refugee” in a State of which he is not a citizen and to which he has gone in search of the security he lacks in his own country because of fears of persecution for reasons of race, religion, political ideas, nationality or membership of a particular social group.

Refuge recognizes individual rights and counts on international protection and assistance through a specialized organization of the United Nations, namely the High Commissioner for Refugees (UNHCR).

The conceptual topic of asylum and refuge had been dealt with on the American continent in separate or divided fashion, without any attempt to resolve the issue by standardizing both institutions through systematic interpretation of the juridical systems in order to prevent fragmentation and weakening of their normativity in offering international protection to the persecuted. This conceptual difference between asylum and refuge has even been determined in the internal legislations of the States of the American continent.

On the universal level, asylum is regulated in article 14 no. 1 of the Universal Declaration of Human Rights, which literally expresses that “everyone has the right to seek and to enjoy in other countries asylum from persecution”. On the regional or Inter-American level, it is regulated in article 27 of the American Declaration of the Rights and Duties of Man, under the title “Right to Asylum”, which reads as follows: “*Every person has the right, in case of pursuit not resulting from ordinary crimes, to seek and receive asylum in foreign territory, and in accordance with the laws of each country and with international agreements*”. In both Declarations, asylum is regulated in general terms, neither of them referring to refuge. This conceptual distinction has led them both to be guided by different international juridical instruments.

The serious crisis of refugees that arose in Central America in the 1980s as a result of the internal conflicts in several countries in the region led to debate on the convergence of both concepts, as well as the international and American systems for protecting refugees. This effort to make both systems compatible led to better protection for refugees in the American continent.

This compatibility is possible if we accept the concept of asylum as a generic institution, as a common root that allows integral development of both institutions, in other words, asylum as such together with refuge, in this way embracing both concepts.

This terminology that defines asylum as a generic concept or a common root has been used by jurists and scholars on the matter, such as the internationalist Reynaldo Galindo Pohl in his lecture “Refuge and asylum in theory and juridical practice”, delivered at the Colloquium held in Cartagena de Indias in 1983 on the topic: “the institution that makes the various rights of the refugees effective is asylum”, and “the States receive people as refugees and then grant them asylum”... and “the only necessary result of ‘qualification of refugees’ is asylum”.

This conceptualization of asylum can also be understood taking into account the fact that both asylum and refuge have the same purpose, namely to offer the protection of the State to victims of persecution, regardless of the procedure by which such protection is formalized in practice, whether the regime of exiles in accordance with the Inter-American conventions and instruments on the matter or else that of refugees according to the conventions of the United Nations, especially the Convention of 1951 on the Status of Refugees and its Protocol of 1967.

This conceptualization is also warranted by the fact that the generic term “asylum” in English and the French word “*asile*” are expressed in this way in the texts on human rights and the right of refugees.

There are some differences between one institution and the other, for example, asylum protects people who are persecuted individually and refuge protects large groups of people. Furthermore, asylum is exclusively a matter of the sovereignty and internal dominion of States, whereas refuge is related to the normative established by the international community, so they should not be considered as synonymous concepts, as argued by jurist César Sepúlveda in his lecture “The question of asylum and refuge” at the Colloquium of Mexico of 1981, when he claimed that: “Asylum and refuge are now different concepts, although at one time they meant the same thing”.

Following this line of thinking, jurist Galindo Pohl expressed that: “the institution of refuge in the Convention of 1951... mainly concerns persecution of groups, ... does not involve individualized persecution ... and covers numerous cases that escape the Inter-American Conventions”.

In the United States, a practical distinction is made between asylum and refuge, so that asylum is granted to those people who are physically present in the United States, whenever they fit the definition of refugees given in international law. On the other hand, a person outside the United States who is prevented from returning to his country of origin or is unwilling to do so out of well-grounded fear of persecution, can apply to be admitted to the United States as a refugee. To request the status of refugee, the applicant must be physically located outside the United States. In both cases, a person with asylum or refugee status or who has resided continuously in the United States for at least a year can apply for a residence card and eventually become a citizen of the United States.

Asylum understood as a generic term or common root can eliminate all these divergences on behalf of protecting people, respecting at the same time the particularities of one and another institution, which will allow the institution of asylum to develop progressively in this direction, seeing that the practice unfolding in the States concerning refugees is that once a person has been given the status of refugee, he is enabled to reside in the territory of the State, and is thereby granted asylum.

The current situation

In 1965 the Inter-American region had the initiative of drawing up a Regional Convention on Refugees, an assignment given to the Inter-American Juridical Committee, which prepared a Draft Convention aimed at providing a regional instrument on the issue.

It was precisely the 2nd Special Inter-American Conference held in Rio de Janeiro, Brazil in 1965, that commissioned the Inter-American Juridical Committee by Resolution to prepare a Draft Inter-American Convention on Refugees.

The Inter-American Juridical Committee, in compliance with its mandate, considered that the main aspects to be analyzed were as follows: a) the juridical situation, including the definition of refugee, their rights and duties, personal status and work situation; b) granting the refugee a travel document; and c) coordinating assistance and protection for refugees. The Inter-American Juridical Committee concluded the Draft, but the topic has yet to be considered by the political bodies of the Organization of American States.

Prior to 1970, the norms on diplomatic asylum and territorial asylum in Latin America were sufficient to attend to this matter. Later on, the existence of internal conflicts in the continent gave rise to the refugee problem because the American States were not prepared to receive a massive contingent of refugees.

While refuge as an autonomous institution different from asylum, as it is conceived in American law, is regulated in the universal sphere by the Convention on the Status of Refugees of 1951 within the framework of the United Nations, as well as in the Protocol to this Statute

known as the Protocol to the Status of Refugees of 1967, the purpose of these instruments was to protect the people displaced during and after the Second World War, which produced another parallel institution, that of Displaced Persons.

Subsequent to these instruments, other instruments have been adopted especially in the American continent to lend more protection to the refugee problem in the continent, such as the Declaration of Cartagena on Refugees of 1984, which broadened the concept of the refugee to include persons displaced by circumstances of generalized violence, as in the case of internal conflicts or other situations that seriously disturb the internal order and cause massive violation of human rights. In this sense, the Declaration of Cartagena recommended extending the protection to persons fleeing from their countries because their life, safety or freedom were threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances that have deeply disturbed public order.

In 1989, following the several internal conflicts in the region of Central America, the International Conference on Central American Refugees (CIREFCA) was set up, which adopted the “Principles and Criteria for the Protection of and Assistance to Central American Refugees, Returnees and Displaced Persons in Latin America”. In 1994 the “Declaration of San José on Refugees and Displaced Persons” was adopted, and in 1999 the “Declaration of Tlatelolco”, which also addresses with concern the problem of refugees in the region. In 2004, the “Declaration and Plan for Action of México to Strengthen the International Protection of Refugees in Latin America” was adopted to pay special attention to the problems that provoke forced displacements and also to propose a series of concrete measures to lend assistance to refugees.

Refugees are considered “*de facto* stateless persons” because they are persecuted in their own States and practically have no nationality, which joins this issue to that of statelessness, regulated in the universal sphere in the Convention on the Status of Stateless Persons of 1954 and the Convention on the Reduction of Statelessness of 1961.

The topic of refugees has been a constant concern in the Inter-American system, which is why the Organization of American States has taken concrete steps to face this problem and continues to try to resolve it.

In this sense, the matter has been addressed in resolutions adopted by the General Assembly of the OAS under the heading of “Protection of Asylum-Seekers and Refugees in the Americas”. At first the topic of refugees and internally displaced persons was dealt with in the same resolution entitled “The Situation of Refugees, Repatriates and Internally Displaced Persons in the Americas”, but at present this is dealt with in separate resolutions on account of the importance of the topic. Although both institutions are certainly closely connected, the main difference is that as a rule the internally displaced remain inside their own territory, that is to say they do not actually cross international borders.

These resolutions mainly show the relevance and fundamental importance of the Convention on the Status of Refugees of 1951 and its Protocol of 1967, these being the principal universal instruments for the protection of refugees. They exhort the Member States of the OAS that have not yet done so to consider signing, ratifying or adhering to the international instruments on the refugee question, as well as to promote adopting institutional procedures and mechanisms toward their effective implementation.

It should be mentioned that resolution AG/RES. 2402 (XXXVIII-O/08), entitled “Protection of Asylum-Seekers and Refugees in the Americas”, adopted on 3 June 2008 at the General Assembly of the OAS, instructed the Permanent Council of the Organization to work together with the Committee on Juridical and Political Affairs (CAJP), with the support from the Department of International Law of the Secretariat for Juridical Affairs of the General Secretariat of the OAS and the collaboration of the High Commissioner of the United Nations for Refugees (UNHCR), for the purpose of organizing a Course on the International Law of

Refugees, directed to the personnel of the Permanent Missions of the Member States of the OAS, the General Secretariat and other interested parties during the second semester of 2008.

Resolution AG/RES. 2511 (XXXIX-O/09), adopted at the General Assembly of the OAS on 4 June 2009 under the title “Protection of Asylum-Seekers and Refugees in the Americas”, underscored the importance of the “First Course on the International Law on Refugees” held on 19 February 2009.

This resolution also exhorted the Member States to study any possible connection between trafficking of persons and international protection of refugees, and to urge them to grant to victims of trafficking and others who are unable to return to their countries of origin some sort of subsidiary or international protection as refugees whenever they show the necessary requirements established in the definition of refugees by the Convention on the Status of Refugees of 1951 and its Protocol of 1967.

With regard to internally displaced people, the General Assembly of the OAS is also concerned with the importance of lending protection to those affected by internal displacements by adopting resolutions called “Internally Displaced Persons”, in which Member States are urged to attend to the causes of internal displacements in order prevent them, and to commit themselves to lend protection and assistance to those affected during displacements, as well as to seek lasting solutions to the problem.

The 40th regular session of the General Assembly of the OAS held in Lima, Peru adopted on 8 June 2010 resolution AG/RES. 2597 (XL-O/10) entitled “Protection of Asylum-Seekers and Refugees in the Americas”, in which the Member States of the OAS pledge to continue offering protection to those applying for the status of refugee, and to refugees, based on the Convention of 1951 and its Protocol of 1967, as well as to seek lasting solutions to the situation.

This resolution refers to the 2nd Course on the International Law on Refugees held on 17 February 2010, which was organized by the Committee of Juridical and Political Affairs (CAJP) with the support of the Department of International Law of the General Secretariat of the OAS and the collaboration of the UNHCR.

Likewise, the same resolution mentions the holding of the “Regional Conference on Refugee Protection and International Migration in the Americas: Protection considerations in the Context of Mixed Migration”, which took place in San José de Costa Rica on 19-20 November 2009.

This resolution approved supporting the Mexico Declaration and Plan of Action to Strengthen the International Protection of Refugees in Latin America and continue full and effective implementation with the collaboration of the International Community and the Office of the High Commissioner of the United Nations for Refugees (UNHCR).

Finally, the Permanent Council of the Organization is assigned to work with the Committee on Juridical and Political Affairs, with the support of the Department of International Law of the General Secretariat of the OAS and the technical and financial collaboration of UNHCR for the purpose of organizing prior to the 43rd regular session of the General Assembly a course on the International Law on Refugees, addressed to the personnel of the Permanent Missions of the Member States, and of the General Secretariat and for other interested parties.

Recommendation

In the face of the current problem in the Americas caused since 1970 by the increase in the massive population of refugees across the continent, due not only to internal conflicts in some States but also to other circumstances, including of an economic nature, there is a need to expand the concept of refugee to be able to cover the whole gamut of realities in the region, which has provoked adopting regional instruments on the issue to be applied in conjunction with the international instruments.

Situations have also arisen in some States of the continent that have led to some people applying for diplomatic and territorial asylum, invoking the Inter-American instruments concerning asylum.

Consequently, both figures are still being used in the Americas, asylum as a Latin American institution and refuge as a universal institution under the system of the United Nations, with their respective peculiarities.

For this reason it would be appropriate to create a generic concept that covers both institutions, thus avoiding all the confusion caused by their co-existence, since on some occasions refuge is requested within the parameters of asylum, and vice-versa.

This generic concept should be aimed at offering more State protection to victims of persecution, regardless of the procedure by means of which this protection is in practice formalized, whether the regime of exiles in accordance with Inter-American conventions and instruments or else the regime of refugees as set out in the instruments of the United Nations, especially the Convention on the Status of Refugees of 1951 and its Protocol of 1967, and in other regional instruments.

This generic concept that manages to embrace both institutions, and as a progressive development of international law, should bear in mind the international law on human rights, the international law on refugees, international humanitarian law, and international criminal law, in order to ensure a superior measure of protection.

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9. Freedom of Thought and Expression

Document

CJI/doc.359/10 Freedom of Thought and Expression
(presented by Dr. Guillermo Fernández de Soto)

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.

At the 76th Regular Session of the Inter-American Juridical Committee (Lima, Peru, March 2010), the Chairman spoke in his capacity as rapporteur for the topic. He recalled the terms of the General Assembly mandate of 2009 set out in resolution AG/RES. 2515 (XXIX-O/09) for conducting an analysis of its importance in guaranteeing the public the right to freedom of thought and expression.

The rapporteur then described the strategy he would follow in his first approach to the topic, dealing with the state of the art from three points of view: first, in accordance with the terms of the American Convention on Human Rights; then, a series of comparisons with decisions and other instruments, such as the International Covenant of Civil and Political Rights; finally, a series of pointers from inter-American jurisprudence, particularly from different rulings by the Inter-American Commission and the Inter-American Court of Human Rights, including, most recently, the IACHR’s Rapporteurship on Freedom of Expression, and, in addition, decisions from the Council of Europe and the restrictions that are enforced in connection with it.

The rapporteur went on to say that freedom of expression was distinct from freedom of thought, and that it was not an absolute right. Both the American Convention on Human Rights and the International Covenant regulate the conditions whereby the exercise of freedom of expression may be restricted. He also referred to a number of instances from inter-American jurisprudence, including an Advisory Opinion issued by the Inter-American Court of Human Rights in 1985 dealing with

compulsory membership in an association prescribed by law for the practice of journalism. That opinion emphasized two dimensions of the right of free expression: the individual dimension as the right to seek, receive, and impart ideas of all kinds, and the collective right to receive and hear expressions of other people's thoughts. Those two dimensions must be guaranteed simultaneously: in other words, it would not be licit to invoke the right of society to be truthfully informed as grounds for a regime of prior censorship intended to suppress information deemed false in the censor's opinion. Neither would it be permissible, with the aim of disseminating information and ideas, to establish public or private media monopolies to attempt to mold public opinion in line with a single point of view. In the recent case of *Herrera Ulloa v. Costa Rica*, the Court said that the expression and dissemination of ideas and information are indivisible, so that a restriction of the possibilities of dissemination directly represents a limit to the right to free expression. In the Opinion cited above, the Court also stated that freedom of expression was an essential element on which the existence of a democratic society was based, and that it was indispensable for the formation of public opinion; consequently, a society that is not well informed is not truly free.

In a comparative analysis, the rapporteur said that the jurisprudence of the European Court on democracy had emphasized the importance of freedom of expression within a democratic society, and that it had to be assured as regards the transmission of both information that is favorably received and that which is deemed offensive. Thus, any restriction on the right must be in proportion to the legitimate goal sought.

He also spoke of the indispensable elements for the full enjoyment of democracy set out in the Inter-American Democratic Charter, such as transparency in government activities, probity, the responsibility of governments in public administration, respect for social rights, and the freedom of expression and of the press.

In addition, with respect to applicable restrictions, the rapporteur referred to Article 13 of the American Convention on Human Rights, which states that the subsequent imposition of liability is to be applied to the abusive exercise of this right, rather than favoring the implementation of forms of prior censorship. The Court's established precedents have set three requirements applicable to restrictions. First of all, they must be expressly established in law; second, they must be intended to protect the rights or reputations of others, or to protect national security, public order, or public morals; and third, they must be necessary in a democratic society. Another ruling from the European Court stated that the acceptable limits of criticism were broader with respect to a politician than a private citizen.

The rapporteur then examined the jurisprudence of the Inter-American Court of Human Rights and the country reports indicating important concepts in this area. He added that the Inter-American Commission and the Rapporteurship had consistently promoted the principles of pluralism in communications processes, particularly as regards policies for the inclusion of groups traditionally excluded from public debate. The Commission has ruled that the imposition of sanctions for abuses of freedom of expression must be unequivocally based on the assumption that the person was not simply expressing an opinion, regardless of how harsh, unfair, or distributing it may have been, but did have the clear intent to commit a crime and a real possibility of attaining his objectives. Democracy is strengthened by public debate, and not by its suppression; consequently, judicial venues must be used to establish the responsibilities and sanctions that might be necessary for attaining that purpose.

Finally, the rapporteur offered a series of recommendations by the Inter-American Commission and Inter-American Court of Human Rights regarding the duty of states to uphold the utmost impartiality and due process in all administrative and judicial procedures for enforcing the law. He concluded that the initiation of proceedings and the imposition of sanctions must be the task of

impartial and independent agencies, be regulated by legal provisions, and abide by the terms of the conventions, and that in no instance should the editorial line of a media outlet be a factor of relevance in pursuing sanctions in this area.

Dr. Baena Soares congratulated the rapporteur for his robust presentation. He noted his agreement with the idea that the Committee's discussions should be targeted at strengthening democracy; for that reason, he thought the study of the topic should not focus exclusively on the three branches of government, but also, and chiefly, on the media. They, together with the states, should uphold the following three basic principles: transparency, ethics, and balance. He also suggested that the draft take new technologies into account, such as the internet, blogs, Twitter, etc., and that the report not be limited to the press and radio. Given the challenges posed by these new manifestations of technology, he thought it was important that they be addressed in a future discussion.

