PERMANENT COUNCIL

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ANNUAL REPORT OF THE INTER-AMERICAN JURIDICAL COMMITTEE TO THE FORTY-THIRD REGULAR SESSION 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, January 30, 2013

CJI/O/01/2013

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/CJI/doc.425/12), regarding the activities of the Committee in 2012.

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

João Clemente Baena Soares
Presidente
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

81st REGULAR SESSION
August 6 to 10, 2012
Rio de Janeiro, Brazil

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ANNUAL REPORT

OF THE INTER-AMERICAN JURIDICAL COMMITTEE TO THE GENERAL ASSEMBLY

2012

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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RESOLUTIONS ADOPTED BY THE INTER-AMERICAN JURIDICAL COMMITTEE

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INTRODUCTION

The Inter-American Juridical Committee is honored to submit to the General Assembly of the Organization of American States its Annual Report on the activities carried out during the year 2012, in accordance with the terms of Article 91.f of the Charter of the Organization of American States and Article 13 of its Statutes, and with 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), dealing with the preparation of annual reports to the General Assembly by the organs, agencies, and entities of the Organization.

In 2012, the Inter-American Juridical Committee held two sessions. The first, its Eightieth Regular Session, took place in the Secretariat of Foreign Affairs of Mexico, from March 5 to 9. The Eighty-First Regular Session was held at the Committee's headquarters in Rio de Janeiro, Brazil, from August 6 to 10.

During this year, the Committee adopted six final reports, four of which give effect to General Assembly requirements in matters relating to the strengthening of the inter-American system for the protection and promotion of human rights CJI/RES. 192 (LXXX-O/12); privacy and personal data protection in the Americas CJI/RES. 186 (LXXX-O/12); cultural diversity in the development of international law CJI/RES. 185 (LXXX-O/12) and access to justice in the Americas CJI/RES. 187 (LXXX-O/12). The Committee also approved two reports that respond to mandates established by its members, a Project for a Model Act on Simplified Stock Corporation CJI/RES. 188 (LXXX-O/12) and a Guide for Regulating the Use of Force and Protection of People in Situations of Internal Violence that do Not Qualify as Armed Conflict (CJI/doc.401/12 rev.4). The Committee completed its consideration of these issues.

Four new rapporteurships were established to keep track of the following topics selected by the Committee: general guidelines for border integration; the immunity of States; electronic customs receipts for agricultural products; and Inter-American Judicial Cooperation. The general guidelines for border integration project aims to develop legal models or frameworks that facilitate bilateral integration. The immunity of States proposal seeks to clarify the status of individuals, government officials, and States in transnational litigation. As for the electronic customs receipts for agricultural products, the idea is to modernize and streamline the system. Finally, the inter-American judicial cooperation mandate is about strengthening ties between those involved in that sphere and disseminating awareness of the multiple decisions handed down at different levels.

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 describes all sessions held in 2012. The second chapter considers the issues that the Inter-American Juridical Committee discussed at the regular sessions in 2012 and contains the texts of the resolutions adopted and the attached 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. João Clemente Baena Soares, Chairman of the Inter-American Juridical Committee, approved the language of this Annual Report.

All this information may be accessed at the webpage of the Inter-American Juridical Committee at: http://www.oas.org/en/sla/iajc/default.asp.

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 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. Eightieth regular session

The 80th regular session of the Inter-American Juridical Committee took place on March 5 to 10, 2012, in Rio de Janeiro, Brazil.

The members of the Inter-American Juridical Committee present for that regular session were the following, 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":

Dr. Carlos Alberto Mata Prates
Dr. David P. Stewart
Dr. Fernando Gómez Mont Urueta
Dr. Jean-Paul Hubert
Dr. Miguel Aníbal Pichardo Olivier
Dr. Freddy Castillo Castellanos
Dr. Fabián Novak Talavera
Dr. José Luis Moreno Guerra
Dr. Ana Elizabeth Villalta Vizcarra

Representing the General Secretariat, technical and administrative support was provided by Dr. 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 Utillano, Principal Legal Officer; Maria Lúcia Iecker Vieira and Maria C. de Souza Gomes of the Secretariat of the Inter-American Juridical Committee.

Initially, the Session was chaired by Dr. Ana Elizabeth Villalta, who announced that Dr. João Clemente Baena Soares had sent a note explaining that, for health reasons, he would not be able to participate in that regular session of the CJI. Here it is worth recalling that former CJI Chair, Dr. Guillermo Fernández de Soto, terminated his mandate on December 31, 2011. Pursuant to the Rules of Procedure, the Vice Chair assumes the Chairmanship until the end of the mandate. Accordingly, Dr. Baena Soares chaired the Committee from January 1 until the month of August. The Committee then elected Dr. Fabián Novak by acclamation as Vice Chair. After thanking the Committee for its support, he proceeded to chair the session in the absence of Dr. Baena Soares. It should also be mentioned that Dr. Hyacinth Evadne Lindsay did not take part in the session.

The Director of the Department of International Law, Dr. Dante Negro, then mentioned the mandates envisaged for this session of the Inter-American Juridical Committee.