Dr. Herdocia, assisting the rapporteur, indicated that in the case of *Claude Reyes et al. v. Chile*, the Court developed notions that could serve to guide this endeavor. He said that the key focus of the Committee's draft should be based on the fact that the consolidation and development of democracy depends on freedom of expression, which is a fundamental right in any democratic society. Regarding the "ethical conducts" referred to in resolution 2515, he stressed that states cannot attempt to impose patterns of conduct that are not the result of broad dialogue with the media, and that statements in that sense had been issued by the Inter-American Commission on Human Rights, the Inter-American Court of Human Rights, and the European courts. The report must support freedom of expression carried out ethically and with transparency and balance, as Dr. Baena Soares said, but he would add the term "responsible." In connection with codes of ethics, he noted his concern at any attempt to impose inappropriate limitations on the right of free expression. He also stressed the media's social function in providing scrutiny of public officials. He then spoke of protecting the reputation of public officials, guaranteed by civil sanctions, and of the importance of verifying cases involving the dissemination of false information or in which the search for truth failed. In addition, he supported the condemnation of *desacato* laws – those intended to punish "offensive" statements – when the information aims at revealing acts of corruption. Finally, he seconded the proposal to include internet-related issues in the draft, as a method that can spread information to thousands of people without limitations and where the publisher cannot be sued for offensive information.

Dr. Freddy Castillo agreed with the comments made by the members in favor of focusing the discussion on the mandate of the General Assembly, which was to ensure the right of free expression of the public and the media in accordance with the challenge of ethics. He added that journalists have been issuing their own rules for years, many of which they did not themselves observe. Recently, the media have created the figure of readers' defenders out of a concern for those media outlets' exercise of the right of free expression, respect the rights of others to be informed truthfully, as also established by the American Convention on Human Rights. This guarantee is not imposed by states: instead, it is self-imposed by journalists' associations, and that represents an important source for research into judgments on self-imposed codes of ethics.

Dr. Elizabeth Villalta agreed with the comments made and emphasized the balance acquired by freedom of expression, which is often out of proportion to people's reputation.

Following a fruitful debate among the members, the Chairman thanked them for their comments, which would be taken on board in the next report to be presented in August.

At the fortieth regular session of the OAS General Assembly (Lima, June 2010), the Committee was asked to report on progress "made on the 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" [AG/RES. 2611 (XL-O/10)].

At the 77th Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, August 2010), Dr. Fernández de Soto, rapporteur for the topic, presented his report CJI/doc.359/10. In his address he recalled that the mandate had arisen at the June 2009 session of the General Assembly, which had asked the 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.”

At the Lima meeting, the rapporteur had presented guidelines from studies carried out by the Inter-American Commission on Human Rights and from rulings by the Court, with statements in favor of associating the terms *ethics* and *responsibility* when talking about freedom of expression. Freedom of expression is a fundamental human right, enshrined in the legal systems of the Americas and Europe, and with a close relationship to democracy. He also spoke of different statements on the matter, including those made by the Committee itself in adopting its resolution on the Inter-American Democratic Charter, identifying the right to information as one of the pillars of democracy. However, he added that it was not an absolute right and that both the American Convention on Human Rights and the International Covenant on Civil and Political Rights subjected it to restrictions in order to preserve the rights or reputations of other people. He also referred to rulings from international agencies prohibiting prior censorship, except as regards entertainments for minors, and to restrictions relating to private persons and those applicable when public figures are involved. He said that in the inter-American system, the legitimacy of such restrictions depends on three conditions: 1) they must be established by formal, specific laws; 2) they must be intended to protect individuals' rights or reputations or public order; and 3) they must be necessary in a democratic society in order to protect a public interest. In his view, freedom of expression is limited by other fundamental rights, with the right of privacy as the essential legal reference point for conducting such an assessment. And, as such, it is the responsibility not only of journalists and the media, but of everyone who exercises the right, under the American Convention, to ensure respect for the reputations of other people.

The Rapporteur also spoke of the sanctions used to punish illicit acts, through the criminalization of slander, libel, and defamation in criminal law, and, in the civil arena, through such mechanisms as the right of rectification when the right is abused beyond the legitimate expression of an opinion or criticism. He then addressed the problems that had arisen with the use of new information technologies, which lacked global regulations.

Finally, in accordance with the Assembly's mandate, he spoke of a number of IACHR recommendations on ethical principles for journalism, which had also been adopted by professional bodies in the Americas and Europe. Based on the remarks made, he proposed that the Committee draw up a code of ethics or set of guiding ethical principles to provide guidance for the journalism profession in the Member States.

In beginning the discussion, the members congratulated the rapporteur on his robust, far-reaching report and offered the comments described below.

Dr. João Clemente Baena Soares stated that the major factor missing from the topic's debate was economic power, which was a major element in distorting or hindering opinions or the transmission of factual information. In second place, he stressed the problems posed by technologies that are still not regulated, with the resultant abuses of publication, even of secret documents, by those who are supposed to safeguard them. Finally, he seconded the rapporteur's proposal for the drafting of a model code, albeit not one targeted at the states, since they were unable to impose ethical conduct; at the same time, however, he said that states could not be remiss in their duties.

Dr. Freddy Castillo noted the existence of monopolies and oligopolies in the field of communications, which revealed how power groups dominate the media. This was an enormous problem in all societies, and it should be included in the Committee's discussions.

Dr. Hyacinth Lindsay noted that freedom of expression could not be unconditional, as the rapporteur had correctly noted, but that it had to respect the reputations of others. Regarding item 7 of the principles adopted by the International Federation of Journalists, she asked whether it included the payment of gratifications for suppressing information because, in the real world, both situations could arise: gratifications for including information or for suppressing it.

Dr. Mauricio Herdocia stressed the principle of the right to information as a fundamental right for the existence of democracy. The first comment arising was, therefore, that codes cannot be imposed: they must be freely adopted in the pursuit of the journalistic profession. However, he emphasized the care that was needed in proposing partial regulations. He reminded the meeting that in some countries, some media outlets were controlled by the state and not only by business owners, and that situation warranted thought on how freedom of expression was to be exercised. He therefore suggested that attention also be given to the new technologies of the internet, which allow the publication of any statement affecting people's privacy or reputations and for which there are no regulations of responsibility. Who assumes responsibility for publication if e-mail is anonymous? In addition, he agreed with the rapporteur's proposal for progressing with drafting a model code.

Dr. Fernández de Soto, in concluding the discussions, proposed including the comments in the next report on the topic.

The document "Freedom of Thought and Expression," CJI/doc.359/10, is transcribed in the following paragraphs.

CJI/doc.359/10

FREEDOM OF THOUGHT AND EXPRESSION

(presented by Dr. Guillermo Fernández de Soto)

1. MANDATE OF THE INTER-AMERICAN JURIDICAL COMMITTEE

The mandate originated in the resolution of the General Assembly AG/RES. 2515 (XXXIX-O/09), in which the Inter-American Juridical Committee was requested "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."

During the 75th regular session of the Inter-American Juridical Committee held in Rio de Janeiro in August 2009, the Chairman 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 have expressed their opinions as regards associating the words ethics and responsibility with freedom of expression. There is a whole area of jurisprudence developed on the matter. In some countries of the Americas an attempt has been made to repress the media by alleging irresponsibility or anti-ethical conduct. There have even been attempts to establish various types of courts for the press – self-control of the press – which to some extent relates to the topic of access to information.

2. FREEDOM OF EXPRESSION AND DEMOCRACY

Freedom of thought and expression is a fundamental human right that is important because of the close relation it has with democracy, a relation qualified by the Inter-American system as indissoluble and essential. In this sense, it has been acknowledged that the main objective of protecting Article 13 of the American Convention is to “strengthen the functioning of pluralist and deliberative democratic systems by protecting and fostering the free circulation of all kinds of information, ideas and expressions”¹.

On 11 September 2001, the governments of the hemisphere adopted the Inter-American Democratic Charter, which, *inter alia*, pointed out that basic components of the exercise of democracy are transparency of governmental activities, probity, responsibility of governments in public administration, respect for social rights and the freedom of thought and expression and the press².

So there is some coincidence between the different regional systems for protection of human rights and the universal system as far as **the essential role of freedom of expression in consolidating and making democratic society dynamic** is concerned. Without effective freedom of expression, materialized in all its terms, democracy grows weak, pluralism and tolerance begin to crumble, the mechanisms of citizen control and denunciation prove useless, and the field is made fertile for authoritarian systems to take root in society.

Today, democracy cannot be understood exclusively as the simple result of an electoral process.

Recently, the Inter-American Juridical Committee clearly expressed in the resolution CJI/RES.159 (LXXV-O/09) dated 12 August 2009 that (...) “the democracy does not consist only in the 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” (...) defined in the Inter-American Democratic Charter. These attributes were conceived as a tool for interpreting and applying the Charter of the OAS on matters of representative democracy.

It also pointed out the right that all States have to elect, without any outside interference, its political, economic and social system, and to organize themselves in the way that they find most appropriate. But it was made quite clear that this right is limited by the pledge to respect the essential elements of representative democracy enumerated in the Democratic Charter.

The text reads as follows:

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 periodic, free and fair elections and 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 public powers and independence of the branches of government.

In this way the text reaffirmed the attributes of democracy agreed in the Declaration of Santiago de Chile in August 1959 and underlined that there exists a vital link between the effective exercise of representative of democracy and the rule of law, which is expressed concretely in the observance of all the elements and components mentioned above.

¹ Annual Report for 2009 of the Special Rapporteurship for the Freedom of Expression of the Inter-American Commission on Human Rights, p. 225. [Spanish version]

² The Inter-American Democratic Charter, adopted at the special session of the General Assembly held on 11 September 2001, Article 4.

The resolution added that given the importance of efficacious and transparent exercise of the judicial function in the democratic system, it is necessary to strengthen independent Judicial Powers endowed with autonomy and integrity, professional rather than partisan character and subject to a regime of non-discriminatory selection.

“Likewise, the Inter-American Commission on Human Rights explained that functional democracy is the maximum guarantee of public order and that the existence of a democratic society is based on the touchstone of the right to freedom of expression”³. The guarantee of free circulation of information, opinions and ideas, as well as access to same, prevents society becoming paralyzed and prepares it to endure the tensions that lead to the destruction of civilizations. So it will be possible to speak of a free society when it is possible, within that society, “to hold an open, public and uncompromising debate about itself”⁴.

The Inter-American Court, in its consultative opinion OC-5/85, also mentioned the relation between democracy and freedom of thought and expression when it claims that:

[...] the freedom of expression is a cornerstone upon which the very existence of a democratic society rests. It is indispensable for the formation of public opinion. It is also a *conditio sine qua non* for the development of political parties, trade unions, scientific and cultural societies and, in general, those who wish to influence the public. It represents, in short, the means that enable the community, when exercising its options, to be sufficiently informed. Consequently, it can be said that a society that is not well informed is not a society that is truly free⁵.

Similarly, the European Court of Human Rights has expressed its opinion on the importance for any democratic society to enjoy freedom of expression when it states that:

[...] the freedom of expression constitutes one of the essential pillars of a democratic society and a fundamental condition for its progress and the personal development of each individual. Such freedom must be guaranteed not only with regard to diffusion of information or ideas that are received favorably or considered as harmless or indifferent, but also as regards information that offends, hurts or disturbs the State or any sector of the population. Such are the demands of pluralism, tolerance and open spirit without which a democratic society does not exist. [...] This means that [...] any formality, condition, restriction or sanction imposed on the matter must be in keeping with the desired legitimate end⁶.

³ Annual Report for 2009 of the Special Rapporteurship for the Freedom of Expression of the Inter-American Commission on Human Rights, p. 249. [Spanish version]

⁴ Annual Report for 2009 of the Special Rapporteurship for the Freedom of Expression of the Inter-American Commission on Human Rights, p. 226. [Spanish version]

⁵ Cfr. La Colegiación Obligatoria de Periodistas, supra nota 85, párr. 70.

⁶ Cfr. Case of Ivcher Bronstein, supra nota 85, párr. 152; Case of “La Última Tentación de Cristo” (Olmedo Bustos y otros), supra nota 85, párr. 69; Eur. Court H.R., Case of Scharsach and News Verlagsgesellschaft v. Austria, Judgement of 13 February, 2004, para. 29; Eur. Court H.R., Case of Perna v. Italy, Judgment of 6 May, 2003, para. 39; Eur. Court H.R., Case of Dichand and others v. Austria, Judgment of 26 February, 2002, para. 37; Eur. Court H.R., Case of Lehideux and Isorni v. France, Judgment of 23 September, 1998, para. 55; Eur. Court H.R., Case of Otto-Preminger-Institut v. Austria, Judgment of 20 September, 1994, Series A no. 295-A, para. 49; Eur. Court H.R. Case of Castells v Spain, Judgment of 23 April, 1992, Serie A. No. 236, para. 42; Eur. Court H.R. Case of Oberschlick v. Austria, Judgment of 25 April, 1991, para. 57; Eur. Court H.R., Case of Müller and Others v. Switzerland, Judgment of 24 May, 1988, Series A no. 133, para. 33; Eur. Court H.R., Case of Lingens v. Austria, Judgment of 8 July, 1986, Series A no. 103, para. 41; Eur. Court H.R., Case of Barthold v. Germany, Judgment of 25 March, 1985, Series A no. 90, para. 58; Eur. Court H.R., Case of The Sunday Times v.

Freedom of the press offers public opinion one of the best ways to know and judge the ideas and attitudes of political leaders. In more general terms, freedom of political controversies belongs to the very heart of the concept of democratic society⁷.

In short, “jurisprudence has emphasized that the democratic function of freedom of expression makes it a necessary condition to prevent the appearance of authoritarian systems, facilitate personal and collective self-determination, and make the mechanisms of citizen control and denunciation effective”⁸.

3. CHARACTERISTICS

In accordance with the provision of Article 13 of the American Convention, the freedom of thought and expression is a right that must be assured to everybody, under equal and non-discriminatory conditions, regardless of any further consideration; “it comprises the freedom to seek, receive and disseminate any kind of information and ideas...”. That is to say, whoever has the protection of the Convention has not only the right and liberty to express their own thoughts, but also the right and freedom to seek, receive and disseminate all kinds of information and ideas. In this order of ideas, by illegally restricting the freedom of thought and expression of an individual, not only the right of that same individual is being infringed, but also the rights of all the others to “receive” information and ideas, and this unveils both dimensions, i.e. the individual and the collective, that the law protects.

In this regard, the Inter-American Court has repeatedly decided that in its **individual dimension**, freedom of thought and expression is not limited to the recognition of the abstract right to free speech or writing, but that it also inseparably comprises the right to disseminate expressions through the means chosen to communicate them, so that they may reach the largest possible audience⁹. The Convention, by proclaiming that the freedom of thought and expression includes the right to disseminate information and ideas “through any ...procedure”, is underlining that the expression and dissemination of thoughts and information are indivisible, and therefore a restriction on the possibilities to disseminate or disclose them represents a direct limitation to the right of free expression. In this regard, the States are in charge of protecting the enforcement of the right to free speech or writing, as well as preventing limitations on their dissemination through disproportionate regulations or prohibitions.

In its **social dimension**, freedom of expression is a means for the exchange of ideas and information and for mass communication among human beings. While it comprises the right of each person to try to communicate to others his/her own viewpoints, it also implies the right of everybody to know opinions and news. For the common citizen, the knowledge of others’ opinions or of the information which others possess is as important as the right he/she has to disseminate his/her own.¹⁰

United Kingdom, Judgment of 29 March, 1979, Series A no. 30, para. 65; y Eur. Court H.R., Case of Handyside v. United Kingdom, Judgment of 7 December, 1976, Series A No. 24, para. 49.

Cfr. African Commission on Human and Peoples' Rights, Media Rights, Agenda and Constitutional Rights Project v. Nigeria, Communication Nos. 105/93, 128/94, 130/94 and 152/96, Decision of 31 October, 1998, para 54.

⁷ Case of Lingens v. Austria, supra note 91, para. 42.

⁸ 2009 Annual Report of the Special Rapporteurship on Freedom of Expression of the Inter-American Commission on Human Rights, p. 225. [Spanish version]

⁹ 2009 Annual Report of the Special Rapporteurship for Freedom of Expression of the Inter-American Commission on Human Rights, p. 230. [Spanish version]

¹⁰ 2009 Annual Report of the Special Rapporteurship for Freedom of Expression of the Inter-American Commission on Human Rights, p. 227. [Spanish version]

Taking into consideration that the two dimensions mentioned on freedom of expression are inseparable and therefore must be simultaneously assured, it would not be possible, in the name of protecting the right of the society to be truthfully informed, to eliminate pieces of information deemed false by the censor, because by doing so, a regime of “previous censorship” would be implemented, which is something that the CIDH views as a limitation incompatible with the American Convention¹¹. Neither would it be admissible, on the grounds of the right to disseminate information and ideas, to set up public or private monopolies on the communication media in an attempt to mold public opinion according to a single viewpoint.

4. LIMITATIONS TO THE RIGHT

Freedom of thought and expression – unlike the freedom of opinion – is not an absolute right. In this sense, the International Covenant on Civil and Political Rights and the American Convention have both regulated situations in which the enforcement of the rights is restricted, in Articles 19.3 y 13.2, respectively. On one hand, the International Covenant establishes that the limitations to this freedom must be “expressly determined by law and be necessary to ensure the respect the rights or reputation of others” or for “the protection of national security, public order or public health or morals”. On the other hand, Article 13.2 bans previous censorship, the sole exception being censorship in the case of public shows which are inadequate for minors, and paragraph 3 of Article 13, which prohibits any restriction on this freedom through “indirect ways and means”.

In order to be able to monitor legitimacy of the other responsibilities, these have to comply with three requirements, i.e.: 1) they should be precisely and clearly defined through formal and material legislation; 2) their purpose should be to protect either the rights or reputation of others, or the protection of national security, the public or the public health or morals (these being urgent purposes authorized by the American Convention); and 3) they should be necessary in a democratic society, being strictly proportional to the purposes sought and suitable enough to achieve the desired goals.

The need for and legal status of the limitations to the rights of expression based on Article 13.2 of the American Convention, will depend on their orientation to satisfy an urgent public interest. That is to say, when there are several options for that purpose, the one to be chosen is that which least restricts the right being protected. Taking this into consideration, it is not enough to demonstrate, for example, that the law fulfills a useful or timely purpose; to be in harmony with the Convention, limitations must be justified according to collective purposes which, depending on their importance, clearly prevail over the social need to fully enjoy the right and are restrictive only to the extent needed to ensure full enforcement of the right established in the aforementioned provision¹².

In this regard, limitations must be strictly proportional to the legitimate interest that justifies them, and must be properly adapted to achieve its purpose, interfering as little as possible in the legitimate enforcement of the right to freedom of expression¹³. In order to determine that the limitation is proportional, it is necessary to evaluate these three factors: “(1) the degree to which the opposite right is affected, i.e. seriously, to an intermediate degree, or

¹¹ 2009 Annual Report of the Special Rapporteurship for Freedom of Expression of the Inter-American Commission on Human Rights, p. 251. [Spanish version]

¹² Cfr. La colegiación obligatoria de periodistas, supra nota 85, párr. 46; ver ambient Eur. Court H. R., Case of The Sunday Times v. United Kingdom, supra nota 91, para. 59; y Eur. Court H. R., Case of Barthold v. Germany, supra nota 91, para. 59.

¹³ 2009 Annual Report of the Special Rapporteurship for Freedom of Expression of the Inter-American Commission on Human Rights, p. 250. [Spanish version]

moderate; (2) the importance of fulfilling the opposite right; and (3) whether the fulfillment of the opposite right justifies the limitation to the freedom of expression”¹⁴.

In no case may limitations to the right represent previous censorship, or be discriminatory or imposed through indirect mechanisms - i.e. through abuse of official or private controls – and these limitations must be used only in exceptional cases.

In cases where the discourse enjoys reinforced protection, such as political discourse and discourse on matters of public interest; discourse on public employees exercising their functions or candidates exercising public offices; and discourse that expresses an essential element of personal dignity; the standards of control must be applied more strictly.

In this regard, the European Court of Human Rights has consistently held that as far as **the permissible limitations of freedom of expression** is concerned, a distinction must be made between the restrictions that are applicable when the object of expression refers to a private person, and on the other hand when it is a public person, such as a politician. The Court states that:

The limits of acceptable criticism are therefore respect for a politician, broader limits than in the case of a private party. Unlike the latter, the former inevitably and consciously submits to the rigorous scrutiny of each and every word and action by newspaper men and the public opinion, so he must show a greater degree of tolerance. Without doubt, article 10, paragraph 2 (Art.10-2) permits protection of the reputation of others – that is, all people – and this protection also includes politicians, even when they are not acting as private citizens, but in these cases the requirements of this protection have to be weighed against the interests of an open debate on political questions¹⁵.

The Inter-American Court thus considers that to foster public deliberation, it is important at the moment to analyze the legitimacy of a restriction that takes into account the fact that public employees voluntarily expose themselves to social scrutiny and that they have better conditions to respond to the acts in which they are involved¹⁶.

5. IMPOSING SANCTIONS FOR ABUSE OF RIGHT

As already mentioned, the right to freedom of thought and expression is liable to restrictions through ulterior responsibilities, under the parameters analyzed above. As a result, the exercise of the right is limited by other fundamental rights, among which the **right to honor** appears as the essential juridical reference for such a ponderation. This right is expressly protected by the Convention in the same article 13 by stipulating that the exercise of the right to freedom of thought and expression must “*assure respect for the rights or reputation of others*” (article 13.2). Then, as the right to expression not only corresponds to journalists or the media, all those who exercise the right are obliged by the Convention to guarantee respect for the rights or reputation of others, especially the right to honor.

According to this order of ideas, since the State is the guarantor of the set of fundamental rights enshrined in the Convention, it has to establish the responsibilities and sanctions that are deemed necessary.

The CIDH and the Court have repeatedly pointed out in jurisprudence that Criminal Law is the most restrictive and severe way to establish responsibilities regarding illicit conduct¹⁷.

¹⁴ 2009 Annual Report of the Special Rapporteurship for Freedom of Expression of the Inter-American Commission on Human Rights, p. 251. [Spanish version]

¹⁵ Cfr. Eur. Court H.R., Case of Dichand and others v. Austria, supra nota 91, para. 39; Eur. Court H.R., Case of Lingens v. Austria, supra nota 91, para. 42.

¹⁶ 2009 Annual Report of the Special Rapporteurship for Freedom of Expression of the Inter-American Commission on Human Rights, p. 256. [Spanish version]

¹⁷ Cfr. Ricardo Canece Case, Sutra nota 44, párr. 104, and Palmara Iribarne Case, Sutra nota 12, párr. 79.

Broad typification of crimes of calumny, injury, defamation or disobedience can contradict the principle of minimum intervention and *ultima ratio* of criminal law. In a democratic society, punitive power can only be exercised to a strictly necessary degree in order to protect the fundamental juridical assets from serious attacks that damage or endanger them. In these cases, the measure taken would be disproportionate and unnecessary. The opposite would lead to abusive exercise of the punitive power on the part of the State.

In exercising its role as guarantor, the state must opt for the least costly means of freedom of expression. In the first place, it must appeal to the right to rectification and in cases in which this is insufficient to repair the damage, it may resort to imposing civil juridical responsibilities on whoever has abused the right. In this sense it is necessary that the damage is certain and serious and that it has infringed the rights of other people or juridical assets specially protected by the Convention.

Bearing in mind the considerations formulated so far regarding due protection of freedom of thought and expression, the reasonable conciliation of the demands of protection of that right, on the one hand, and of honor on the other hand, and the principle of minimum penal intervention characteristic of a democratic society, the employment of penal measures must correspond to the need to protect fundamental juridical assets from conduct that implies serious damage to such assets and must be proportionate to the damage inflicted. The penal typification of a conduct must be clear and precise, as determined by the jurisprudence of this Tribunal in examining article 9 of the American Convention.

This topic is increasingly relevant in societies where the rights of individuals are at times affected by the factual power of the media in a context of asymmetry in which, as mentioned by the Court, the State must seek a sense of balance. In order for the State to be able to guarantee the right to honor, in a democratic society paths can be used that the administration of justice offers – including penal responsibilities – within the appropriate framework of proportionality and reasonability, and the democratic and respectful exercise of the set of human rights.

Consequently, everyone is liable to the responsibilities derived from impacting on the rights of third parties. Everyone, journalists or not, must assume their responsibilities. As for the State, it has to guarantee that all its citizens respect the rights of others by limiting any conduct that can jeopardize public guarantees.

Therefore, the right to honor must be a matter of protection. In particular, so-called “objective honor” that has to do with the value that the others attribute to the person in question, to the extent that this affects the good reputation or good fame that that person enjoys in the social environment in which he or she lives. In this sense, within the juridical framework of the application of the right to honor, freedom of thought and expression as a fundamental right neither sustains nor legitimizes manifestly injurious phrases and terms that go beyond the legitimate exercise of the right to opine or the exercise of criticism.

As to the use of penal mechanisms as sanctions on questions of general interest, or on employees or candidates to fill public or political positions, the CIDH considers that in themselves these violate article 13 of the Convention, given the non-existence of any imperative social interest that justifies it¹⁸.

Likewise, the Inter-American Commission on Human Rights observes with concern that the ambiguity of the legal suppositions compromises the principle of legality, which obliges the States to define in an express, precise and clear manner each one of the conducts that may be liable to sanction.

It should be recalled that in no case can the freedom of thought and expression be limited by invoking mere conjectures on eventual impact on order or hypothetical circumstances

¹⁸ 2009 Annual Report of the Special Rapporteurship for Freedom of Expression of the Inter-American Commission on Human Rights, p. 261 and 262. [Spanish version].

derived from subjective interpretations by the authorities in the face of acts that do not clearly present an actual risk that is certain and objective and suggests imminent grave disturbances or anarchistic violence.

6. RECOMMENDATIONS

Based on the analysis carried out in this document, and bearing in mind that the General Assembly of the OAS, at its 40th regular session, asked the Inter-American Juridical Committee to inform it on the advances made in analyzing the importance of the means of communication to be free and independent in the exercise of their journalistic activity, guided by an ethical code which by no means can be imposed by the States and is consistent with the principles of applicable international law, in order to guarantee the freedom of thought and expression of citizens, the following recommendations and proposals may be formulated:

For the effects of the analysis of the Commission, I feel that it is opportune to mention some of the recommendations that the CIDH has recently reported. Probably no other institution in the system has dealt with the topic in such depth.

For example, the Inter-American Commission on Human Rights mentions that: “the States must guarantee the utmost impartiality and due process in all the administrative and judicial procedures to demand compliance with the legislation on radio broadcasting. Above all, opening such procedures and imposing sanctions must be entrusted to impartial and independent bodies, regulated by legal norms of precise and delimited content, and ruled by the provisions of article 13 of the American Convention.”

Accordingly, all decisions regarding radio broadcasting must be submitted to the laws, Constitution and international treaties in effect, and all guarantees of due legal process strictly respected, as well as the principle of good faith and the inter-American standards that ensure the right to freedom of thought and expression for all people without discrimination. Also, to make sure that no action is motivated or directed to reward media that agree with the government’s policies or punish those that are critical or independent.

In addition, the need has been shown for the highest state instances to condemn publicly acts of violence against social communicators and media for the purpose of preventing actions that foster such crimes and prevent a climate of stigmatization being developed towards those who defend a critical line of government actions.

-To ensure that public employees abstain from making statements that create an atmosphere of intimidation that limits the right to freedom of expression. In particular, States must create a climate in which everyone can expose their ideas or opinions without fear of being persecuted, attacked or sanctioned.

-To promote incorporating the international standards on freedom of expression from the judicial instances, since these are effective tools for protecting and guaranteeing the normative framework on freedom of thought and expression in effect.

The Committee has identified that political intolerance, the lack of independence of the powers of the States before the Executive, restrictions on freedom of thought and expression and pacific protest, among others, are factors that seriously limit the prevalence of human rights.

Thus, the Special Report on the Right to Freedom of Expression has pointed out what penal or civil sanction is necessary:

-To promote annulment of the laws that enshrine disobedience, regardless of the way this is presented, given that these norms are contrary to the American Convention and restrict public debate, an essential element of democratic functioning.

-To promote changing the laws on criminal defamation so as to eliminate the use of penal processes to protect honor and reputation when information is diffused on matters of public interest, public employees or candidates to public positions.

-To incorporate in their juridical systems differentiated standards to evaluate the ultimate responsibility of whoever spreads opinions or ideas on matters of general interest or political criticism, including the standard of “real malice” and strict proportionality and reasonability of sanctions, in such a way that the processes followed by this cause do not create a silencing effect on democratic debate.

-To promote changing the laws on injury of ideas or institutions so as to eliminate the use of penal processes to inhibit free democratic debate on all matters.

Also, the Special Report recommended Member States to eliminate any norm that enables “previous censorship” on the part of any state body and also any qualification that might imply censorship of freedom of expression, such as previous requirements as to veracity, opportunity and impartiality in information.

The question that arises is how to reconcile these principles and recommendations with the mandate received to analyze, how to exercise journalistic activities in the framework of ethical conduct not imposed by the States and consistent with applicable international law, especially the norms that exist with regard to human rights?

An answer to this comes from professional journalistic deontology formed by a set of norms that rule on this activity and that in certain circumstances are felt to be obligatory. This regulatory function is carried out by law and morals, among others. One could say that this theory is based on two essential principles: social responsibility and veracity of information.

Another definition is given by José María Desantes Guanter in his book *El autocontrol de la información* (Self-control of information): “deontology, as a systematic set of minimal norms established by a certain professional group that reflects a common majority ethical conception of its members. It is like an objectivation of the various subjective ethical-professional concepts that are more or less in agreement with their social environment. To ensure that it prevails, individual ethical conceptions cannot be opposed”.

This concept arouses polemics and controversies. It is necessary that newspapermen feel the moral need to carry out work by attending to certain requirements concerning intellectual honesty beyond all reasonable suspicion; this is where analysts coincide in pointing out the personal need that appears to resort to the most unanimous ethical principles of the codes of the profession.

These codes are defined as “voluntary norms of conduct” that signal the correct path for the professionals. One of the most important values is that of professional honesty with regard to objectivity.

The International Federation of Journalists, in its Declaration of Basic Principles of 1986, underscored, among other items, respect for the truth and freedom of the press, condemnation of occult information and falsification of documents, the use of fair methods to obtain news, the obligation to rectify and deny information that turns out to be false, and professional secrecy.

However, some people claim that the problem lies in the fact that ethics is not a primary issue in the profession. What matters most are the economic interests of each means of communication, their sympathies, their privileged situation in an information-technology society, the media-wise treatment of current affairs, and the most sensitive of all the innovative, advanced forms of technology. The latter is illustrated by various authors, like Professor Wolton, who claims that “there is no distance between information and voyeurism when technical ideology predominates over the ethics of information”.

For example, in Spain the implantation of ethical codes in the media is a recent phenomenon. These codes are remarkably similar to others in place in the West, in that they regulate everything that has to do with intimacy, honor, relations with the journalistic source and the incompatibility of certain activities with the information-providing function. Nonetheless, there are significant lacunas as regards who is in charge of enforcing the codes, as well as the sanction for those who violate them.

A current example is evidenced in the agreement that the users of the service called “Twitter” must accept when they log in. The agreement reads that “Any responsibility regarding any publicly or privately disseminated content lies with the author of said content. Twitter neither supervises nor controls the content published through said “services” and is not responsible for said content. Any use or dependence of any of these contents or materials published through this service, or otherwise obtained by the user through these services, are the user’s responsibility.” Then, how can we regulate these topics in a world governed by information technology? This is a challenge with deep impacts for the adequate enforcement of the freedom of expression in the global sphere.

Other examples of international principles of professional ethics in the case of journalism have appeared within the framework of the Declaration approved by the 1983 UNESCO General Conference. This was the first document addressing the problem involving journalistic professional deontology and is undoubtedly the most important declaration on the international level.

- Duties
 1. With regard to the principle on the right of citizens to have access to truthful information, journalists have the obligation to adhere to objective reality.
 2. In relation also to the same principle, journalists have the obligation of favoring the access of citizens to information and their involvement in communication mass media. This obligation also includes the duty to correct and rectify the information and the right to respond.
 3. Journalists have the obligation to maintain a high degree of integrity. This implies that professionals shall refrain from accepting any kind of illegitimate remuneration and from promoting private interests against common well-being.
 4. Journalists must always respect the right to have private lives and the right to human dignity.
 5. Journalists have the obligation to respect intellectual property and refrain from committing any kind of plagiarism.
 6. Journalist also have the obligation to respect universal values and cultural diversity.
 7. And finally, they must refrain from promoting war and engage in promoting a new form of communication and information.
- Rights
 1. Journalists have the right to refuse working against their personal and moral convictions.
 2. Journalists have the right to keep their information sources undisclosed.
 3. They also have the right to refuse involvement in decision-making processes in the communication media they work for.

Moreover, the Council of Europe approved Resolution 1003 in July 1993 on the ethics of journalism, one of the most complete documents on this topic and perhaps the only truly binding one in view of the organ that adopted it.

- Obligations
 1. Journalists have the obligation to obtain the information they publish by legal and ethical means.
 2. The duty to inform the truth.
 3. The obligation to rectify false or erroneous information already delivered.
 4. In addition, journalists have the obligation to be completely independent when delivering information.

5. Related to this obligation, this document also details that journalists must not get involved in any kind of relationship referring to private interests, public authorities and high economic spheres.
 6. For the first time ever, journalists are required to be properly qualified for their work.
 7. Journalists must respect the right to private lives, the assumption of innocence and the rights of minors.
 8. They are also obliged to avoid promoting war. They must defend democracy, human dignity and equality among people.
 9. Journalists must also report on all matters concerned with the "*public sphere*", for the good of the citizens.
- Rights
 1. Journalists have the right to freedom of expression.
 2. They also have the freedom to be able to inform without having to submit to any kind of internal pressure.
 3. They are entitled to submit to the "conscience clause", although not to professional secrecy, because although Article 20 of the Constitution indicates that in the future an Organic Law will refer to such secrecy (although not yet referring to journalists), for the journalist this is more a right than an obligation. All this stems from the refusal by many journalist organizations, on the grounds that this would assume criminalization of professional secrecy.
 4. In addition, journalists are entitled to receive a decent salary, as well as appropriate working conditions and the right of access to the resources and necessary means to work in their profession.

The declaration of principles of the International Federation of Journalists also mentions similar rights and obligations.

- Obligations
 1. Journalists shall never obtain information through illicit methods.
 2. Journalists shall respect the truth and recognize the rights of citizens to be acquainted with information.
 3. Journalists are obliged to report only in accordance with facts of known sources.
 4. They are also obliged to refrain from suppressing information essential for citizens.
 5. They must not deliberately distort the information that they deliver.
 6. Journalists shall rectify any information which is found to be inaccurate, incomplete or detrimental.
 7. Journalists shall refrain from accepting, under any circumstances, any reward for offering a certain type of information.
 8. They will also publish information that is objective and impartial.
 9. They have to respect the rights to honor, non-discrimination and intellectual property, and promote equality.
- Rights
 1. Right to freedom of research.
 2. Right to publish true and honest information.
 3. Right to fair comment and criticism.

The background information above suggests that the IJC, in compliance with the mandate of the General Assembly, might prepare a draft Model Code by collecting the international principles and established norms of practice and embodying the ethical principles for journalism

in the member States of the Organization of American States. This Code might also provide a clear guidance that will serve as a common international basis and also a powerful inspiration for national or hemispheric codes of journalistic ethics to be promoted.

10. Topics on Private International Law

Document

CJI/doc.347/10 Seventh Inter-American Specialized Conference on Private International Law
(presented by Dr. Ana Elizabeth Villalta Vizcarra)

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.

At the 76th Regular Session of the Inter-American Juridical Committee (Lima, Peru, March 2010) the rapporteur for the topic, Dr. Ana Elizabeth Villalta, presented document CJI/doc.347/10 "Seventh Inter-American Specialized Conference on Private International Law." She began by speaking about the role that the Juridical Committee has played in codifying private international law in the past and the current developments in the fields of consumer protection and secured transactions.

In her presentation, Dr. Villalta reported on the holding of the Seventh Conference at Organization headquarters in Washington, D.C., in October 2009, at which the "OAS Model Registry Regulations under the Model Inter-American Law on Secured Transactions" were adopted. CIDIP-VII was attended by Dr. Stewart representing the CJI and by Dr. Villalta as a representative of the delegation of El Salvador.