The Inter-American Juridical Committee had before it the following agenda, adopted by means of resolution CJI/RES. 182 (LXXIX-O/11), "Agenda for the Eightieth Regular Session of the Inter-American Juridical Committee":

CJI/RES. 182 (LXXIX-O/11)

AGENDA FOR THE EIGHTIETH REGULAR SESSION OF THE INTER-AMERICAN JURIDICAL COMMITTEE
(Mexico City, from March 5, 2012)

Topics under consideration

1. Access to justice in the Americas
   Rapporteur: Dr. Freddy Castillo Castellanos
2. Cultural diversity in the development of international law
   Rapporteur: Dr. Freddy Castillo Castellanos
3. Topics on Private International Law: Inter-American Specialized Conference on Private International Law
   Rapporteurs: Drs. Ana Elizabeth Villalta Vizcarra, David P. Stewart, and Guillermo Fernández de Soto
4. Protection of Personal Data
   Rapporteur: Dr. David P. Stewart
5. Strengthening the Inter-American System of Human Rights
   Rapporteurs: Drs. João Clemente Baena Soares and Fabián Novak Talavera
6. Sexual orientation, and gender identity
   Rapporteurs: Drs. Ana Elizabeth Villalta Vizcarra and Freddy Castillo Castellanos
7. Model legislation on protection of cultural property in the event of armed conflict
   Rapporteurs: Drs. Ana Elizabeth Villalta Vizcarra and Freddy Castillo Castellanos
8. Guide for regulating the use of force and protection of people in situations of internal violence that do not qualify as armed conflict
   Rapporteur: Dr. Fernando Gómez Mont Urueta
9. Simplified stock corporation
   Rapporteur: Dr. David P. Stewart

This resolution was approved unanimously at the meeting held on August 5, 2011, by the following members: Drs. João Clemente Baena Soares, Hyacinth Evadne Lindsay, Jean-Paul Hubert, Fernando Gómez Mont Urueta, David P. Stewart, Ana Elizabeth Villalta Vizcarra, Fabián Novak Talavera, Guillermo Fernández de Soto, Mauricio Herdocia Sacasa and Freddy Castillo Castellanos.

* * *

The Inter-American Juridical Committee adopted resolution CJI/RES. 184 (LXXX-O/12), "Date and Venue of the Eighty-First Regular Session of the Inter-American Juridical Committee," in which it decided to hold its 81st regular session at its headquarters in the city of Rio de Janeiro, Brazil, commencing on August 6, 2012.

CJI/RES. 184 (LXXX-O/12)

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

THE INTER-AMERICAN JURIDICAL COMMITTEE,

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

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 81st regular session in Rio de Janeiro, Brazil, starting on August 6, 2012.

This resolution was approved unanimously at the meeting held on March 9, 2012, by the following members: Drs. Carlos Mata Prates, David P. Stewart, Fernando Gómez Mont Urueta, Jean-Paul Hubert, Miguel A. Pichardo Olivier, Freddy Castillo Castellanos, Fabián Novak Talavera, José Luis Moreno Guerra and Ana Elizabeth Villalta Vizcarra.

* * *

It is worth noting that the presence of the Inter-American Juridical Committee in Mexico City enabled its members to hold meetings with various State bodies, such as the Supreme Court, the Federal Access to Information and Data Protection Institute (IFAI), the Federal Electoral Institute (IFE), and entities working in the field of international law, both domestic (the Mexican International Law Society) and international (International Committee of the Red Cross). Those meetings yielded a fruitful exchange of views on possible new items to include on the Committee's agenda as well the start of a number of cooperation initiatives. There was also room for dialogue regarding the international implementation of treaties and the relation between domestic and international law. In that context, the Juridical Committee adopted resolution CJI/RES. 190 (LXXX-O/12), thanking the Government and people of Mexico for their efforts in organizing and hosting the regular session and expressing its gratitude to Dr. Fernando Gómez Mont Urueta, in particular.

CJI/RES. 190 (LXXX-O/12)

ACKNOWLEDGEMENT TO THE GOVERNMENT AND PEOPLE OF MEXICO

THE INTER-AMERICAN JURIDICAL COMMITTEE,

HAVING accepted the cordial invitation of the Government of México to hold its 80th regular session in Mexico City, D.F., from March 5 to 10, 2012;

RECOGNIZING the efforts made by the Government of Mexico 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 Mexico for their warm and generous hospitality, with special recognition to Dr. Fernando Gómez Mont Urueta.

2. To leave on record the importance it represents for the Inter-American Juridical Committee to hold its 80th regular session in this country, emphasizing the opportunity its members have had to meet with the most prominent political, juridical and academic authorities of Mexico.

3. To forward this resolution as an expression of its gratitude to the Government and the people of Mexico.

This resolution was approved unanimously at the meeting held on March 9, 2012, by the following members: Drs. Carlos Mata Prates, David P. Stewart, Fernando Gómez Mont Urueta, Jean-Paul Hubert, Miguel A. Pichardo Olivier, Freddy Castillo Castellanos, Fabián Novak Talavera, José Luis Moreno Guerra and Ana Elizabeth Villalta Vizcarra.

At the end of the working sessions, the Committee took time to pay tribute to Mrs. Maria Conceição de Souza Gomes (Mari), who has worked, *inter alia* as chief librarian, in the Committee Secretariat since the 1990s and will shortly be retiring.

CJI/RES. 189 (LXXX-O/12)

TRIBUTE TO MARIA CONCEIÇÃO DE SOUZA GOMES

THE INTER-AMERICAN JURIDICAL COMMITTEE,

WHEREAS in the course of this year and after many years of dedicated work, Mrs. Maria C. de Souza Gomes will retire from the OAS;

RECALLING that Mrs. Maria C. de Souza Gomes has been acting at the Secretariat of the Inter-American Juridical Committee, inter alia, as chief librarian since the nineties;

AWARE of the valuable contribution made Maria C. de Souza Gomes both to the Inter-American Juridical Committee and its members;

HIGHLIGHTING the various personal and professional qualities of Maria C. de Souza Gomes,

RESOLVES:

1. To express its deep appreciation to Mrs. Maria de Souza Gomes for her dedication and invaluable contribution to the work of the Inter-American Juridical Committee.

2. To wish her greatest success in her future endeavors, in the hope that he will maintain his relationship with the Inter-American Juridical Committee.

3. To communicate this resolution to her.

This resolution was approved unanimously at the meeting held on March 9, 2012 by the following members: Carlos Alberto Mata Prates, David P. Stewart, Fernando Gómez Mont Urueta, Jean-Paul Hubert, Miguel Aníbal Pichardo, Freddy Castillo Castellanos, Fabián Novak Talavera, José Luis Moreno and Ana Elizabeth Villalta Vizcarra.