On the topic "consumer protection," Dr. Villalta recalled the proposals presented by the United States, Canada, and Brazil, the latter under the title "Proposal of Buenos Aires." She also spoke of the efforts made at the Meetings of Experts and in the teleconferences organized by the Working Group in order to produce a final document and, ultimately, convene another conference, planned for October 2010 in Brazil. She explained that her report incorporated the new proposals presented by Canada (guide to monetary restitution), the United States (credit card), and Brazil, and the documents from the most recent discussions within the Working Group.

Since the studies carried out by the Juridical Committee on the topics for CIDIP-VII have already been placed before the Working Group and there were no further guidelines for discussions, the rapporteur proposed examining current topics in the area of private international law that could be of interest to CIDIP-VIII. She recalled that at the previous period of sessions, Dr. Fernández de Soto had proposed the topic "Situation of alternate dispute resolution methods." This period of sessions also had to determine how the Juridical Committee would collaborate with CIDIP-VIII.

After thanking the rapporteur for her report, Dr. Herdocia noted the importance of the Juridical Committee's participation in the CIDIP process, represented by one or two members at the Meetings of Experts and at all other important events.

Dr. Negro also pointed out that the process of teleconferences should conclude with a report from the Working Group for the General Assembly. He also reported that the three teleconferences held produced no concrete results. In his opinion, the three proposals were not mutually exclusive

because they addressed different aspects of the same problems; however, the countries involved have serious reservations regarding the content provided by the others. Until this situation is overcome, it will be difficult to set the date for the conference on consumer protection.

Following an exchange of opinions on the topic, the meeting reaffirmed the Committee's presence at CIDIP-related meetings, to the extent allowed by budgetary considerations, and that Dr. Villalta should continue to follow the topic and report back to the Committee.

At the fortieth regular session of the OAS General Assembly (Lima, June 2010), the Member States failed to reach consensus on the proposals related to the "Seventh Inter-American Specialized Conference on Private International Law," and so the resolution from the previous year remained in effect.

At the 77th Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, August 2010), no discussions took place on the topic.

Document CJI/doc. 347/10 presented by Dr. Villalta are transcribed below:

CJI/doc.347/10

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

(presented by Dr. Ana Elizabeth Villalta Vizcarra)

Background:

The Seventh Inter-American Specialized Conference on Private International Law (CIDIP-VII) was formally summoned by OAS General Assembly Resolution AG/RES. 1923 (XXXIII-O/03) dated June 10, 2003; then, by OAS General Assembly Resolution AG/RES. 2065 (XXX-O/05) dated June 7, 2005 and by OAS General Assembly Resolution AG/RES. 2217 (XXXVI-O/06) dated June 6, 2006, the Agenda for the Seventh Inter-American Specialized Conference on Private International Law was established, as follows: I. **Consumer Protection:** Applicable Law, Jurisdiction and Monetary Redress (Conventions and Model Laws), and II. **Secured Transactions:** Electronic Registries for Implementation of the Model Inter-American Law on Secured Transactions.

Moreover, the Permanent Council of the Organization of American States was instructed to continue its preparatory work to complete the draft text of the Instruments on Consumer Protection and Secured Transaction Registries in order for these instruments to be approved at CIDIP-VII and, once the preparatory work has been completed, set the date for holding the Seventh Inter-American Specialized Conference on Private International Law and present a report on the fulfillment of this resolution at the next OAS General Assembly meeting.

In said resolution, it was further resolved to instruct the Permanent Council of the Organization of American States to select the host country for CIDIP-VII and request the Inter-American Juridical Committee to present its comments and observations in relation to the Final Agenda items.

Concerning Consumer Protection, proposals have been received from Brazil, Canada and the United States on the Inter-American Convention on Applicable Law (Brazil); the Model Law on Jurisdiction and Applicable Law (Canada), and a Legislative Guide on Monetary Redress (United States).

Regarding Electronic Registries, a proposal has been jointly presented by the delegations of Canada, United States and Mexico on the Model Registry Regulations under the Model Inter-American Law on Secured Transactions.

In turn, this Agenda strengthens the CIDIP process as the principal component of the Organization of American States for the development and harmonization of private international law in the western hemisphere.

a) Secured Transactions

The draft Model Registry Regulations under the Model Inter-American Law on Secured Transactions was presented to the Committee on Juridical and Political Affairs of the OAS Permanent Council on March 5, 2009, whereupon a consultation process was conducted until April 20, 2009. All Member States of the Organization of American States were asked to submit their comments as part of said process.

The Chair of the Committee on Juridical and Political Affairs summoned three work meetings between March and May 2009; as a result of these meetings, the Draft Model Regulations were approved by said Committee on May 12, 2009 and sent to the Permanent Council of the Organization of American States, which approved the Draft Model Regulations on May 29, 2009.

By OAS Permanent Council Resolution CP/RES. 958 (1714/09) adopted at the session held on September 16, 2009, it was resolved, with regard to Secured Transactions, to approve the Model Registry Regulations under the Model Inter-American Law on Secured Transactions presented by the Member States; said Council, at its regular meeting held on May 22, 2009, forwarded to the Committee on Administrative and Budgetary Affairs (CAAP) a request to consider the funding of CIDIP-VII on the secured transaction item; and said Committee, at its regular meeting held on August 11, 2009, approved the funding required to hold this Conference in accordance with the provisions set forth in OAS General Assembly Resolution AG/RES. 2202 (XXXVI-O/06).

In this resolution, the Permanent Council of the Organization of American States resolved: to set October 7 to 9, 2009 as the date to hold the Seventh Inter-American Specialized Conference on Private International Law (CIDIP-VII) regarding Secured Transactions, and invite the Member States of the Organization that are interested in participating in this Conference.

In OAS Permanent Council Resolution CP/RES. 959 (1714/09) dated September 16, 2009, it was resolved to approve the agenda for the Seventh Inter-American Specialized Conference on Private International Law (CIDIP-VII) on Secured Transactions: “**Secured Transactions: Electronic Registries for Implementation of the Model Inter-American Law on Secured Transactions. Consideration of the Model Registry Regulations under the Model Inter-American Law on Secured Transactions**”.

Moreover, in said resolution it was further resolved to approve the agenda and set October 7 to 9, 2009 as the date to hold the Seventh Inter-American Specialized Conference on Private International Law (CIDIP-VII) on Secured Transactions, and invite the governments of the Member States of the Organization.

Accordingly, the Permanent Council of the Organization of American States summoned the Seventh Inter-American Specialized Conference on Private International Law (CIDIP-VII) on **Secured Transactions: Electronic Registries for Implementation of the Model Inter-American Law**, to be held from October 7 to 9, 2009, at OAS headquarters, in Washington, D.C.

The working document to be used at the Conference was the draft jointly prepared by the delegations of Canada, United States, and Mexico, regarding the “Model Registry Regulations under the Model Inter -American Law on Secured Transactions”.

In accordance with the provisions set forth in the aforesaid resolutions, the meeting was held from October 7 to 9, 2009 at OAS headquarters, Simón Bolívar Room, in Washington, D.C. At said meeting, the Delegates of the Member States which attended the meeting discussed the Draft Model Regulations, which were approved on October 9, 2009. The Final Act of the Conference was then signed by the Heads of Delegation of the Member States which attended the meeting, thereby resulting in the adoption of the **“OAS Model Registry Regulations under the Model Inter-American Law on Secured Transactions”**.

b) Consumer protection

As far as **“Consumer Protection”** is concerned, the General Assembly of the Organization of American States, by Resolution AG/RES. 2527 (XXXIX-O/09) dated June 3, 2009, instructed the Permanent Council of the Organization of American States to set up a working group made up of government officials and representatives of interested Member States with a view to completing the draft final documents on consumer protection and present a report by January 31, 2010 regarding the progress of negotiations and, once the Experts complete their work, set the dates for CIDIP-VII on the topic of Consumer Protection. The Government of Brazil offered to host CIDIP-VII on consumer protection. If the Permanent Council does not set the date for CIDIP-VII on Consumer Protection, then the Working Group will continue its work and submit a new progress report by May 15, 2010.

The First Meeting of Experts on Consumer Protection, as part of the Preparatory Work for the Seventh Inter-American Specialized Conference on Private International Law (CIDIP-VII), was carried out in the city of Porto Alegre, Rio Grande do Sul, Brazil, from December 2 to 4, 2006, where the Instruments proposed by Brazil, United States and Canada were analyzed and the Delegations were able to reach consensus on substantial matters, agreeing to continue working to resolve pending matters. The Report on the meeting held in Porto Alegre was adopted at this meeting.

On January 18, 2007, at OAS Headquarters in Washington, D.C., the Delegations of Brazil, Canada and the United States attended the meeting summoned by the Committee on Juridical and Political Affairs of the Permanent Council of the Organization of American States to present their respective reports.

By OAS Permanent Council Resolution CP/RES. 958 (1714/09) dated September 16, 2009, it was considered that with regard to Consumer Protection, the General Assembly of the Organization of American States, by resolution AG/RES. 2527 (XXXIX-O/09), had instructed the Permanent Council to set up a Working Group to complete the final documents on consumer protection, present a progress report by January 31, 2010, and set the dates for CIDIP-VII on the topic of Consumer Protection, once the experts complete their work. Said resolution further makes reference to the offer made by the Government of Brazil to host CIDIP-VII on the topic of consumer protection.

In compliance with OAS General Assembly Resolution AG/RES. 2527 (XXXIX-O/09) dated June 3, 2009, the Working Group entrusted with the task of preparing the final draft documents on Consumer Protection held the First Teleconference where the simplified version of the Final Brazilian Proposal was discussed. This proposal has now become a joint proposal of the governments of Brazil, Argentina and Paraguay, known as the “Buenos Aires Proposal”. The aforesaid teleconference was carried out on October 27, 2009, with the attendance of the Delegates of Brazil, Canada, Costa Rica, El Salvador, Mexico (chair), United States, Paraguay, Peru, and officers of the Secretariat for Legal Affairs of the OAS General Secretariat.

The Working Group held its Second Teleconference on January 21, 2010, at OAS headquarters, in Washington, D.C., where Canada’s proposal for CIDIP-VII was discussed and a debate was conducted by all participating Delegations. The Delegations agreed to hold another Teleconference to present the US Delegation Proposal and then hold a debate among participating delegations.

The Teleconference to discuss the US Proposal was held on February 25th at OAS headquarters, at 1 p.m. (local time in Washington, D.C.), where the Draft Legislative Guide on Consumer Dispute Resolution and Redress for Consumers, the Draft Model Law on Small Claims, and the Draft Model Law on Government Redress for Consumers were analyzed. No major changes were made by the US Delegation. According to the resolutions adopted at the Porto Alegre meeting held in December 2006, the US Delegation informed participating delegates that the Model Rules for Electronic Resolution of Cross-Border E-Commerce Consumer Disputes had been reviewed in order to include a Model Law or Cooperative Framework, and that an Exhibit B on *Alternate Dispute Resolution for Consumer Payment Card Claims had been added*.

The US Delegation also presented for discussion a document entitled “Building a Practical Framework for Consumer Protection”, which was then discussed by participating delegates.

Once all Teleconferences have been held to discuss the Brazilian Proposal, now called “Buenos Aires Proposal”, and the proposals presented by Canada and the United States, the Informal Working Group, along with OAS officers and representatives, in accordance with the provisions set forth in the above-mentioned Resolutions, will prepare the final documents on Consumer Protection, which must then be submitted to the Member States for approval. It has also been agreed that Brazil will host the Seventh Inter-American Specialized Conference on Private International Law (CIDIP-VII) on Consumer Protection.

By OAS General Assembly Resolution AG/RES. 2527 (XXXIX-O/09) dated June 3, 2009, the Permanent Council of the Organization of American States was instructed to allocate funds from the Regular Fund program-budget to cover the expenses related to the preparatory work to be carried out in relation to Consumer Protection, as established in this Resolution.

It was further resolved therein that the Permanent Council would inform the OAS General Assembly at its Fortieth Regular Session of the implementation of this resolution, the implementation of which will be subject to the availability of funds in the program-budget of the Organization and other resources.

Attached is a simplified version of both the Final Brazilian Proposal, known as “Buenos Aires Proposal”, as well as the basic aspects of the Canadian and US Proposals.¹ All these proposals, which have already been discussed at the aforesaid Teleconferences, will be jointly analyzed by the Delegates at the Working Group in order to obtain the final documents and thus summon CIDIP-VII on Consumer Protection in October 2010.

In view that the Seventh Inter-American Specialized Conference on Private International Law (CIDIP-VII) on Secured Transactions has already been held, and further in view that CIDIP-VII should now be summoned to address the topic of Consumer Protection, it may be convenient to have the Inter-American Juridical Committee propose the topics to be discussed at the next CIDIP. At the 75th regular session held by the Inter-American Juridical Committee in Rio de Janeiro, Brazil, in August 2009, Dr. Guillermo Fernández de Soto proposed discussing the “Current Status of Alternative Dispute Resolution Methods”. At the 76th regular session it might be necessary to discuss other topical issues related to Private International Law. In this way, the Inter-American Juridical Committee may contribute to the preparatory work carried out by the Eighth Inter-American Specialized Conference on Private International Law, CIDIP-VIII.

¹ The three proposals are available at the Secretariat of the Inter-American Juridical Committee.

NEW TOPICS

1. Participatory democracy and citizen participation

At the fortieth regular session of the OAS General Assembly (Lima, June 2010), the Inter-American Juridical Committee was asked to conduct a legal study into the mechanisms for participatory democracy and citizen participation provided for in the laws of some of the region's countries, resolution AG/RES. 2611 (XL-O/10).

At the 77th Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, August 2010), the Chairman recalled the mandate set out in the resolution cited in the previous paragraph. In his opinion, this mandate should be interpreted in restrictive terms and not be included in the Committee's treatment of the topics related to strengthening democracy, for which Dr. Hubert is the rapporteur.

An intense debate then took place on the leading-edge mechanisms adopted by the constitutions and laws of the nations of the Americas to ensure citizen participation; these have gone beyond the formal constraints of law to cover such additional topics as the socially excluded, indigenous populations, ethnic minorities, gender equality, etc. Mention was also made of growing public participation in matters of consumer protection and administrative decentralization, which was enabling municipalities to participate more actively in the democratic process.

After offering an overview of citizen participation practices in his country, Dr. Herdocia seconded the Chairman's opinion that the topic be dealt with separately, and that the Juridical Committee should set about preparing a study on citizen participation in the democratic model. He also reminded the meeting that both the OAS Charter and the Inter-American Democratic Charter state that participatory democracy is a legal right in the Americas.

Dr. Baena Soares said that the Committee's study should essentially offer a critical assessment of the topic and not be restricted to identifying the different forms of citizen participation. At the same time, since the General Assembly mandate refers to "some" countries, he said it would be necessary to redefine that criterion.

Dr. Castillo said that although participatory democracy had been extensively studied, there had been little analysis of the practical implementation of mechanisms for citizen participation. He proposed studying the guarantees that enable that participation to take place. He added that he thought in addition to forms of electoral participation, equal weight should be given to some basic guidelines for organized participation, for example, in preparing the budget or through the involvement of groups such as bar associations, which in one way or another represent organized citizenship.

Dr. Stewart noted that the mandate could lead to discussions of a political nature, with ideological considerations hindering its analysis. He added that the common-law countries had citizen participation practices, such as consultations, that did not necessarily derive from legislation, and that the Committee's study should not be limited solely to laws in the formal sense, but should also include other forms of participation.

Dr. Villalta said that the General Assembly's mandate referred to the countries of the Americas. In her opinion, the domestic laws of the OAS countries should be compiled and, depending on what was received, a report on the topic could be prepared.

Dr. Novak proposed that the members collect that information in their home countries: not just their laws, but also published papers on the topic.

The Chairman gave a summary of the opinions that had been shared and noted that consensus existed on the following points: 1) the topic should be addressed using a restrictive interpretation; 2) this topic should be kept separate from the topic of strengthening democracy; 3) the aim should not be to discuss participatory democracy, but rather to identify citizen participation mechanisms for making representative democracy more effective.

Dr. Negro noted the willingness of the Secretariat for Legal Affairs to keep in contact with the Political Secretariat, in order to convey any studies prepared by that office.

The Chairman asked the Secretariat to prepare a note to be sent to the delegations of the OAS Member States, requesting the information necessary for progressing with the topic. Dr. Fabián Novak was elected to serve as the rapporteur for this topic.

2. Peace, Security, and Cooperation

At the fortieth regular session of the OAS General Assembly (Lima, June 2010), the Inter-American Juridical Committee was asked to conduct, within its existing resources, a comparative analysis of the principal legal instruments of the inter-American system related to peace, security, and cooperation, resolution AG/RES. 2611 (XL-O/10).

At the 77th Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, August 2010), Dr. Negro clarified the mandate established by resolution AG/RES. 2611 (XL-O/10), explaining that the original proposal was very broad and covered all kinds of legal instruments, including resolutions from other organs of the inter-American system, and that for that reason the word “principal” had been used, to restrict the treatment of the topic to the treaties in force. Regarding the reference to “cooperation,” he noted that the concept was related to that of peace and security.

Dr. Novak also explained that the mandate had arisen from a proposal made by the Peruvian foreign ministry, on account of its concern regarding the commitments entered into at the regional level, both through resolutions of the inter-American system and through treaties. In his opinion, the Committee’s work should define what progress had taken place, what the limits were at the inter-American level, and what possible recommendations could be formulated in order to attain greater progress with respect to peace and security in the region.

Dr. Hubert spoke of new concepts of security: not solely restricted to the use of weapons or activities related to war, but also, and primarily, covering topics related to human security and poverty.

Dr. Herdocia noted that starting with an analysis of the treaties in force within the regulatory framework of the OAS, consideration should be given to the concept of democratic security, since broadened to the topic of multidimensional security, as set out in the 2003 Declaration of Mexico. That conceptual vision, going further than the treaties, is set out in OAS declarations and in documents adopted by the Member States; it is, therefore, a conceptual world, separate from the normative world of the OAS.

The Chairman said that the topic was indeed of great importance, since the concept of traditional security had been reassessed and the threats facing the security system are different from those that gave rise to the inter-American legal instruments. In other words, security is no longer seen as a merely legal or territorial issue: the concept has been expanded to include other ideas, such as human security and multidimensional security. He recalled the various revisions of the OAS basic instruments, the intense debates regarding the TIAR that took place within the Permanent Council, which ultimately did not attain the results expected.

Dr. Villalta asked what approach should be adopted toward cooperation among the states for the maintenance of peace and security, since in the OAS documents both aspects appear as related

concepts. In this regard, she recalled the actions of the Contadora Group. She concluded by asking what the goals of the requested analysis would be.

Dr. Negro explained that the request had arisen from a Peruvian proposal, with Venezuela's counterproposal then being made within the CAJP. Later, the delegations discussed the two proposals in the General Committee of the General Assembly. He added that perhaps it would be pertinent to clarify the content of the mandate in the light of the Declaration of Lima, which could serve as a way for making progress with the Juridical Committee's treatment of the topic. Dr. Toro reported that the Secretariat of Political Affairs had prepared a document containing all the instruments adopted on these questions, and that he would convey a copy of it to the members of the Juridical Committee.

It was decided to return to the topic at a later date. Finally, Dr. Mauricio Herdocia was chosen to serve as rapporteur.

3. Simplified stock companies (SAS)

At the 77th Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, August 2010), the Chairman of the Committee gave a presentation on a project intended to simplify the operations of commercial companies. Noting the strictness of the applicable regulations, the aim is to increase the flexibility of the administration and capital of such companies to make them practical and useful. In connection with this, a group of Colombian lawyers had presented a "Draft model law on simplified stock companies" and had undertaken to give a personal presentation of the rationale behind the draft model law, for the Committee to conduct an analysis of it.

The members agreed to receive the group, which would allow the Committee contact with a reality different from that of government spheres. Since the topic is one of private international law, some members requested that it be included under the private international law topics. Some also noted that a study of the proposal could represent a significant contribution to the field by the Juridical Committee.

CONCLUDED TOPICS

During the period covered by this report, the Committee concluded two mandates: Strengthening the Consultative Function of the Inter-American Juridical Committee, and Draft Inter-American Convention against Racism and All Forms of Discrimination and Intolerance.

1. Strengthening the consultative function of the Inter-American Juridical Committee

Document

CJI/doc.340/09 rev.1 Strengthening the consultative function of the Inter-American Juridical Committee
(presented by Dr. Fabián Novak Talavera)

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.

At the 76th Regular Session of the Inter-American Juridical Committee (Lima, Peru, March 2010), the rapporteur for the topic, Dr. Fabián Novak, set out the background information and spoke of the preliminary report on the issue presented at the 75th period of sessions (document CJI/doc.327/09), which offers a detailed and systematic analysis of the areas of competence and powers of the Juridical Committee and of the conceptual differences between these terms in the guiding instruments: the OAS Charter and the Inter-American Juridical Committee’s Statute and Rules of Procedure. The Juridical Committee has five main areas of competence, including two which are covered by this rapporteurship: replying to consultations and conducting studies and preparatory work. Statistics indicate that little use is made of the CJI’s consultative function by the Organization’s political bodies: in recent years, only one consultation – in the case of Álvarez Machain – has been received. In contrast, its power to produce studies and preparatory work has been used much more extensively and, mostly, at the initiative of the members themselves. In his document, the rapporteur identified the possible causes that might explain the low or nonexistent frequency with which the Organization refers

consultations to the Committee and, finally, he offered five recommendations and proposals, which were discussed by the members.

The report presented by the rapporteur at this period of sessions, document CJI/doc.340/09, collects the suggestions offered by the members at earlier sessions, such as: elimination of the calendar of sessions (the proposed change would not have a great impact within the Organization); elimination of competence for integration; greater clarity in mandates; establishment of mechanisms to publicize and to follow-up on the CJI's work; more active participation by CJI members at OAS meetings.

The Chairman congratulated Dr. Novak on his solid report, which contained a very complete overview and specific recommendations for dealing with the topic; his comments were echoed by the other members.

Dr. Baena Soares made reference to Chapter 5: Recommendations and Proposals, saying he supported items (a) to (g). However, he suggested deleting proposal (h), since he thought it was unlikely that the Juridical Committee could establish a rapid consultation mechanism in the terms suggested. He was in favor of a more general wording. Regarding the failure of the Member States to respond to questionnaires sent out by the Committee with the aim of clarifying the topics assigned to it, he said that "no reply" was, of course, a political response. As a result, the Committee should continue in accordance with the guidance it sets itself for dealing with a particular issue.

Dr. Herdocia proposed rewording item (h), but leaving the possibility of using the computer-based mechanism in more general terms. He offered a second suggestion in the wording of certain paragraphs, to allow a systematic interpretation of the instruments that define the Committee's areas of competence.

Dr. Hubert spoke of statistics showing the prevailing attitude toward the Committee, whereby it is only asked for its opinion on drafts under discussion and not on issues that warrant a swift reply. In his view, the Committee has become a group that produces long-term studies, with its consultative competence ignored. The problem at hand was how the CJI could resolve that situation. He proposed the creation of a group to discuss the strategies that could be adopted. He emphasized the matter of unclear mandates and the need to consult with the Secretariat for Legal Affairs to clarify them.

Dr. Novak recalled the Chairman's words at the previous session on direct access by the Secretary General to the Secretariat for Legal Affairs for urgent consultations, noting the close relationship and trust that assure certainty regarding the final result of the consultation, whereas referring a query to a collegiate body of 11 members from different countries, with different ideologies, would produce an unknown result. Secondly, the time taken for decisions to be adopted is immediate, whereas if the consultation was referred to the Committee, it would take longer to receive a reply. He remarked that he chose not to address this issue in the report, but that it was a tacit fact.

In turn, Dr. Villalta supported keeping item (h), since the Committee's two regular sessions did not allow for swift and timely work to be produced. Thus, the alternative offered by item (h) would overcome the need for the members to gather together, and would allow queries to be dealt with swiftly through the use of computer-based technology.

Dr. Stewart said that in his view, the problem was not in the differences in the definitions of areas of competence or powers, although that was an important element. The problem lay in the Committee's working methods, which, he thought, must be improved. Opinions are requested when deemed useful, and perhaps the organs of the OAS are unaware that the Committee can provide them with legal consultations. Second, he suggested that the Juridical Committee should improve its own marketing; in other words, show the Organization that the Committee can present high-quality legal opinions within short deadlines. He also said he shared Dr. Villalta's views on the use of electronic

channels to make progress with the Committee's work. In light of the suggestion made by the rapporteur in item (c), he proposed conducting an investigation, in conjunction with the Secretariat for Legal Affairs, to identify priority areas or topics of relevance to the Member States. Finally, he agreed with the recommendations set out in items (c) and (d) and asked the rapporteur to clarify the contents of paragraph (f). In closing, he spoke of the steps he had taken to publicize the Committee's opinion on the Democratic Charter through the inclusion of Lelia Mooney's article in *International Legal Materials*, which had already been distributed to the members.

Dr. Novak referred to items (e) and (f), which were based on his professional experiences at the Catholic University, which has an active network of inter-university agreements. He spoke of an agreement signed with Rosario University that had not prospered, in that the University receives no reports from Committee, and the Committee is not informed of the academic activities the University carries out. At the same time, the aim is to involve the members of the CJI in international conferences, which can be pursued from within the Secretariat, in conjunction with the members. Moreover, item (f) was intended to cover the delay that the Juridical Committee needs to prepare a study. Some topics are prolonged indefinitely without a date for their conclusion, and the proposal involves adopting a calendar so that topics do not remain open.

Dr. Negro offered a series of comments on the best way to carry out the mandates given to the Secretariat. Regarding item (b) of the recommendations, dealing with greater dissemination of the possibilities for collaboration offered by the Committee, he suggested that the covering note of Dr. Novak's report be distributed to the other organs. On item (c), dealing with a more active participation by the Committee's members, he noted that that had been the practice during the current year and the previous one, and that it had been successful and should continue. Regarding Dr. Hubert's remarks, he stated that the Secretariat, along with the Missions, made great efforts to ensure that clear, priority mandates were adopted. However, the Secretariat was not able to influence the organs' decisions, which involve a political component. In light of this, he thought that the Juridical Committee should give a firm reply to the General Assembly regarding the general nature of the topics and, more importantly, should make it known that the Committee can provide significant responses, as does the Inter-American Court, as clearly illustrated by the Opinion on Democracy and the Resolution on the European Immigration Directive. He thus emphasized that although the presentation of the Report fulfills the necessary interaction between the organs, the documents with the greatest impact are the individual reports. He asked the meeting about the advisability of releasing the individual reports immediately, or waiting for their publication in the Annual Report.

At Dr. Castillo's suggestion, it was agreed to set up a working group, comprising Drs. Stewart, Baena Soares, Castillo, and Negro, in order to design the strategy for publicizing the possibilities offered by the Juridical Committee's consultative function and to promote item (h) in the rapporteur's report. The next period of sessions would hear a report on the impact of these outreach efforts.

The Chairman summarized the discussion that had taken place on the issue and proposed organizing a kind of "spiritual retreat" to facilitate reflection on the CJI's values, principles, and procedures, with a view to determining its future tasks. He also suggested that the Juridical Committee, taking advantage of the transition within the OAS, should pursue and strategically determine what best suits the Organization. The Chairman undertook to seek out resources for this purpose and urged the other members to work in that direction. He also asked the Secretariat to submit a budget to cover the cost of an activity of this kind.

Finally, Dr. Novak said he would submit a revised version of his report on Thursday, March 18. The revised version of the report, document CJI/doc.340/09 rev. 1, includes the comments made on the

format as well as those addressing substantive issues. It also incorporates the proposal on the use of electronic media made by Dr. Baena Soares.

The Chairman proposed approving the document and conveying it to the Council and, additionally, he said he would include it in his verbal report to the Permanent Council the following month.

The rapporteur's document was sent to the Permanent Council by the Chairman in March 2010, and it was distributed to the Member States on April 8 as document CP/INF.6028/10.

The following paragraphs transcribe the approved document, titled "Strengthening the Consultative Function of the Inter-American Juridical Committee" (CJI/doc.340/09 rev.1).

CJI/doc.340/09 rev. 1

**STRENGTHENING THE CONSULTATIVE FUNCTION
OF THE INTER-AMERICAN JURIDICAL COMMITTEE**

(presented by Dr. Fabián Novak Talavera)

1. DEFINING THE FUNCTIONS AND/OR ATTRIBUTIONS OF THE INTER-AMERICAN JURIDICAL COMMITTEE

1.1 Applicable normative framework

The functions and/or attributions of the Inter-American Juridical Committee of the OAS are regulated by three different juridical instruments: the Charter of the OAS, the Statutes and the Rules of Procedure of the Committee.

The provisions regarding the functions of the Committee contained in these three instruments follow a different normative hierarchy, the first being an international treaty with foundational characteristics, the second contained in successive resolutions adopted by the General Assembly of the OAS,¹ and the third adopted and successively modified by resolutions of the Committee itself.²

Bearing this in mind, let us see which functions are granted to the Inter-American Juridical Committee in these three instruments.

1.2 Functions of the Inter-American Juridical Committee

A full, joint and systematic reading of the three instruments mentioned above³ allows one to conclude that the Inter-American Juridical Committee of the OAS has five main functions or attributions:

¹ The Statutes were adopted by Resolution of the General Assembly of the OAS AG/RES. 89 (II-O/72) at its second regular session held in Washington D.C. on 11-21 April 1972. The Statutes were later changed by resolution AG/RES. 885 (XVII-O/87) adopted at the seventeenth regular session of the General Assembly held in Washington D.C. in November 1987, and by resolution AG/RES. 2282 (XXXVII-O/07) adopted at the thirty-seventh regular session of the General Assembly held in Panamá in June 2007.

² The Committee adopted its first Rules of Procedure on 15 August 1949. Later on it adopted a new Rules of Procedure in the regular session held on 25 July to 23 August 1972, with further amendments made regular sessions held in January-February 1976, August 1986, January-February 1987 and July-August 1991.

³ With regard to this point, it is fundamental to apply the Principle of Interpretation of the treaties denominated *Del Contexto*, according to which one should analyze "the set of the

a. To provide consulting (that is, to lend advisory assistance) on juridical matters of an international character as requested by the bodies of the OAS (a function enshrined in article 99 of the Charter, in article 12 paragraph a) of the Statutes, and in article 5 paragraph a) of the Rules of Procedure).

b. To carry out studies and preparatory work on juridical matters of an international character as assigned by the General Assembly, the Meeting of Consultation of Ministers of Foreign Affairs or the Councils of the Organization (a function enshrined in article 100 of the Charter, in article 12 paragraph b) of the Statutes, and in article 5 paragraph b) of the Rules of Procedure).

c. To carry out on its own initiative studies and preparatory work that it considers appropriate (a function enshrined in article 100 of the Charter, in article 12 paragraph c) of the Statutes, and in article 6 paragraph a) of the Rules of Procedure).⁴

d. To suggest holding specialized conferences and meetings on juridical topics of an international character (a function enshrined in article 100 of the Charter, in article 12 paragraph d) of the Statutes, and in article 6 paragraph b) of the Rules of Procedure).⁵

e. To establish relations for cooperation with national and international entities dedicated to the development or codification of International Law or to the study, research, teaching or diffusion of juridical matters of international interest (a function enshrined in article 103 of the Charter, in article 12 paragraph e) of the Statutes and in article 7 of the Rules of Procedure).⁶

In addition, the Charter of the OAS and the Rules of Procedure of the Inter-American Juridical Committee mention another two functions, which do not appear in the Chapter entitled "Functions and Powers" in the Statutes. Nevertheless, this instrument does refer to them in article 3 when it mentions the "purposes" of the Committee, and indirectly in article 33 (Secretariat) where it points to the procedure for dealing with the opinions of the Committee within the Organization. These additional functions are:

international treaty or instrument in question, each of its parts and all of them in relation to each other. The context of the treaty can also be derived from other instruments different from the treaty itself, such as the Resolutions dictated" on said text. In this respect, see DE LA GUARDIA, Ernesto. **Derecho de los Tratados Internacionales**. Buenos Aires: Ábaco de Rodolfo De Palma, 1997, p. 211; YASSEEN, Mustafá. *L'interprétation des traités d'après la Convention de Vienne sur le droit des traits*. RCADI, 1976-III, t. 151, p. 1-114; NOVAK, Fabián; GARCÍA-CORROCHANO, Luis. **Derecho Internacional Público**. t. I: Introducción y Fuentes. Lima: Instituto de Estudios Internacionales (IDEI) de la Pontificia Universidad Católica del Perú, 2000, p. 209.

⁴ Note in this case that although the Rules of Procedure do not include this function in article 5 and consequently do not qualify it as a "principal attribution", it does establish in article 6 that, just as in article 5, it is contained in title III denominated "Attributions".

⁵ In relation to this function, only the Statutes state that the suggestion can be made to the General Assembly or the Councils of the OAS, which translates the consensus reached by the corresponding Working Group, as referred to by the Rapporteur of Subcommittee I of the Special Committee of Panamá. See COMITÉ JURÍDICO INTERAMERICANO. **Proyecto de Estatuto del Comité Jurídico Interamericano**. Rio de Janeiro, 26 de marzo de 1971, p. 275.

⁶ This is the case, for example, of the United Nations International Law Commission, UNITAR (United Nations Institute for Training and Research), UNCITRAL (United Nations Commission on International Trade Law), UNIDROIT (International Institute for the Unification of Private Law), IDI (Institut de Droit International), among others.

f. To prepare draft treaties or draw up opinions on matters of regional interest that refer to the progressive development of International Law and its codification (a function enshrined in article 99 of the Charter and in article 5 paragraph d) of the Rules of Procedure).⁷

g. To study the juridical problems related to the integration of Member States in developing the economic, social and educational, scientific and cultural fields, as well as the possibility of standardizing their legislations wherever appropriate (a function enshrined in article 99 of the Charter and in article 5 paragraph e) of the Rules of Procedure).⁸

One may conclude from the above that although the functions or attributions of the Inter-American Juridical Committee are quite broad and diverse, certain difficulties do present themselves as regards determining their precise scope.

One difficulty springs from the fact that the Charter of the OAS, as well as the Rules of Procedure of the Inter-American Juridical Committee, do not distinguish between “purposes” and “functions”, assuming both to be one and the same concept. However, as is known, the “purpose” of a body or entity is the purpose or end for which it was created,⁹ whereas the “function” is rather the attribution that is granted to that entity or body to accomplish the ends for which it was created.¹⁰ Notwithstanding the clear difference between these two concepts, both juridical instruments seem to embrace within the “functions” of the Committee both those included under the title “purposes” and those properly denominated “attributions”.

The Inter-American Juridical Committee itself called attention to this situation in May 1949,¹¹ with regard to the Draft Statutes of the Inter-American Council of Jurisconsults. On that occasion the Juridical Committee saw quite clearly the difference between “purposes” and “functions”, the latter being understood as the “juridical capacity to perform certain functions and not others, or the juridically delimited field of action of such functions”.¹² Accordingly, it was seen as a “mistake of the Draft to designate as functions (competences) of the Council of Jurisconsults what in fact were purposes”; nonetheless, it was understood that the “purposes”

⁷ According to article 3, paragraph b) of the Rules of Procedure, this function can be exercised by own initiative or requested by the bodies mentioned in article 100 of the Charter of the OAS.

⁸ According to article 3, paragraph c) of the Rules of Procedure, this function can be exercised by own initiative or requested by the bodies mentioned in article 100 of the Charter of the OAS.

⁹ REAL ACADEMIA ESPAÑOLA. **Diccionario de la Lengua Española**. Madrid, 22. ed., tomo 5, 2001, p. 718. Here we should apply the Principle of the Ordinary and Natural Sense of Terms, according to which the provisions of a Treaty must be interpreted in accordance with its usual rather than its technical sense. In this respect, see EHRLICH, Ludwik. “L’interprétation des Traités”. In: RCADI, 1928-III, tomo 24, p. 107. Also CORTE INTERNACIONAL DE JUSTICIA. **Opinión Consultiva sobre Competencia de la Asamblea General para la Admisión sobre un Estado en las Naciones Unidas**. Reports, 1950, p. 8.