B. Eighty-First regular session

The 81st regular session of the Inter-American Juridical Committee took place on August 6 to 10, 2012, at its headquarters in the city of Rio de Janeiro, Brazil.

The members of the Inter-American Juridical Committee present for that regular session were the following, 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:

Dr. José Luis Moreno Guerra
Dr. Fernando Gómez Mont Urueta
Dr. Hyacinth Evadne Lindsay
Dr. Ana Elizabeth Villalta Vizcarra
Dr. Fabián Novak Talavera
Dr. João Clemente Baena Soares
Dr. David P. Stewart
Dr. Jean-Paul Hubert
Dr. Miguel Aníbal Pichardo Olivier
Dr. Carlos Mata Prates
Dr. Freddy Castillo Castellanos

Representing the General Secretariat, technical and administrative support was provided by Dr. Jean-Michel Arrighi, Secretary for Legal Affairs; Dante Negro, Director of the Department of International Law; Luis Toro Utillano, Principal Legal Officer with that same Department; Maria

Lúcia Iecker Vieira and Maria C. de Souza Gomes from the Secretariat of the Inter-American Juridical Committee.

At its first meeting, the Committee proceeded to elect its officers. Dr. Baena Soares was elected by acclamation for a four-year term as Committee Chair and Dr. Fabián Novak Talavera was elected Vice Chair.

Dr. Baena Soares congratulated the members of the Inter-American Juridical Committee re-elected in Bolivia, Dr. Novak and Dr. Stewart, and welcomed the new member presented by the Government of Haiti, Dr. Collot, who will take up his position in January 2013. Dr. Baena Soares also welcomed the members elected by the General Assembly in San Salvador, who he had been able to meet thanks to his participation in the session held in Mexico City. He also expressed sorrow at the passing of Dr. Manoel Tolomei Moletta and said he planned to prepare a draft resolution and to organize a meeting with the family to pay homage to and celebrate Dr. Moletta's life.

For his part, Dr. Dante Negro referred to the work agenda, the order of business drawn up by the Committee Chair for this regular session, and the ratification of rapporteurs. He also announced that two days had been set aside to receive guests during the course of the week. He said the Committee was expecting a visit on Tuesday, August 7 from Professor Adriana Dreyzin de Klor of the National University of Córdoba, and on Thursday, August 9, from Mr. Patrick Zahnd of the International Committee of the Red Cross (ICRC), Inés Bustillo of the Economic Commission for Latin America and the Caribbean (ECLAC), and Professor Arturo Oropeza of the Autonomous National University of Mexico.

Dr. David Stewart then gave a report on his presentation to the International Law Commission of the United Nations (CJI/doc.416/12) and to the Committee on Juridical and Political Affairs (CAJP) of the OAS Permanent Council. Dr. David Stewart said he thought the presentation of the Committee's activities before both bodies had been useful. He also mentioned the topics raised in each case. For instance, the representatives present at the CAJP meeting heard about the Committee's concerns regarding the budget.

In the presentation to the International Law Commission of the United Nations, he had pointed out the features that the Commission and the Committee have in common and where they differ. From the questions asked by the members of the UN Commission, Dr. Stewart discerned interest in several topics the Committee has been addressing, such as: direct participation; freedom of expression and opinion; cultural diversity; gender identity; the strengthening of the human rights mechanism; and developments relating to refugees. He also detected a desire to establish more direct ties of cooperation between the two entities, including exchanges of documents, participation in the Course on International Law, and any other form of reciprocal cooperation that might bring the two bodies closer together. In addition, he asked the Secretariat for a list of international organizations similar in nature to the Committee, an initiative seconded by Dr. Novak and Dr. Castillo. Finally, Dr. David Stewart suggested being more pro-active with regard to the agenda of the International Law Commission, focusing on issues that could pertain to the same field, and he offered to work with the Department of International Law in that regard.

Dr. Dante Negro said that the Department of International Law sends the Annual Report to the U.N. Commission and he undertook to present by the next session a list of international organizations that perform similar functions to the Committee.

As the meeting drew to a close, Dr. Fabián Novak Talavera reported on his presentation to the forty-second regular session of the OAS General Assembly, held in Cochabamba, Bolivia, which he attended at the request of the Chair. He noted that it had been a complex General Assembly with

much discussion on strengthening the inter-American human rights system, although little time had been left for presentations by the organs themselves, including the CJI. He said that the Secretary General had greatly appreciated the numerous reports submitted by the Inter-American Juridical Committee over such a short period of time and that he had underscored the high quality of the Committee's report on the inter-American system. In that regard, Dr. Novak ascertained that both the Secretary General and the President of Ecuador had made references to the CJI's report. Finally, Dr. Novak stressed that in his speech to the General Assembly he had mentioned concerns regarding the budgetary situation and called for an assessment of the practice of assigning more mandates to the Committee while at the same time cutting its funding.

At its 81st regular session, the Inter-American Juridical Committee had before it the following agenda, which was adopted by means of resolution CJI/RES. 191 (LXXX-O/12), "Agenda for the Eighty-First Regular Session of the Inter-American Juridical Committee":

CJI/RES. 191 (LXXX-O/12)

AGENDA FOR THE EIGHTY-FIRST REGULAR SESSION OF THE INTER-AMERICAN JURIDICAL COMMITTEE
(Rio de Janeiro, Brazil, August 6, 2012)

Topics under consideration:

1. Guide for regulating the use of force and protection of people in situations of internal violence that do not qualify as armed conflict
   Rapporteur: Dr. Fernando Gómez Mont Urueta
2. Sexual orientation and gender identity
   Rapporteurs: Drs. Ana Elizabeth Villalta Vizcarra and Freddy Castillo Castellanos
3. Model legislation on protection of cultural property in the event of armed conflict
   Rapporteurs: Drs. Ana Elizabeth Villalta Vizcarra and Freddy Castillo Castellanos
4. Topics on Private International Law: Inter-American Specialized Conference on Private International Law
   Rapporteurs: Drs. Ana Elizabeth Villalta Vizcarra and David P. Stewart
5. General guidelines for border integration
   Rapporteur: Dr. José Luis Moreno Guerra

This resolution was approved unanimously at the meeting held on March 9, 2012, by the following members: Drs. Carlos Alberto Mata Prates, David P. Stewart, Fernando Gómez Mont Urueta, Jean-Paul Hubert, Miguel Aníbal Pichardo Olivier, Freddy Castillo Castellanos, Fabián Novak Talavera, José Luis Moreno Guerra and Ana Elizabeth Villalta Vizcarra.