¹⁰ REAL ACADEMIA ESPAÑOLA. *Ob. cit.*, t. 3, p. 408.

¹¹ Here should be applied the Principle of Interpretation of the treaties known as “On Preparatory Work”, according to which one looks for the desire or intention of the parties by investigating the history of how the text was elaborated. Preparatory work is the name given to the set of instruments, minutes, declarations or debates in which are registered the various antecedents and works of a conference, congress, convention or treaty. See LAUTERPACHT, Hersch. *Les travaux préparatoires et l’interprétation des traits*. RCADI. 1934-I, t. 48, p. 785-786; CORTE PERMANENTE DE JUSTICIA INTERNACIONAL. **Opinión Consultiva sobre la interpretación de la Convención de 1919 relativa al trabajo nocturno de mujeres**, Serie A/B, 1932, n. 50, p. 38; **Opinión Consultiva sobre la jurisdicción de la Comisión Europea sobre el Danubio**, Serie B, 1927, n. 14, p. 28.

¹² COMITÉ JURÍDICO INTERAMERICANO. **Observaciones al Proyecto de Estatuto del Consejo Interamericano de Jurisconsultos, formulado por la Comisión del Consejo sobre los Órganos del Consejo y sus Estatutos**. Rio de Janeiro, 30 de mayo de 1949, p. 10-11.

defined for the Council (“to serve as an advisory body on juridical matters”, “to promote the development of international law”, “to study the possibility of standardizing legislations”), were in fact so concrete that they should be understood as true “functions”.¹³ Furthermore, the Juridical Committee concluded its analysis by stating that “so far, no-one has thought that it is a question of purposes”.¹⁴ Regrettably, despite the efforts made by some members of the Committee to distinguish these concepts,¹⁵ their use without distinction would persist in the successive Statutes and Rules of Procedure of the Inter-American Juridical Committee, the interpretation always being that when such instruments refer to the “purposes” of this consultative body, what is actually being referred to are clearly defined functions and/or attributions.

A second difficulty crops up when we note that the attributions of the Juridical Committee referenced in these three instruments are not the same: the Statutes mention five competences, the Rules of Procedure seven (also specifying that five of these are “principal”), and the Charter also seven, although it actually includes “purposes” (article 99) and “attributions” (articles 100 and 103).

All of this enables us to make an initial recommendation, namely that any future amendment to the Charter of the OAS, the Statutes and/or the Rules of Procedure should take into account the above observations so as to ensure perfect harmony between these three texts and in this way expressly define as functions or attributions of the Committee those functions that today appear under the title of “purposes”. In the meantime, and notwithstanding the above-mentioned difficulties, we believe that the attributions of the Committee detailed above can be established based on a review of the preparatory work that gave rise to the Statutes and Rules of Procedure of the Committee, as well as a joint and systematic reading of these three instruments.

With the functions and/or attributions of the Inter-American Juridical Committee now defined, let us proceed to establish which of these functions are contained in the mandate of this Rapporteur.

2. SCOPE OF THE MANDATE GRANTED BY THE JURIDICAL COMMITTEE TO THE RAPPORTEUR

At its 74th regular session held in Bogotá, Colombia, the Inter-American Juridical Committee decided to include in its working agenda the topic “Strengthening the Consultative Function of the Inter-American Juridical Committee”, and assigned Dr. Fabián Novak to develop the topic. However, despite the broad discussion within the Committee in respect to the scope of this report, some difficulty was experienced in reaching an agreement, because of the

¹³ *Ibid.*, p. 16. In another aside, the Committee stated: “[...] the ‘purposes’ that article 6 of the Charter assigns to the Inter-American Council of Jurisconsults are in fact ‘functions’”.

¹⁴ *Idem.*

¹⁵ This is the case of Caicedo Castilla (session of 11 March 1971) and Américo Pablo Ricaldoni, then member of the Inter-American Juridical Committee. The latter, in his Draft Rules of Procedure of 1972, declared: “The Statutes that this Draft proposes to regulate uses various expressions, of different content, that refer to the duties of the Committee as a body. These are the words ‘ends’, ‘purpose’, ‘attributions’ and ‘functions’. These items have been given a different meaning both in doctrine and in comparative legislation, which makes it necessary to explain the precise meaning that the Draft gives them. For the rapporteur, the concept of ‘purpose’ [...] is the aim desired to be reached [...]. As for ‘attributions’, the Draft believes that it ascribes to the criterion of the Statutes by considering as such those tasks attributed to a body so that it can carry out its own purposes”. Further ahead, Ricaldoni even distinguishes the terms “attributions” and “functions”, pointing out that the latter referred “simply to the way that attributions are exercised”. See Informe sobre Reglamento del Comité Jurídico Interamericano. Exposición de Motivos, Américo Pablo Ricaldoni (Relator). CJI/SO/D. N° 1/1972, p. 3 and 18.

problems of interpretation of the Committee's functions which we pointed out earlier. That is precisely why it is fundamental for this rapporteur to start out by defining the limits of his mandate, in order to try to fulfill it in a proper manner.

In this sense, of the seven competences of the Juridical Committee defined in clause 1.2 of this report, this Rapporteur understands that the mandate covers the study of the first two (that is, to *provide consulting services* and to *carry out studies and preparatory work upon request*), with in both cases the Committee emitting an opinion or study as assigned (consultation) by a body of the Organization. Although it would be more precise, given the title of the mandate, to understand that this refers only to the first of these functions, this report is inclined to be more comprehensive.

3. THE FUNCTION OF THE IAJC TO PROVIDE CONSULTING SERVICES AND FULFILL ASSIGNMENTS

3.1 Consultations and assignments as two different functions

A fundamental point of this report is to clarify and distinguish the consultative function of the IAJC and its function to carry out assigned studies and preparatory work. The debate that took place at the 74th regular session, and in particular at the session held on 19 March 2009, shows us that these functions may be mistakenly understood as one, which doubtless has contributed to the scant use of one of them. That is why it is of paramount importance to make a distinction between them.

One demonstration that these are different functions is the fact that they are found contemplated and regulated as such in different articles in the three instruments that regulate the Committee's functions. In other words, when the Statutes or the Rules of Procedure of the Committee enumerate its "main attributions", they set forth in the first paragraph the function of "advising and providing consulting services", and in another different paragraph (the second) the function of "carrying out studies and preparatory work upon assignment". The same situation occurs with the Charter of the OAS when it enshrines the first of these functions in article 99 and the second in article 100, although it must be acknowledged that the wording of this latter instrument may lead to some confusion, as has indeed happened. In any case, the Statutes and the Rules of Procedure leave no room for doubt.¹⁶

A second - and this time definitive - example is that, as we shall develop further ahead, the bodies of the OAS that can request the Committee for a *consultation* are not the same ones that can ask for a *study or preparatory work to be carried out*. In the first case, the request can be made by any body of the OAS, whereas in the second instance the request must come from certain very specifically considered bodies. This shows us that the drafters of these three instruments, especially the Statutes and the Rules of Procedure, had this distinction of functions very clearly in mind, so much so that they appointed different bodies as being capable of performing them.

Finally, a third differentiating element is related to the nature of each function. Thus, the function of "advising and providing consulting services" consists in emitting a written opinion, statement or advice on some controversial issue in order to illustrate and remove any doubts in

¹⁶ With regard to this point, while it could be argued that the Charter of the OAS is an international treaty that cannot be limited in its scope by Statutes and Rules of Procedure, we believe that these three instruments should best be interpreted together and integrally as complementary norms, and in this sense we can affirm that there is no contradiction, modification or limitation to the scope of the Charter; on the contrary, we understand that the latter two instruments (Statutes and Rules of Procedure) have made it precise and respected its spirit, above all if we bear in mind that the Statutes were adopted and changed by means of both resolutions of the General Assembly of the OAS itself.

its regard.¹⁷ Whereas the function of carrying out studies and preparatory work should rather be meant to deliver a report that entails an in-depth examination of a certain issue, a greater effort that would require more time and dedication.¹⁸ In other words, the consultation would point to a technical, illustrated answer on the part of the Committee concerning some controversial question, an answer formulated quickly and opportunely, rather than studies and preparatory work that attempt to develop a topic whose very nature would consume more time.

So, the two functions being different, let us now look at what matters could be the object of consultations and assignments, as well as who is qualified to formulate them.

3.2 Matters for consultations and assignments

As regards *consultations*, the three instruments under study in this report materially confer on the Inter-American Juridical Committee the fullest consultative capacity that can be granted to an international entity by establishing that this is the consultative body of the Organization “on juridical matters”¹⁹ and by then pointing out that these matters should be of “an international nature”.²⁰

The same happens in the case of the *assignments* when these same instruments state that the Committee will undertake studies and preparatory work on “juridical matters of an international nature” that it receives on assignment.²¹

There is therefore no doubt that the Inter-American Juridical Committee can provide consulting services and fulfill assignments on any international juridical question, with no limitation or express or tacit restriction of any type being set. Furthermore, practice shows us that this function is so broad that the Committee has even emitted statements concerning the juridicity of a sentence passed by a national court, as well as on the validity of an internal law in accordance with International Law.²²

To this it should be added that the instruments in question grant the Committee “the fullest technical autonomy” to undertake its studies and express its opinions,²³ meaning that the amplitude applies not only to the matters that can be the object of consultation or assignment but also to the way they are resolved.

3.3 Subjects qualified to request consultations or determine assignments

Unlike the preceding point, there are differences between the subjects qualified to request the Inter-American Juridical Committee for a consultation and those who can legitimately assign a study or preparatory work.

In effect, the Committee can be asked for a *consultation* by any body of the OAS, according to article 99 of the Charter, which generally provides that the Inter-American Juridical Committee is the consultative body “of the Organization”, the same wording being repeated in article 3 of the Statutes and in article 3 paragraph a) of the Rules of Procedure. A similar provision is found in article 12, paragraph a) of the Statutes and in article 5, paragraph a) of the Rules of Procedure, which also states that consultations can be requested “by the bodies” of the Organization. Even clearer is article 5, paragraph c) of the Rules of Procedure, which expressly provides that “when the request for *advice or for information* comes from a *principal organ not mentioned in article 100 of the Charter*, it shall be authorized by the General

¹⁷ REAL ACADEMIA ESPAÑOLA. *Ob. cit.*, t. 3, p. 428.

¹⁸ See note 9.

¹⁹ See article 99 of the Charter of the OAS and articles 3 and 12 paragraph a) of the Statutes.

²⁰ See articles 3 paragraph a) and 5 paragraph b) of the Rules of Procedure.

²¹ See article 100 of the Charter of the OAS, article 12 paragraph b) of the Statutes and article 5 paragraph b) of the Rules of Procedure.

²² See notes 28 and 29.

²³ See article 102 of the Charter of the OAS and article 2 of the Statutes.

Assembly”; and on the other hand, if the request comes from “a *subsidiary or dependent agency*, it shall be authorized by the organ on which it depends”.

This allows us to conclude that both the Statutes and the Rules of Procedure of the Committee have on the one hand specified the scope of article 99 of the Charter of the OAS, and consequently the function of the Inter-American Juridical Committee as regards *consulting services*, only being qualified to provide those requested by “bodies of the OAS”, thereby excluding the “States” that are also part of the Organization.²⁴ On the other hand, both the Statutes and the Rules of Procedure of the Committee have failed to set limits on the bodies of the OAS that may request consultation; as a matter of fact, they refer to each and every one of them.

The same idea is conveyed by the preparatory work meant to draw up the Rules of Procedure of the Inter-American Juridical Committee in 1972, although originally full subjective legitimacy was contemplated both for “consultations” and “studies and preparatory work”. In any case, in these draft Rules of Procedure, Américo Pablo Ricaldoni explained that the requirement that the General Assembly or the superior body authorize the request for consultation made by principal bodies not contemplated in article 100 of the Charter or by subsidiary or dependent bodies, respectively, should be for the purpose of “preventing distortions to the infrastructure of the Organization”.²⁵

As a consequence, *consultations* are different from *assignments*, precisely because the former can be requested by any body of the OAS, namely:

- a. The General Assembly,
- b. The Meeting of Consultation of Ministers of Foreign Affairs,
- c. The Councils (the Permanent Council and the Inter-American Council for Integral Development),
- d. The Inter-American Commission on Human Rights,
- e. The General Secretariat,
- f. Specialized Conferences,
- g. Specialized Bodies, and
- h. Subsidiary or dependent bodies.²⁶

It should therefore be noted that the Juridical Committee can provide *consulting services* for any body of the OAS, including the Office of the General Secretariat. It remains clear that these consultations cannot be requested by Member States of the Organization. Finally, in the case of a consultation being requested by a body other than those listed in article 100 of the Charter, the General Assembly or a body superior to it shall act as a filter to authorize it before the Committee begins to address it.

In respect to the *assignments* for studies and preparatory work, the subjects qualified to request these are less in number. Thus, article 100 of the Charter of the OAS, like article 12, paragraph b) of the Statutes and article 5, paragraph b) of the Rules of Procedure, expressly provide that studies and preparatory work can only be assigned to the Committee by:

- a. The General Assembly,
- b. The Meeting of Consultation of Ministers of Foreign Affairs, and
- c. The Councils of the Organization.

²⁴ See footnote 16.

²⁵ See RICARDONI, Américo Pablo (Relator). **Informe sobre Reglamento del Comité Jurídico Interamericano**: exposición de motivos. CJI/SO/D. N° 1/1972, p. 21.

²⁶ See articles 53 and 70 of the Charter of the OAS.

Having established the difference and contents of each of these two functions, let us now look at what has been the practice of the Inter-American Juridical Committee and other bodies of the OAS in respect to them.

4. THE PRACTICE OF THE INTER-AMERICAN JURIDICAL COMMITTEE WITH REGARD TO CONSULTATIONS AND ASSIGNMENTS

4.1 Conclusions drawn from the practice of the Juridical Committee

In relation to the function of the Inter-American Juridical Committee to provide consulting services and fulfill assignments, it is interesting to note how this and other bodies of the OAS have acted. In this sense, a thorough analysis of this practice in the period between 1990 and 2008 leads us to the following conclusions:²⁷

a. The first conclusion is that in this period practically no body of the OAS formulated *consultations* to the Committee, the same ones referenced in article 99 of the Charter, article 12 (a) of the Statutes and article 5 (a) and (c) of the Rules of Procedure. Indeed, while in practical terms some assignments made to the Committee during these years could qualify as actual *consultations*, it is correct to say that juridically and formally they were not requested of the Committee as such. This is the case, for example, of the Helms-Burton Law²⁸ or that of the Inter-American Convention against Corruption.²⁹ The sole exception found in this period was the consultation made to the Committee in respect to the Alvarez-Machain affair.³⁰

b. The second conclusion is that in this same period the Committee received approximately twenty-nine *assignments for studies and preparatory work*, all of them based on article 100 of the Charter of the OAS, on article 12 (a) and (b) of the Statutes and on article 5 (b) of the Rules of Procedure. Regarding this point, it is interesting to note that we believe that the resolutions of the *assignments* misquote paragraphs (a) and (b) of article 12 of the Statutes, which our report claims refer to different functions of the Committee: the first subparagraph to *consultations* and the second to *assignments*. In a sense, this once more demonstrates the practice that reigns in the Organization of referring without distinction to these two functions of the Juridical Committee in spite of the fact that they are clearly differentiated in its texts.

²⁷ Here credit should be given to the work of the staff of the Inter-American Juridical Committee, thanks to whom all the pertinent information was made available, classified and organized by year.

²⁸ See Resolution AG/RES. 1364 (XXVI-O/96) of 4 June 1996, in which the General Assembly of the OAS assigns the Committee to present its opinion concerning the validity of the Helms-Burton Law in accordance with International Law, without specifying whether it does so under article 99 or article 100 of the Charter. It was rather the Inter-American Juridical Committee that interpreted — not based on any resolution of the General Assembly — that the Opinion was emitted adjusted to the functions assigned in article 99 of the Charter, that is to say, as a consultation.

²⁹ See Resolution AG/RES. 1328 (XXV-O/95) of 9 June 1995, in which the General Assembly assigns the Committee — once again without explaining whether it is a consultation or assignment — to lend priority to reviewing the Draft Inter-American Convention against Corruption. In this case, when the Committee engaged to analyze the topic, it did not explain under which function it did so.

³⁰ In effect, in this case the Permanent Council of the OAS, through Resolution CP/RES. 586 (909/92) of 15 July 1992, requested the Committee for an opinion on the international juridicity of the sentence passed by the Supreme Court of the United States of America in the case Government of the United States of America vs. Humberto Alvarez-Machain, based on its consultative function enshrined in article 99 of the Charter of the OAS. Likewise, the Juridical Committee, in its resolution CJI/RES. II-15/92, assumes the function of this case based on article 99 of the Charter, stating that “consultative opinions have no obligatory effects for the body or bodies that request them”.

c. The third conclusion is that the vast majority of *assignments* were made to the Committee by the General Assembly of the Organization, and on only six or seven occasions by the Permanent Council of the OAS; to date, no other body of the Organization has made any assignments.

d. Finally, during this period, thirty-eight topics were included in the Committee's agenda by individual or collective initiative of its own members, as provided for in article 100 of the Charter of the OAS, in article 12 (c) of the Statutes and in article 6 (a) of the Rules of Procedure, that is, 56.7% of the work of the Juridical Committee has been created "from the inside".

4.2 Possible causal factors

If we analyze the above conclusions in the light of the information contained in this report, we could try to establish some possible causes or factors that explain the fact that the Organization formulates few *consultations* to the Committee, as well as the short list of bodies that have so far approached it with an *assignment*. Thus:

- i. The lack of clarity in respect to the objectives and functions of the Juridical Committee, as well as the distinction between its competence to provide *consulting* services and fulfill assignments, has unquestionably limited the possibilities for the Committee to exercise its advisory function and carry out assignments more intensely and more often.

It is particularly difficult to expect the bodies that make up the Organization to distinguish and identify the different possibilities of collaboration that the Committee offers if their functions are not clearly defined in the Charter and in its Statutes and Rules of Procedure.

- ii. To this lack of clarity as to competence should be added factors that could also be contributing to the fact that only 43.3% of the Committee's work has been assigned "from the outside", and this almost exclusively by a single body of the Organization: the General Assembly. Among these factors, which result from an in-depth analysis of the work carried out by the Committee as well as from interviews held by the rapporteur with different State and Organization employees, the following deserve special mention:

- a. The absence of deadlines for presenting the reports of the Committee, which may be a reason why the assignments are not accomplished within the time frame expected by the requesting body.

In this respect it is important to note that on some occasions this delay has to do with the lack of precision of the mandate adopted by the General Assembly or the lack of response from the Member States to the questionnaires drawn up by the Committee, which are fundamental to allow the rapporteurs to terminate and sometimes to initiate their research.

- b. The lack of harmony that in some cases exists between the matters which are of interest to the Organization and its Member States and those that may be of interest to the Committee and its members. This situation is seen, for example, when we realize that some of the topics included in the Committee's agenda on the initiative and under the supervision of some member are not checked to see whether the same initiative is shared by the countries that make up the OAS.
- c. The limited impact and diffusion that in general the reports issued by the Inter-American Juridical Committee have had in the academic milieu, among NGOs, Members States, and - even more importantly - within the Organization itself. Save in some very specific cases, the impact and diffusion of these reports has been very limited.

- d. The practical and budgetary difficulty of holding special sessions — provided in the Statutes and the Rules of Procedure — in order to attend to urgent consulting work. For this effect, it is preferred to resort to the Secretariat for Legal Affairs of the OAS, given the fact that it is a permanent body and also because it is located in Washington, D.C..

We believe that all these factors explain — at least in part — the results that we have presented above. Without any doubt, such factors have inhibited many bodies of the Organization, as well as the Member States themselves, from requesting the Committee for *consultations* and increasing the number of *assignments*, despite the scope and undeniable importance of the functions for which it was created. In this sense it is imperative to develop a set of actions addressed at righting this situation, actions that by mandate of the Committee are suggested below.

5. RECOMMENDATIONS AND PROPOSALS

Based on the above analysis and the listing of the factors that in our assessment act against strengthening the functions of the Inter-American Juridical Committee designed to provide consulting services and fulfill assignments, the following recommendations and proposals can be formulated:

- a. In the first place, it is essential to state precisely and clearly the functions of the Inter-American Juridical Committee, in particular those meant to provide consulting services and fulfill assignments, bearing in mind the three legal instruments that support them. Beyond any necessary future review of these three instruments, we believe that it is possible — by applying various principles of interpretation quoted in this report — not only to define such functions but also to explain precisely their scope and content, as well as the bodies that can activate them. This report precisely makes a proposal in this sense.
- b. In the second place, it is necessary to disclose the activities and functions (already defined) of the Committee within the Organization, in order to make known the different collaboration possibilities afforded by this consultative body of the OAS. Accordingly, the Committee, through the Secretariat, should send a communication to the Member States and bodies of the OAS specifying the different collaboration possibilities offered to them by the Juridical Committee, clearly defining the scope of its functions and the technical and autonomous nature of its work. Moreover, the drafting of a short document (pamphlet) to be widely disseminated should be contemplated.
- c. In the third place, the Committee needs to act more closely with the Member States and political bodies of the Organization in order to know the topics of concern in which the Committee can participate and debate. Accordingly, an attempt would be made to register the Committee in the agenda of the Organization, developing reports, studies or consultations that are relevant to it. In this sense it would be important for the Chairman and/or Rapporteurs of the Committee to take part in the sessions of the Permanent Council and the Committee on Juridical and Political Affairs of the OAS as far as is possible, not only to mark presence but also to become familiar with the concerns of the Member States that might eventually be addressed by the Committee. The Committee budget should make an annual projection in this respect.
- d. Fourthly, the Committee should have available a mechanism for follow-up on its reports and resolutions within the OAS, which we feel should be entrusted to its Secretariat to guarantee proper diffusion of such matters among the various bodies connected with the topic, and among the Member States of the Organization (in

particular, among the Legal Advisory Departments of the Ministries of Foreign Affairs).

- e. Likewise, the Inter-American Juridical Committee should set up an electronic network with universities, professional associations, research institutions and NGOs, on a permanent basis and with a double role: on the one hand to feed information to the Committee on the topics debated in the international agenda that might eventually be of interest to the OAS, and on the other hand to spread the research and reports of the Committee among the international academic community. To this end, the Secretariat could take advantage of the agreements signed by the Committee with academic institutions that are in effect, as well as making contact with the most prestigious international research centers, in order to maintain this electronic exchange of information with the commitment to share it among its members.

This would not only provide feedback to the Committee with updated information on the topics of concern and interest to the International Community but also have a multiplying effect by diffusing the results of its research and reports.

In addition, the Secretariat should keep the members of the Committee informed about national and international academic forums held in different countries of our hemisphere on the topics that are being researched in order to provide for or at least offer the presence of the rapporteurs of the Committee at such events, or at least access the documents prepared on the subject. This would also afford the Committee more visibility and presence in international academic forums, thereby consolidating its prestige and image outside and within the Organization.

Thus, and without affecting the responsibilities that the Secretariat of the Committee should assume on the matter, we believe that the capacity of initiative of each one of the Members of the Inter-American Juridical Committee will prove vital for the successful fulfillment of the recommendations contained in this paragraph, provided they possess a network of personal and institutional contacts that should be exploited for the benefit of this body of the OAS.

- f. In order to accelerate the work of the Committee, broader and better programming could be established, setting deadlines and/or schedules for delivering final reports which would enable a more timely delivery of results to the requesting body. Moreover, the States' failure to answer the questionnaires distributed by the Committee should not prevent it from continuing with the development of reports, given the capacity of initiative this body has.
- g. It is also important for the Secretariat of the Committee or the Secretariat for Legal Affairs (present at the sessions of the General Assembly and the Permanent Council) to request and ensure that the assignments passed on to the Committee are minimally precise and indicate the desired product so as to facilitate the work of future rapporteurs of the Committee.
- h. Finally, the Committee must use electronic means of communication³¹ more intensively in order make internal consultation in advance, schedule work or future courses of action, coordinate and schedule its reports and contact networks.

³¹ In this regard we should recall only as reference that the Statutes and Rules of Procedure of the Inter-American Juridical Committee currently allow to change the date of a regular or special meeting by vote, either by mail, cable or any other means of communication (See article 20 of the Statutes and article 17 item c) of the Rules of Procedure).

2. The Struggle against Discrimination and Intolerance in the Americas

Document

CJI/doc.339/09 rev.2 Comments on the Draft Inter-American Convention Against Racism
and All Forms of Discrimination and Intolerance
(presented by Dr. Fabián Novak Talavera)

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 XXXVII 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-descendants. 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-descendants, 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-descendants 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-descendants 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 (Chair madam *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 Chair *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.

At the 76th Regular Session of the Inter-American Juridical Committee (Lima, Peru, March 2010), the Rapporteur, Dr. Fabián Novak, spoke of the background to the topic and his document CJI/doc.339/09, "Comments on the Draft Inter-American Convention Against Racism and All Forms of Discrimination and Intolerance in the Americas," of which he offered a detailed analysis. He also explained those parts that set out the opinions shared by the members at the previous period of sessions. He added that the document emphasized the firm stance of not creating another body for the enforcement of the Convention's provisions. If the creation of such a body was insisted on, he proposed that it be technical in nature, not political, and that it involve civil society participation; in addition, its areas of competence should be identified with greater clarity, in order to avoid duplicating functions already entrusted to the Inter-American Commission on Human Rights. Regarding the initiative whereby the Draft Convention would allow the Inter-American Court of Human Rights to issue advisory opinions at the request of the Member States and other agencies of the Organization, he explained that that authority was based on the Convention of Belém do Pará, and that it even allowed the inclusion of those states that have not recognized the competence of the Court pursuant to Article 62 of the American Convention on Human Rights.

Dr. Negro recalled the origin of and developments with the Working Group dealing with the Draft Convention, which had been in existence for four years. He noted the existence of difficulties at the conceptual level. The first problem is determining the scope of the Convention: for one group of states, it should deal with racism and not with racial discrimination, whereas for another group, the instrument represents an opportunity to introduce definitions of other forms of discrimination. Another disputed issue is the creation of a follow-up mechanism, with some supporting the proposal to establish a follow-up committee while others prefer to assign that authority to the existing agencies,

the Commission, and the Court. It should be noted that this project was promoted by civil society to protect people of African descent, as a result of the Durban Conference at which a Plan of Action and Declaration were adopted on the topic. As with the Draft Declaration on the Rights of Indigenous Peoples, the time spent on the discussions is weakening the debate. This year, there was only one meeting of the Working Group, which made little progress.

Drs. Herdocia and Baena Soares spoke in favor of maintaining the points that define the Committee's position regarding its scope of application and the creation of an agency, and they also suggested various modifications to the language of the draft in order to enhance its clarity.

Dr. Stewart, in addition to other comments on stylistic and translation changes, emphasized the importance of more clearly distinguishing the definitions of racism and discrimination, which were not very clear in the rapporteur's draft. He said that from the U.S. legal perspective, racist actions by governments and institutions can be prohibited, but an individual cannot be prevented from being racist. One way to emphasize that idea is to define racism as an ideology, since ideologies are not subject to regulations. He also thought it was unnecessary to refer to provisions of *ius cogens*, which is a term that generates problems in common-law countries.

Dr. Lindsay spoke in favor of including the concept of racism, which was found in all constitutions.

Dr. Villalta said she supported the rapporteur's draft. She also said she supported the creation of a follow-up committee to work to prevent discriminatory treatment and, if violations were detected, to refer the complaints to the Commission and then to the Court. She asked Dr. Negro to report on the functioning of the Committee on People with Disabilities.

Dr. Negro reminded the meeting that the Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities, adopted in 1999, created a follow-up committee, the purpose of which was to assess reports from the Member States on the implementation of the Convention, without assuming functions that correspond to the Commission on Human Rights. The creation of a body such as the one described represents a financial burden for the Organization, but it would allow progress to be made with the analysis of the proposed provisions.

Dr. Pichardo said he agreed with the recommendations; however, he was concerned about paragraph 10, which proposes extending the competence of the Court to cover complaints involving states that have not recognized its jurisdiction.

Dr. Novak explained that it was a concept enshrined in the Convention of Belém do Pará, which provides that a state signing up to the Convention is aware that violations of its terms may fall under the jurisdiction of the Court, but solely with respect to the scope of that Convention and not in connection with violations of other human rights instruments.

Finally, the Chairman, after congratulating the rapporteur on his robust report, asked him to compile the members' comments and submit a version for review by the Committee. On March 18, 2010, Dr. Novak submitted his revised report (CJI/doc.339/09 rev. 1) with the changes proposed by Drs. Soares, Stewart, and Herdocia.

The Chairman made an observation on the legal consequences of extending the competence of the Court to states that have not recognized it. Dr. Herdocia proposed an alternative wording for Article 10 on page 5, which included language similar to that of Article 12 of the Convention of Belém do Pará. Dr. Stewart asked if this new version referred to the Court. Dr. Novak explained that although it was not implicitly referred to, its interpretation does allow the competence of the Court for those states that have accepted its jurisdiction.

Those comments were incorporated into the second revision of the report, which was approved.

The rapporteur's document was sent to the Permanent Council by the Chairman in March 2010, and it was distributed to the Member States on April 8 as document CP/INF.6030/10.

The following paragraphs transcribe the adopted report, Comments on the Draft Inter-American Convention against Racism and All Forms of Discrimination and Intolerance, document CJI/doc.339/09 rev.2.

CJI/doc.339/09 rev.2

**Comments on the Draft Inter-American Convention against
Racism and all forms of Discrimination and Intolerance**

(presented by Dr. Fabián Novak Talavera)

Having analyzed the Draft Inter-American Convention against Racism and all Forms of Discrimination and Intolerance being prepared by the Working Group of the Committee on Juridical and Political Affairs of the OAS, as well as the proposals made by the Member States and the comments presented by the specialists consulted by that body,¹ the Inter-American Juridical Committee deems it appropriate to present the following comments as a contribution to strengthening this important inter-American draft instrument:

1. A first comment refers to the name of the Convention, which underlines the theme *racism* above any other form of discrimination. As a matter of fact, the Convention expressly refers to “racism and (in a general way) all forms of discrimination and intolerance”. In this respect, one observation may be made with regard to the fact that *racism* is contained in the broader concept of *discrimination*, which is why this Juridical Committee finds no reason to use both terms in the title of the Convention.

Nevertheless, if the intention of the Working Group is to underscore or privilege racism above other forms of discrimination — bearing in mind our regional reality — then the Juridical Committee considers that in any case the Draft Convention should contain a definition not only of racism but also of each of the forms of discrimination mentioned therein. The purpose of this is to avoid differentiated treatment of the various forms of discrimination, which would run counter to full and effective protection of the right to equality and non-discrimination.
2. Secondly, in its considerative (preamble) section, the Preliminary Draft Convention contains some expressions that we feel could be improved upon or made more precise. For example:
 - a. The second considerative paragraph refers to the “resolute commitment” of member States instead of referring simply to the “commitment” of the States. We see no need to qualify the obligation made by the member States.

¹ In addition to the final version of the Draft Convention agreed on by the Secretariat of the Juridical Committee, see the following documents: Outcome Document of the Durban Review Conference; DULITZKY, Ariel E. **Analysis of and commentary on the Draft inter-American convention against racism and all forms of discrimination and intolerance**, 22 January 2009; Alternative drafts made by the governments of Mexico, Canada and Argentina; among others.

- b. The third considerative paragraph uses the word “deficiency” when in fact what is being referred to is a person’s “disability”, which is the term that is universally accepted.²
 - c. The fourth considerative paragraph mentions that “equality and nondiscrimination among human persons are dynamic democratic concepts”, an expression that in our understanding could be replaced by a more precise one, such as “equality and nondiscrimination are rights, among others, that form the basis of a democratic society”.
 - d. The seventh considerative paragraph refers to a person’s “psychological distress” instead of “psychological condition”, which is a technically more correct and precise expression.
 - e. The eighth considerative paragraph uses the expression “African roots” to refer to a person’s origin, which we suggest should be replaced by the simpler and more direct phrase “African origin”.
3. Thirdly, in the opinion of this Juridical Committee, article 1 of the Draft Convention concerning definitions presents some limitations as regards the motives that can lead to discrimination; thus, although the Draft contains a long list of these motives, recognition is not given to some of the criteria included in the International Convention on the Elimination of All Forms of Racial Discrimination, dated 7 March 1966 (see in particular articles 1 and 2) or in the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, dated 18 December 1990 (see in particular articles 1 and 7).

Furthermore, this Juridical Committee agrees with the observation made by Dr. Ariel Dulitzky in the above-mentioned report, that the definition of racism contained in article 1 of the Draft confuses the concept of *racism* with that of *racial discrimination*, notwithstanding that doctrine clearly makes the distinction between the former as an ideology and the second as a concrete practice prohibited by International Law.

In respect to the definition of *intolerance* also contained in article 1, we concur with the observation made by some State delegations that the definition is too broad and liable to be understood as including dissention, which is rather a characteristic of any democratic system.

4. In respect to article 3 of the Draft Convention, this Juridical Committee proposes the need to maintain the distinction between individual and collective discrimination. The reason for this is that both forms of discrimination have their own characteristics but also because, in practice, discrimination not only refers to a concrete individual but also to a religious, racial, ideological, or any other such group. To support this position, we have some international instruments available of a universal nature that include both types of discrimination³, as well as numerous reports of the Inter-American Commission on Human Rights⁴ and the jurisprudence of the Inter-American Court of Human Rights.⁵

² This remark refers to the Spanish text, where the term “deficiency” is used. The English text is correct.

³ As is the case of the International Convention on the Elimination of All Forms of Racial Discrimination (article 2, paragraph 2, for example).

⁴ See the Annual Reports and Special Reports of the Inter-American Commission on Human Rights as of 1996, in particular the Special Reports of Mexico (1998), Colombia (1999) and Peru (2000).

⁵ See Advisory Opinion OC-18/03 dated 17 September 2003 on the Juridical Condition and Rights of the Undocumented Migrant; the Sentence of the De La Cruz Flores Affair, dated 18 November 2004; among others.

5. In the opinion of the Juridical Committee, article 5 of the Draft Convention is particularly questionable, referring as it does to other rights that should also be protected, such as the right to freedom of expression.

Indeed, the Juridical Committee understands the undeniable need to prohibit the spreading of ideas that foster hate and violence for reasons based on some of the factors of discrimination pointed out in the actual Draft Convention. However, in order for this prohibition not to be applied abusively, the Committee suggests that it should be rendered effective when the spreading of such ideas directly or indirectly “promotes” or “incites”, rather than just “presenting” or “representing”, hate and violence, without defending or justifying these ideas. These ideas could very well be presented for clearly pedagogical or academic reasons.

This is why the Committee advises that the prohibition should be expressed with definite concepts that make it quite clear that the purpose of the norm is to prevent hate and violence being fostered through the media and other channels of mass communication.

6. As for article 11 of the Draft Convention, which posits the obligation of Member States to implement legislative measures to invert the burden of proof so that the accused has to prove adoption of procedures and practices that ensure equal, non-discriminatory treatment, the Juridical Committee must remember that although inverting the burden of proof is accepted in the international practice of criminal law, the same does not hold true of other areas such as the administrative, labor or civil spheres. In this sense, it would be appropriate to establish beforehand the feasibility of this obligation so as not to create obstacles or complications to the States when they come to evaluate adopting this international instrument.

On the other hand, still with regard to article 11, we appreciate the proposal formulated by some State delegations not to limit the right to equal “access to the system of justice” but to extend it to equal treatment “in the process itself”. In this way, equal treatment becomes more comprehensive.