At its August meeting, the Inter-American Juridical Committee decided to hold its next session on March 11 to 15, 2013, through resolution CJI/RES. 197 (LXXXI-O/12), "Date and Venue of the Eighty-Second Regular Session of the Inter-American Juridical Committee." It also adopted resolution CJI/RES. 196 (LXXXI-O/12), "Agenda for the Eighty-Second Regular Session of the Inter-American Juridical Committee".

CJI/RES. 197 (LXXXI-O/12)

DATE AND VENUE OF THE EIGHTY-SECOND REGULAR SESSION OF THE INTER-AMERICAN JURIDICAL COMMITTEE

THE INTER-AMERICAN JURIDICAL COMMITTEE,

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

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 82nd regular session in Rio de Janeiro, Brazil, on March 11 to 15, 2013.

This resolution was approved unanimously at the meeting held on August 9, 2012, by the following members: Drs. José Luis Moreno, Hyacinth Evadne Lindsay, Ana Elizabeth Villalta Vizcarra, Fabián Novak Talavera, João Clemente Baena Soares, David P. Stewart, Jean-Paul Hubert, Miguel A. Pichardo Olivier, Carlos Mata Prates and Freddy Castillo Castellanos.

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CJI/RES. 196 (LXXXI-O/12)

AGENDA FOR THE EIGHTY-SECOND REGULAR SESSION OF THE INTER-AMERICAN JURIDICAL COMMITTEE
(Rio de Janeiro, Brazil, March 11-15, 2013)

Topics under consideration:

1. Sexual orientation and gender identity
   Rapporteurs: Drs. Ana Elizabeth Villalta Vizcarra and Freddy Castillo Castellanos
2. Model legislation on protection of cultural property in the event of armed conflict
   Rapporteurs: Drs. Ana Elizabeth Villalta Vizcarra and Freddy Castillo Castellanos
3. General guidelines for border integration
   Rapporteur: Dr. José Luis Moreno Guerra
4. Immunity of States
   Rapporteur: Dr. Carlos Mata Prates
5. Electronic warehouse receipts for agricultural products
   Rapporteur: Dr. David P. Stewart
6. Inter-American legal cooperation
   Rapporteurs: Drs. Fernando Gómez Mont Urueta and Ana Elizabeth Villalta Vizcarra

This resolution was approved unanimously at the meeting held on August 9, 2012, by the following members: Drs. José Luis Moreno, Hyacinth Evadne Lindsay, Ana Elizabeth Villalta Vizcarra, Fabián Novak Talavera, João Clemente Baena Soares, David P. Stewart, Jean-Paul Hubert, Miguel A. Pichardo Olivier, Carlos Mata Prates and Freddy Castillo Castellanos.

Likewise during the eighty-second session, posthumous tribute was paid to the former Secretary of the Inter-American Juridical Committee, Dr. Manoel Tolomei Pereira Gomes Moletta, CJI/RES. 193 (LXXXI-O/12), and to Dr. Luis Marchand Stens, CJI/RES. 194 (LXXXI-O/12), a long-time member of the Committee.

CJI/RES. 193 (LXXXI-O/12)

HOMAGE TO
DOCTOR MANOEL TOLOMEI PEREIRA GOMES MOLETTA

THE INTER-AMERICAN JURIDICAL COMMITTEE,

CONSIDERING the passing away of Dr. Manoel Tolomei Pereira Gomes Moletta in the city of Rio de Janeiro, Brazil on July 3, 2012;

RECALLING that Dr. Moletta occupied the position of Secretary of the Inter-American Juridical Committee from 1994 until the present, as well as working in the General Secretariat of the OAS since 1992, both of which functions he carried out with the highest degree of responsibility and professionalism;

EMPHASIZING the immense contribution that Dr. Moletta made to the work of the Inter-American Juridical Committee, always with the greatest dedication, initiative and competence aimed at enhancing the performance of the Committee in the duties assigned by the Charter of the OAS, by promoting and divulging the work of this Organization and developing the academic activities organized and promoted by the Committee;

REMEMBERING Dr Moletta's open disposition and sympathy toward all the members of the Inter-American Juridical Committee and the staff of the General Secretariat, in addition to his candor, warmth, joyfulness, spontaneity, straightforwardness and simplicity, all of which qualities made him stand out as a unique and special human being who will not be forgotten by all who had the good fortune and the honor of knowing him closely and enjoying the gift of his friendship,

RESOLVES:

1. To express its deep sadness and grief at the death of Dr. Manoel Tolomei Pereira Gomes Moletta, Secretary of the Inter-American Juridical Committee.

2. To convey this resolution and its solidarity to the members of Dr. Manoel Moletta's family as a demonstration of the profound affection and admiration felt by the members of the Inter-American Juridical Committee and staff of the General Secretariat, all of them his friends, thanks to the above-mentioned qualities which distinguished him as an excellent professional, a loyal and selfless companion, and a generous and true friend; and to tell them that Manoel Moletta, our dear *Maneco*, and his nobleness will always remain in our memory and our prayers.

This resolution was approved unanimously at the meeting held on August 6th, 2012 by the following members: Drs. José Luis Moreno Guerra, Fernando Gómez Mont Urueta, Hyacinth Evadne Lindsay, Ana Elizabeth Villalta Vizcarra, Fabián Novak Talavera, João Clemente Baena Soares, David P. Stewart, Jean-Paul Hubert, Miguel A. Pichardo Olivier, Carlos Mata Prates and Freddy Castillo Castellanos.

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CJI/RES. 194 (LXXXI-O/12)

HOMAGE TO DOCTOR LUIS MARCHAND STENS

THE INTER-AMERICAN JURIDICAL COMMITTEE,

CONSIDERING the passing away of Dr. Luis Marchand in Lima, Peru on August 1st, 2012;

RECALLING that Dr. Marchand was a member of the Inter-American Juridical Committee from January 1997 to December 2000 and again from January 2003 to December 2006, a mission that he accomplished with the greatest responsibility and professionalism;

PLACING EMPHASIS on the significant contribution made by Dr. Marchand to the work of the Inter-American Juridical Committee, notably on themes such as cooperation against terrorism; improving the administration of justice in the Americas; hemispheric security and the measures aimed at mutual trust; integration and international trade; and the struggle against corruption and impunity, on all of which themes he wrote excellent reports and collaborated as rapporteur;

STRESSING Dr. Marchand's various qualities, among which should be mentioned his profound juridical expertise, diplomatic astuteness and cordial treatment toward others, all of which earned him a position of prominence among the members of the Inter-American Juridical Committee,

RESOLVES:

1. To express its deep sadness and grief at the death of Dr. Luis Marchand, former member of the Inter-American Juridical Committee.

2. To convey this draft resolution and its solidarity to the members of Dr. Luis Marchand's family as an expression of its sorrow.

This resolution was approved unanimously at the meeting held on August 8th, 2012 by the following members: Drs. José Luis Moreno Guerra, Fernando Gómez Mont Urueta, Hyacinth Evadne Lindsay, Ana Elizabeth Villalta Vizcarra, Fabián Novak Talavera, João Clemente Baena Soares, David P. Stewart, Jean-Paul Hubert, Miguel A. Pichardo Olivier, Carlos Mata Prates and Freddy Castillo Castellanos.

Finally, the Juridical Committee adopted a resolution rendering homage to Dr. Jean-Paul Hubert whose mandate ends on December 31, 2012.

CJI/RES. 195 (LXXXI-O/12)

TRIBUTE TO DOCTOR JEAN-PAUL HUBERT

THE INTER-AMERICAN JURIDICAL COMMITTEE,

CONSIDERING that on December 31, 2012 Dr. Jean-Paul Hubert's mandate comes to an end;

RECALLING that Dr. Hubert has been a member of the Committee since December 2003, serving as Vice-President in the period from 2004 to 2006 and President in the period from 2006 to 2008;

AWARE of the invaluable contribution made by Dr. Hubert throughout his mandates to the work of the Committee, and that his reports were an incomparable help in developing and harmonizing international law and the Inter-American System, notably as regards those themes concerning democracy and the application of the Inter-American Democratic Charter;

RECOGNIZING in particular Dr. Hubert's many personal qualities and professionalism, including his juridical and academic expertise and the cordial manner with which he conducted his leadership among the members of the Committee,

RESOLVES:

1. To express its heartfelt thanks to Dr. Jean-Paul Hubert for his dedication and invaluable contributions to the work of the Inter-American Juridical Committee.

2. To wish him continued success in his future work, with the hope that he keeps in touch with the Inter-American Juridical Committee.

3. To send this resolution to the various sectors of the Organization.

This resolution was approved unanimously at the meeting held on August 8th, 2012, by the following members: Drs. José Luis Moreno Guerra, Fernando Gómez Mont Urueta, Hyacinth Evadne Lindsay, Ana Elizabeth Villalta Vizcarra, Fabián Novak Talavera, João Clemente Baena Soares, David P. Stewart, Miguel A. Pichardo Olivier, Carlos Mata Prates and Freddy Castillo Castellanos.

CHAPTER II

TOPICS DISCUSSED BY THE INTER-AMERICAN JURIDICAL COMMITTEE AT THE REGULAR SESSIONS HELD IN 2012

I. THEMES UNDER CONSIDERATION

During 2012, the Inter-American Juridical Committee held two regular sessions. At these sessions, the Committee adopted six reports, four of which correspond to mandates assigned by the General Assembly and address the following topics: strengthening of the inter-American system for the protection and promotion of human rights; privacy and the protection of personal data in the Americas; cultural diversity in the development of international law; and access to justice in the Americas. The two other reports corresponded to mandates established by the Committee itself: a Model Act on the Simplified Stock Corporation and a Guide for regulating the use of force and protection of people in situations of internal violence that do not qualify as armed conflict.

Four new rapporteurships were also created to pursue new mandates established by the Committee: General guidelines for border integration; Immunity of States; Electronic Warehouse Receipts for Agricultural Products; and Inter-American Judicial Cooperation. Finally, it was decided to continue addressing the following subjects: sexual orientation, gender identity and expression; and model legislation on protection of cultural property in the event of armed conflict.

Following is a presentation of the aforementioned topics, along with, where applicable, the documents on those topics prepared and approved by the Inter-American Juridical Committee.

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1. Strengthening the Inter-American Human Rights System

	Documents
CJI/RES. 192/12 (LXXX-O/12)	Strengthening the Inter-American System for the Protection and Promotion of Human Rights
Annex: CJI/doc.400/12 rev.3	Report of the Inter-American Juridical Committee. Strengthening the Inter-American System of Protection and Promotion of Human Rights

During the forty-first regular session of the OAS General Assembly (El Salvador, June 2011), the Inter-American Juridical Committee was requested "to give priority to the preparation of a study on ways to strengthen the inter-American human rights system" AG/RES. 2675 (XLI-O/11).