7. Article 13 of the Draft sets forth that the obligation of States Parties is to develop studies on situations or manifestations of discrimination that have been occurring in each of their territories. Nevertheless, as has been observed by some State delegations, the objective of these studies has not been made clear, so the Inter-American Juridical Committee suggests giving them a useful purpose. The Draft could therefore point out that these studies should be meant as a contribution toward drawing up public policies against discrimination and intolerance, as well as to devise and execute national plans or strategies of action designed to ban any discriminatory practice.
8. The Draft Convention sets out to create the Inter-American Committee for the Prevention, Eradication and Punishment of Racism and all Forms of Discrimination and Intolerance, designed to assess the situation of each of the Member States as regards compliance with the provisions of the Convention.

In this respect, the Inter-American Juridical Committee states that, in this case, it is not in favor of creating a new body within the inter-American system, in the first place because of the budgetary limitations existing at the Organization of American States, and secondly in order to avoid duplicating functions that could well be assumed by the Inter-American Commission on Human Rights.

Nonetheless, should a favorable opinion prevail for the creation of this new body, we consider that the present wording meant to establish its characteristics and general structure could be ameliorated. We are therefore of the opinion that assurance should be given that the body to be created will have a technical rather than political format, consequently enjoy full autonomy, allow the participation of civil society, and be clear as to its competences and remit, none of which has been included in the Draft as it currently

stands. We believe that the experience of the Ad-Hoc Committee on the Rights and Dignity of Persons with Disabilities, the model on which this new Committee is doubtless based, should serve to guarantee effective functioning of this follow-up body to be created, as well as to avoid duplicating functions being undertaken by other bodies of the OAS, as is the case of the Commission and the Inter-American Court of Human Rights.

9. Considering the model of the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (the Convention of Belém do Pará), adopted on 9 June 1994,⁶ we support the initiative for the Draft Convention in question to enable the Inter-American Court of Human Rights to emit Advisory Opinions at the request of Member States and competent bodies of the OAS concerning the provisions of the Convention. This would allow relying on a very high-level jurisdictional body that could doubtless clear up the problem of the true sense and scope of the Convention being commented upon.
10. Finally, the Inter-American Juridical Committee considers the convenience of contemplating a mechanism to lodge petitions in the Draft Inter-American Convention against Racism and all Forms of Discrimination and Intolerance, as established in article 12 of the Convention of Belém do Pará, which provides:

Any person or group of persons, or any nongovernmental entity legally recognized in one or more member states of the Organization, may lodge petitions with the Inter-American Commission on Human Rights containing denunciations or complaints of violations of Article 7 of this Convention by a State Party, and the Commission shall consider such claims in accordance with the norms and procedures established by the American Convention on Human Rights and the Statutes and Regulations of the Inter-American Commission on Human Rights for lodging and considering petitions.

In any case, beyond these suggestions and remarks, the Inter-American Juridical Committee wishes to assert the importance and historical significance of this inter-American draft instrument which includes among its norms, some that are today considered to be *ius cogens*⁷ and whose culmination and being put into effect will contribute to banish discriminatory and intolerant practices on our continent and lead to egalitarian treatment of people without distinction, preference or exclusion.

⁶ Article 11: "The States Parties to this Convention and the Inter-American Commission of Women may request of the Inter-American Court of Human Rights advisory opinions on the interpretation of this Convention".

⁷ This is the case of the right to non-discrimination. See GROS ESPIELL, Héctor. **Derechos Humanos**. Lima: Cultural Cuzco, 1991, p. 221; CÁRDENAS, Fernando; ROMAN, Mauricio. **El Sistema Interamericano de Derechos Humanos**. Tesis, Bogotá: Pontificia Universidad Javeriana, 1985, p. 103-104; ZAFFARONI, Eugenio Raúl. El Racismo como estructura discursiva contra los Derechos Humanos. En: **Presente y Futuro de los Derechos Humanos**: ensayos en honor a Fernando Volio Jiménez. San José: Instituto Interamericano de Derechos Humanos, 1998, p. 433-442. See, in this same context, the jurisprudence of the Inter-American Court of Human Rights.

CHAPTER III

OTHER ACTIVITIES

ACTIVITIES CARRIED OUT BY THE INTER-AMERICAN JURIDICAL COMMITTEE DURING 2010

A. Presentation of the Annual Report of the Inter-American Juridical Committee

At the first meeting of the 77th Regular Session (Rio de Janeiro, Brazil, August 2010), the Chairman of the Inter-American Juridical Committee, Dr. Guillermo Fernández de Soto, gave a verbal report on the meeting held at the Committee on Juridical and Political Affairs on April 29, 2010, and on the report submitted to the fortieth regular session of the OAS General Assembly (held in Lima, Peru, on June 8, 2010). On that occasion, the General Assembly assigned seven mandates to Committee, including two new ones: a request dealing with the main instruments related to peace, security, and cooperation, and another on mechanisms for participatory democracy and citizen participation.

B. Course on International Law

Between August 2 and 20, 2010, the Inter-American Juridical Committee and the Department of International Law of the OAS Secretariat for Legal Affairs organized the 37th Course on International Law, with the participation of 19 professors from different countries of the Americas and Europe, 22 OAS scholarship recipients selected from among more than 33 candidates, and four students who paid their own attendance costs. Among the scholarship recipients were four individuals of African descent from Brazil, Colombia, Jamaica, and Panama, who were able to attend thanks to the support of funds from CIDA/Canada. The central theme of the Course was “International Law and Contemporary Global Transformations.” It should be noted that for the second consecutive year, the duration of the Course was three weeks because of budget problems, with the budget not increasing in proportion to the cost of living in Rio de Janeiro.

The inauguration of the 37th Course of International Law took place on August 2, 2010, at the Convention Center of the Hotel Everest Rio. Addresses were given by the Chairman of the Juridical Committee, Dr. Guillermo Fernández de Soto, and the Director of the Department of International Law, Dr. Dante Negro. The traditional homage was given by Dr. Mauricio Herdocia Sacasa, a member of the Inter-American Juridical Committee, who dedicated it to the jurist Andrés Bello.

XXXVII Course on International Law

“International Law and Contemporary Global Transformations”

Rio de Janeiro, Brazil

Organized by the Inter-American Juridical Committee and
the Department of International of the Secretariat for Legal Affairs of the
Organization of American States

Week One

Monday 2

9:00 – 9:45

ACCREDITATION

10:00 – 11:30

INAUGURATION

Dr. Guillermo Fernández de Soto

Chairman of the Inter-American Juridical Committee

Opening address

Dr. Dante Negro

Director of the Department of International Law
OAS Secretariat for Legal Affairs
Opening address

Dr. Mauricio Herdocia Sacasa

Member of the Inter-American Juridical Committee
Homage to Andrés Bello
Short message from Course coordinators

Tuesday 3

9:00 – 10:50

Leonardo Nemer C. Brant

Professor of Public International Law at the Law School of the Federal University of Minas Gerais, Brazil
Thoughts on the Normative Nature of International Law during Contemporary Global Transformations (I)

11:10 – 1:00

Carlos Jiménez Piernas

Professor in Public International Law, European Commission, Jean Monnet, Chair, Alcalá University, Spain
Foundations of Contemporary International Law in Light of the Idea of Consensus (I)

2:30 – 4:30

Guillermo Fernández de Soto

Chairman of the Inter-American Juridical Committee
The Inter-American Juridical Committee

Wednesday 4

9:00 – 10:50

Leonardo Nemer C. Brant

Thoughts on the Normative Nature of International Law during Contemporary Global Transformations (II)

11:10 – 1:00

Carlos Jiménez Piernas

Foundations of Contemporary International Law in Light of the Idea of Consensus (II)

2:30 – 4:30

Celina Romany

Attorney and Professor, Haywood Burns Chair, City University of New York Law School, United States
Gender and Race Perspectives in International Law: A Look at the Region (I)

Thursday 5

9:00 – 10:50

Leonardo Nemer C. Brant

Thoughts on the Normative Nature of International Law during Contemporary Global Transformations (III)

11:10 – 1:00

Carlos Jiménez Piernas

Foundations of Contemporary International Law in light of the Idea of Consensus (III)

2:30 – 4:30

Celina Romany

Gender and Race Perspectives in International Law: A Look at the Region (II)

Friday 6

9:00 – 10:50

Celina Romany

Gender and Race Perspectives in International Law: A Look at the Region (III)

11:10 – 1:00

Carlos Jiménez Piernas

Foundations of Contemporary International Law in Light of the Idea of Consensus (IV)

2:30 – 4:30

Ana Elizabeth Villalta Vizcarra

Member of the Inter-American Juridical Committee
The Problem of Migrants in the Americas

Week Two

Monday 9

9:00 – 10:50

Diego Moreno

OAS Department of International Law
Draft Inter-American Convention against Racism and All Forms of Discrimination and Intolerance: Current Challenges in the Process

11:10 – 1:00

Alejandro M. Garro

Professor of Comparative Law, Columbia University, New York, United States
The Inter-American Model Law on Secured Transactions: Problems Facing its Implementation in Latin America (I)

2:30 – 4:30

Mauricio Herdocia Sacasa

Member of the Inter-American Juridical Committee
The International Criminal Court from the Viewpoint of the Inter-American system

Tuesday 10

9:00 – 10:50

Juan Carlos Murillo

UNHCR Regional Legal Adviser in Costa Rica
The Right of Asylum in the Americas

11:10 – 1:00

Alejandro M. Garro

The Inter-American Model Law on Secured Transactions: Problems Facing its Implementation in Latin America (II)

2:30 – 4:30

Paul F. Arrighi,

Member of the International Chamber of Commerce's International Court of Arbitration
International Commercial Arbitration in the Americas 35 Years After the Panama Convention (I)

Wednesday 11

9:00 – 10:50

Juan Carlos Murillo

International Protection of Refugees in the Americas

11:10 – 1:00

Alejandro M. Garro

The Inter-American Model Law on Secured Transactions: Problems Facing its Implementation in Latin America (III)

2:30 – 4:30 **Paul F. Arrighi**
International Commercial Arbitration in the Americas 35 Years After the Panama Convention (II)

Thursday 12

9:00 – 10:50 **Jaime Aparicio Otero**
Former Chairman of the Inter-American Juridical Committee
Legal Aspects of Democracy and the Rule of Law in the Inter-American System (I)

11:10 – 1:00 **Dante Negro**
Director, OAS Department of International Law
Introduction to the Inter-American system

2:30 – 4:30 **David P. Stewart**
Member of the Inter-American Juridical Committee
Current Issues in International Criminal Law

Friday 13

9:00 – 10:50 **Jaime Aparicio Otero**
Legal Aspects of Democracy and the Rule of Law in the Inter-American System (II)

11:10 – 1:00 **Victor Rico**
Secretary for Political Affairs of the OAS
The Work of the OAS Secretariat of Political Affairs

2:30 – 4:30 **Luis Toro Utillano**
OAS Department of International Law
The Rights of Indigenous Peoples in the Americas

Week Three

Monday 16

9:00 – 10:50 **Walter Kaelin**
Professor of Constitutional and International Law, University of Bern/Switzerland, and Representative of the UN Secretary General on the Human Rights of Internally Displaced Persons
The Protection of Internally Displaced Persons in International Law (I)

11:10 – 1:00 **Walter Kaelin**
The Protection of Internally Displaced Persons in International Law (II)

2:30 – 4:30 **Martina Caroni**
Professor of Public International Law, University of Lucerne, Switzerland
Human Rights and Transnational Corporations in the 21st Century (I)

Tuesday 17

9:00 – 10:50 **Walter Kaelin**
The Protection of Internally Displaced Persons in International Law (II)

11:10 – 1:00 **Martina Caroni**
Human Rights and Transnational Corporations in the 21st Century (II)

Wednesday 18

9:00 – 10:50

Bernard Audit

Professor Emeritus of Law, University of Paris
Arbitration Agreements and Private International Law (I)

11:10 – 1:00

Jean-Michel Arrighi

OAS Secretary for Legal Affairs
Dispute Resolution in the Inter-American System (I)

Thursday 19

9:00 – 10:50

Bernard Audit

Arbitration Agreements and Private International Law (II)

11:10 – 1:00

Jean-Michel Arrighi

Dispute Resolution in the Inter-American System (II)

Friday 20

10:00

CLOSING CEREMONY AND PRESENTATION OF CERTIFICATES

Jean-Michel Arrighi

OAS Secretary for Legal Affairs

Bernard Audit

Professor Emeritus of Law, University of Paris

Manoel Tolomei Moletta

Secretary, OAS 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

1. Participation of the Inter-American Juridical Committee as an Observer or Guest at Different Organizations and Conferences during 2010

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

“Secured transactions”

Washington, D.C., October 2009

Observer: Dr. David P. Stewart

(Dr. Ana Elizabeth Villalta attended as a representative of the delegation of El Salvador)

United Nations High Commissioner for Refugees – UNHCR

“Regional Conference on the Protection of Refugees and International Migration in the Americas: Protection Considerations in the Context of Mixed Migration”

San José, Costa Rica, November 19-20, 2009

Observer/Guest: Dr. Ana Elizabeth Villalta Vizcarra

OAS Committee on Juridical and Political Affairs – CAJP

Washington, April 29, 2010

Participation: CJI Chairman Dr. Guillermo Fernández de Soto presented the 2009 report.

OAS Committee on Juridical and Political Affairs – CAJP

Fourth Special Working Meeting on the International Criminal Court
Washington, D.C., January 27, 2010

Participation: Dr. Mauricio Herdocia Sacasa

OAS Committee on Juridical and Political Affairs – CAJP

Special Meeting on International Humanitarian Law
Washington, D.C., January 29, 2010

Participation: Drs. Mauricio Herdocia Sacasa and Jorge Palacios Treviño

Seminar on the International Criminal Court

“Special Seminar on Challenges and Solutions for the Ratification of the Rome Statute”
El Salvador, February 18, 2010

Participation: Drs. Ana Elizabeth Villalta Vizcarra and Mauricio Herdocia Sacasa

Symposium on Migratory Topics, Georgetown University

Washington, D.C., April 2010

Participation: Dr. David P. Stewart (joint rapporteur for the topic)

2. 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 2010:

• **During the 76th regular session, held in, Peru:**

1. On March 15, 2010, the plenary of the Juridical Committee received a visit by Peruvian dignitaries during the solemn inauguration ceremony of the 76th Regular Session. Attended by the Vice Minister for Foreign Affairs of Peru, Ambassador Néstor Popolizio Bardales, by the Under Secretary for Multilateral Affairs of the Foreign Ministry, Ambassador Luzmila Zanabria Ishikawa, government authorities, representatives from the embassies of the OAS Member States, the deans of several law schools, representatives of academia, in the Plenary Room of the Carlos García Bedoya Building, seat of the Ministry of Foreign Affairs in Lima, Peru.
2. On March 16, 2010, meeting of the members of the Inter-American Juridical Committee with the Chairman of the Justice and Human Rights Commission of the Congress of the Republic.
3. On March 17, 2010, meeting of the members of the Inter-American Juridical Committee with students from San Martín de Porres University.
4. On March 18, 2010, meeting with the Prosecutor General, Dr. Gladys Echaiz, at the headquarters of the Public Prosecution Service.
5. On March 22, 2010, Dr. Javier La Rosa, in charge of the Access to Justice area of the Legal Defense Institute of Peru (IDL), visited the members of the Committee at the Ministry of Foreign Affairs in Lima. On that occasion Dr. La Rosa spoke about access to justice in the region and the actions taken within each country to overcome geographical obstacles as well as linguistic, economic, and cultural barriers. He thus reaffirmed the importance of the set of guiding principles to be adopted by the Juridical Committee, which will have an impact at the Inter-American level, strengthening the existing declarations and provisions for protecting populations denied access to justice.

6. On March 22, 2010, at midday, a meeting was held with the President of the Constitutional Court, Dr. Juan Vergara Gotelli, attended by all the members of that court.
 7. On March 22, 2010, in the afternoon, Drs. Stewart, Villalta, and Palacios attended a meeting with representatives of the International Organization for Migration in Lima.
 8. On March 23, 2010, Dr. Francesca Vargas, representing the Coalition for the International Criminal Court, visited the members of the Committee at the Ministry of Foreign Affairs in Lima. She reported on her organization's actions in promoting the ratification of the Rome Statute.
- **During the 77th regular session, held in Rio de Janeiro, Brazil:**
 1. On August 5, 2010, visit by Professors Celina Romany Siaca, Carlos Jiménez Piernas, and Leonardo Nemer Caldeira Brant, who attended the 37th Course of International Law. Professor Romany, who teaches law at New York University, gave a presentation on "Gender and Race Perspectives in International Law: A Look at the Region." In addition, Professor Carlos Jiménez Piernas, from the University of Alcalá in Spain, shared his experiences with the Committee's members through his talk on "Bases for Contemporary International Law in Light of the Concept of Consensus." Professor Leonardo Nemer Caldeira Brant, a lecturer in public international law at Brazil's Federal University of Minas Gerais, gave a presentation introducing his lecture on "Reflections on the Regulatory Nature of International Law under Contemporary Global Transformations."
 2. On August 9, 2010, visit by the members of the Inter-American Juridical Committee to the Getúlio Vargas Foundation. With the participation of lecturers and researchers, the meeting was also attended by Dr. Ricardo Seitenfus, a former member of the Inter-American Juridical Committee currently serving as the Representative of the General Secretariat of the OAS in the Republic of Haiti.
 3. On August 11, 2010, visit by Professors Alejandro M. Garro and Paul Arrighi, who attended the 37th Course of International Law. Professor Garro lectures in comparative law at Columbia University, New York, United States; Professor Arrighi is a member of the International Chamber of Commerce's International Court of Arbitration. They both participated in a discussion on topics of interest in private international law and the future of the CIDIP process.
 4. On August 11, 2010, visit by Dr. Juan Carlos Murillo, UNHCR regional legal adviser, in Costa Rica, who spoke about international protection for refugees and answered questions about refugees posed by the Committee's members.
 5. On August 12, 2010, visit by Dr. Jaime Aparicio, former Chairman and member of the Inter-American Juridical Committee, who received homage for his time with the Committee and then participated in a discussion on his course on "Legal Aspects of Democracy and the Rule of Law in the Inter-American system".

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