At the 79th regular session of the Inter-American Juridical Committee (Rio de Janeiro, Brazil, August 2011), the Chair, Dr. Fernández de Soto, revealed the important past work done by the Inter-American Juridical Committee in creating the organs to promote and protect human rights. He observed certain concerns pertaining to the operation of the system, and believed that constructive advice on the part of the Committee would be useful and welcome. He further reported that he had asked Dr. Novak to serve as rapporteur for this topic, and he requested Dr. Baena Soares to participate as co-rapporteur on the topic; this was agreed to by the plenary.

Dr. Dante Negro then explained that this resolution arose from a discussion among the foreign ministers in San Salvador, and that its purpose was "to reflect further on the functioning of the Inter-American Commission on Human Rights;" a working group of the Permanent Council has been set up to this end. The mandate of the Inter-American Juridical Committee consists in making recommendations on ways to strengthen the system. However, the working group is expecting the Committee to share the work it does on the subject with them. The working group is open to the participation of all members, and it has also considered the participation of civil society and other entities interested in the subject. The group is chaired by Ambassador Hugo de Zela, the Permanent Representative of Peru to the OAS.

The following are some of the topics for discussion by the working group:

- Appointment of the Executive Secretary of the Commission;
- The friendly settlement mechanism;
- Provisional measures;
- The Commission's competence with respect to the promotion of human rights and how it is balanced with its case management functions;
- Procedural measures;
- Financial strengthening of the system.

Finally, he presented a file of the papers prepared by the Department of International Law, which covered discussions and meetings of political organs since 1996.

Dr. Fabián Novak confirmed his position regarding the broad nature of the Inter-American Juridical Committee's mandate. From a thematic standpoint, it would include everything that would help strengthen the system. He also pointed out the priority nature of the mandate, pursuant to the text of the resolution itself, and the limitations that the working group of the Permanent Council itself imposed, since it intends to complete its work by December of this year. In this context, he requested members to use the Internet to exchange views on the subject, with the constant support of the Secretariat. In this latter case, he requested that the final table of proposals be updated, and that the

rapporteur be kept informed of the progress made by the working group in Washington, D.C. Finally, he emphasized the concern and expectations that this mandate has raised amongst members of civil society, with regard to the work of both the working group and the Inter-American Juridical Committee. In this context, the Committee's report may be subject to criticism by the States and the NGOs themselves, but the important thing is that it sticks to legal matters.

Dr. Mauricio Herdocia urged the rapporteur to define certain essentially legal topics related to the activities of the system's institutions and national organs, such as access by victims to protective mechanisms.

Dr. Gómez Mont Urueta noted the complexity of the topic, and that it could have an impact on the internal equilibrium of countries. He proposed to the rapporteur that political processes be left to their own space, and that the Committee's contributions be confined to a legal point of view. He suggested that a comparative analysis with other organs in other national and international systems be undertaken. He further expressed interest in clarifying the field of competence of the Commission to avoid any conflicts of prerogatives.

Dr. Hubert supported Dr. Herdocia's views regarding the Committee's mandate on the subject. One option would be to limit it to promoting and ensuring compliance with decisions, but at the same time there was the possibility of strengthening the system. He had a high regard for comparative studies, but the work should not be confined to that.

The rapporteur, Dr. Novak, proposed a document that would strengthen the system from a legal standpoint and serve as a kind of arbitration. He also considered it positive to involve the system broadly. As for comparing it with the European Union, he indicated a reluctance to do so, since the Union does not have an entity similar to the Commission, and many of its decisions may not be as advanced as those in the inter-American system.

Dr. Villalta noted the progress made by the inter-American system, and especially the work of the Court related to jurisdictional functions. She urged the rapporteur to use information at the disposal of the Committee related to the work done at the time the institutions to protect and promote human rights were created.

The Chair shared his personal experience with the human rights system and presented possible contributions by the Committee in this area. He invited it to focus on aspects related to cooperation, above and beyond critical aspects. He further proposed clear admissibility criteria regarding the obligations applicable to States. The International Criminal Court offers an important example that takes into account both the interests of justice and victims' interests, which implies that there is a balance between justice and peace. With regard to precautionary or provisional measures, the International Court of Justice has clear criteria that could be taken up in the rapporteur's study. Another element to consider is the friendly settlement mechanism, which provides an opportunity to the parties to settle a dispute involving violation of a right. He noted that this mechanism had been weakened, and so he asked the rapporteur to consider this too. Finally, he agreed on the need to conduct a broad-based, legal study that would be both useful and enriching.

During the 80th regular session of the Inter-American Juridical Committee (Mexico City, March, 2012), the rapporteur, Dr. Fabián Novak presented the document: "Strengthening the Inter-American System of Protection and Promotion of Human Rights", CJI/doc.400/12 rev.1 of January 30, 2012, written jointly with Dr. Baena Soares, as the rapporteurs on the subject.

Dr. Novak alluded to the report of the Permanent Council and to the recommendations of both the states and the organs of the system, specifying that the pronouncements were of three kinds: procedural, substantive and financial.

Dr. Fernando Gómez Mont Urueta drew attention to the delicate nature of the mandate. He also alluded to the need to clarify the question of access to the organs of the system in order to establish reasonable expectations regarding their effectiveness and establish criteria that would facilitate mutual respect among the parties. As regards the operational capacity of the system, he proposed addressing the level of integrity of domestic systems. Finally, he underscored the importance of adjusting funding for the system, in light of the need for the organs to both make an impact and function on a permanent basis. The rapporteur for this issue, Dr. Fabián Novak, said it was important to draw the states' attention to this matter and to require a real commitment from them. He also underscored the importance of the deadlines set, with respect to both admissibility and the archiving of cases. He also referred to the organs' duty to promote human rights. Concerning financing, the rapporteurs said that, in the medium and long run, the solution lay in the member states raising their quota payments enough to ensure that the Inter-American Commission on Human Rights (IACHR) and the Inter-American Court of Human Rights (I/A Court H.R.) function on a permanent basis.

Dr. Ana Elizabeth Villalta asked Dr. Fabián Novak about direct access to the Courts. In response, the rapporteur expressed his concern regarding the direct access option, given the European experience. Nevertheless, he pointed out that the amended Rules of Procedure of the Inter-American Court of Human Rights allow individuals to participate directly, once a case has been screened by the IACHR. Dr. Jean-Paul Hubert congratulated the rapporteurs for all the work they had accomplished in the little time they had been allowed. He asked the rapporteur to keep track of any follow-up to be given to this document. Dr. Fabián Novak confirmed both rapporteurs' interest in contributing to the discussion. Finally, he urged Committee members to review the document and point to specific areas in which it can be improved.

Dr. Fernando Gómez Mont asked about the appropriateness of requiring a special majority for refuting complaints to the inter-American human rights protection system. He also called for greater insistence on the need for the organs to function full time and on the need to include a section on selection of the IACHR's Executive Secretary. Dr. Fabián Novak explained that the situation regarding the selection of the Executive Secretary had not been addressed in the report because there are no disputes regarding the Rules of Procedure. As for the question of donors, the report clearly establishes that the funds will earmarked for institution-building in respect of both the IACHR and the Inter-American Court and will not be distributed among specific topics. As for the suggestion that a qualified majority be required for access to the system, the rapporteur had ascertained that qualified majorities were used exceptionally in emergencies and should be applied for the admission of petitions. It would, moreover, unduly restrict access to the system. Dr. Carlos Alberto Mata shared his thoughts on precautionary measures, underscoring the difference between the jurisdictional nature of the Court and the administrative nature of the Commission. In view of that distinction, it was his understanding that precautionary measures should be decreed for those States that had recognized the jurisdiction of the Court. He also pointed to the difference between the inter-American system and European community system. Dr. Fabián Novak added that in practice the States had shown that they accepted the competence of the IACHR to issue precautionary measures, a practice that had become a custom that the member states regarded as mandatory.

Dr. José Luis Moreno asked the rapporteurs to avoid politicizing human rights or even ranking them, and he invited them to include an explanation regarding the practice of precautionary measures that emphasized the legal framework. In Dr. Fabián Novak's view, they constituted a practice accepted by all, so that his intention was not eliminate the practice but rather to regulate it.

Dr. David Stewart made two suggestions regarding the document: first, not to limit it to the institutions, but rather to the system; and second, to make some mention of the American Declaration

of the Rights and Duties of Man, an instrument that is binding for all the OAS member states. As for strengthening the role of the IACHR, he underscored the importance of promoting dissemination and asked whether it might be necessary to consider other eventualities under point 3.6 (d). He also asked for explanations regarding the role of the Committee on Juridical and Political Affairs with respect to compliance with resolutions, a suggestion queried by Dr. Carlos Alberto Mata Prates because in his view the subject was covered by existing procedures, given the annual reports that had to be presented to the General Assembly. Dr. Fabián Novak confirmed that the rapporteurs had wanted to include some effective political measure to call attention to the States that are not complying with the rulings of the Court, because its decisions were not in fact being implemented. Furthermore, he pointed out that the body that should concern itself with this would be the Permanent Council, and not the CAJP. The rapporteur pointed out that the time allowed for the presentation of reports to the General Assembly was minimal. Dr. Jean-Michel Arrighi explained the difficulties associated with either the Permanent Council or the General Assembly monitoring compliance because not all the member states are parties to the American Convention on Human Rights. For that reason, in his view, the role of the Permanent Council should be to exercise political oversight of compliance, but only in respect of states parties to the Convention. Here, Dr. Carlos Alberto Mata Prates proposed that Dr. Arrighi's comment be included, and he asked that failures to comply with decisions of the Court be clearly identified. For his part, and in light of the lack of consensus, the rapporteur suggested including a reference to the General Assembly so that it could exercise its prerogative of overseeing compliance. Dr. Jean-Michel Arrighi proposed making a distinction between States that are parties to the Convention and those that are not. The formula would then be that "the General Assembly urge the State to comply with the judgment and instruct the Permanent Council to monitor compliance and, in consultation with the Court, report back to the General Assembly." The Rapporteur explained that promotion work is one of the spheres of competence established in the Statute and Rules of Procedure of the IACHR and that resolving on cases should be regarded as part of that mandate. He said that, like Dr. Baena Soares, they considered that the States, and not just the organs responsible for running the system, performed an essential role. Regarding the matter of archiving petitions, the rapporteur pointed to the need to include, explicitly, all applicable cases, because not all were included in subparagraph 1 of Article 42 of the IACHR's Rules of Procedure.

Dr. Jean-Paul Hubert mentioned Canada's position with respect to the human rights system instruments and the reminded the rapporteur of the need to emphasize the position of States that are not parties to the inter-American instrument. He proposed that it should be clearly established that the States that are not parties to those instruments are committed to respecting human rights: a proposal that was supported by the Plenary. Dr. David Stewart pointed out that all the countries had an obligation to protect human right by virtue of the Charter. The rapporteur said that he would include a paragraph to that effect. For his part, Dr. Carlos Mata Prates said that he disagreed with the adoption of precautionary measures by an administrative body, but that he respected the opinion of the rapporteur that a customary law provision had been established by the actual practice of States.

On another topic, he urged that a clear reference be made in the text to the consultation made by the General Assembly and the procedure it should follow to avoid any misinterpretation in the sense of a possible conflict with the organs referred to. Dr. Fabián Novak underscored the importance of clarifying, in the resolution accompanying the report, that the opinions expressed are in response to a General Assembly mandate and within the prerogatives granted to the Committee. He also stressed that the NGO representatives consulted had expressed fear that the Report would only call for changes to the system, and not to the organs themselves. In this connection, the rapporteur read the corresponding paragraph on page 2 on the commitment the organs of the system need to make. Finally, he said he disagreed with telling the General Assembly how to proceed because that would

only trigger further discussions. For his part, Dr. Jean-Paul Hubert concurred with Dr. Carlos Mata Prates regarding questioning of the system. He added that the Committee should pay more attention to or be concerned as to the reaction of the countries or third parties, since the Committee's job was to strengthen the system.

Dr. Elizabeth Villalta queried the lack of balance between the space devoted to the IACHR and to the Court. She also supported the idea of a paragraph at the start of the report indicating that the Committee was responding to a General Assembly mandate. The rapporteur said that most of the proposals put to the Permanent Council referred to the IACHR. In his view, the current debate between the organs and the states had lost sight of the essence of what was at stake, namely the protection of individuals. An effort should be made to ensure that the states are comfortable with the system, have reasonable deadlines, and are asked to follow objective and predictable procedures. At the same time, the competencies of the organs for protecting individuals needed boosting and the system needed to be adapted to current circumstances.

Dr. Freddy Castillo Castellanos congratulated the rapporteurs on the report they had submitted and suggested that, in order to minimize the impression of bias with respect to its addressees, the following phrase could be inserted on page three of the report: "Although most of these proposals refer to the Commission…". Likewise, in point d), he suggested that the recommendation be addressed to the Assembly and not to the Commission. The Plenary supported these suggestions.

Dr. Fernando Gómez Mont Urueta underscored the seriousness of the draft report and its emphasis on regulating what already exists. However, he wondered whether a more in-depth reform might not potentially be called for, given the importance of the subject matter and the opportunity the Committee had of advocating a comprehensive overhaul of the system. He pointed to the advisability of emphasizing the need for the organs to work full time and of explaining why the Executive Secretary of the IACHR needed an extraordinary prerogative in cases that were clearly inadmissible or inexpedient. He also asked that certain conditions be included when it comes to setting deadlines and issuing precautionary measures, noting that it was the Committee's intention to make the system work. In response to Dr. Fernando Gómez Mont Urueta's suggestions, the rapporteur proposed that the Plenary approve the idea of envisaging, as the starting point of the report, full-time work by both Commissioners and Judges. The Plenary approved this proposal. The rapporteur also asked Dr. Fernando Gómez Mont Urueta to submit a written proposal on the participation of the Executive Secretary of the IACHR and his assessment of the preferential treatment accorded precautionary measures.

Dr. Miguel Angel Pichardo asked for a revision of point 2 of the document, given that, on January 27, 2012, the Dominican Republic had deposited the instrument of accession to the Protocol to the American Convention on Human Rights to Abolish the Death penalty. On this, Dr. Fernando Gómez Mont Urueta asked the Committee Secretariat to refer to the status of signatures and ratifications when presenting the report to the General Assembly, and to add a footnote referring to the date.

A final review of the report was conducted on March 9.The reference to fostering ratification was modified and the expression "expansion of the competency of the organs" was explained. In point d), the recommendation is addressed to the General Assembly. Likewise, changes were made to the Spanish along with adjustments to the role of the General Assembly in order to make the most of its power to oversee compliance with the resolutions of the Inter-American Court of Human Rights. The expression "judgments of this tribunal" was changed to "judgments of this Court" (changing Spanish "tribunal" to "Corte") and reference was made to the full-time nature of both the Commission and the Court. A separate section, entitled "Other procedural matters," was also added,

in which the question of the Commission and Court working full time is presented as a matter of priority, rather than as a gradual development. For his part, the rapporteur proposed two new numbered paragraphs, to replace subparagraphs f) and g), respectively. It is the Committee's intention that the members of both organs work full time, which entails new costs for the OAS. Hence the importance of changing the subtitle of the document. The rapporteur seconded the recommendation and proposed that the new title should be "Full Time Operation of the Court and the Commission." In the same vein, Dr. Carlos Mata Prates asked that the reference to officials ("*funcionarios*") be changed to "members of these organs" and that the reference to "States" in this section be deleted. Dr. Freddy Castillo Castellanos and Dr David P. Stewart asked to change "professionalization" to "dedication." However, the Committee decided to delete the word, as Dr. Elizabeth Villalta had proposed, Dr. David P. Stewart also proposed adding "full time" in parenthesis in the subtitle. The rapporteur drew attention to the proposals made by Dr. Fernando Gómez Mont Urueta and asked the Committee members to take the time to read them. In that connection, a new paragraph was proposed that would serve as a link to the end of the document; the financing initiative was included; and the reasonable deadline proposal was reinstated.

Upon completing its review of the new version of the document, the plenary adopted the document entitled "Report of the Inter-American Juridical Committee. Strengthening the Inter-American System of Protection and Promotion of Human Rights," prepared by Dr. Fabián Novak Talavera and Dr. João Clemente Baena Soares, document CJI/doc.400/12 rev.3. It was also proposed that the report be accompanied by resolution CJI/RES. 192/12 (LXXX-O/12), when it is submitted to the General Assembly.

CJI/RES. 192 (LXXX-O/12)

STRENGTHENING THE INTER-AMERICAN SYSTEM FOR THE PROTECTION AND PROMOTION OF HUMAN RIGHTS

THE INTER-AMERICAN JURIDICAL COMMITTEE,

CONSIDERING that resolution AG/RES. 2675 (XLI-O/11) requested the Inter-American Juridical Committee "to give priority to the preparation of a study on ways to strengthen the inter-American human rights system";

HAVING IN MIND the study of the rapporteurs, Drs. Fabián Novak Talavera and João Clemente Baena Soares, on "Strengthening the Inter-American System of Protection and Promotion of Human Rights" (CJI/doc.400/12 rev.1),

RESOLVES:

1. To thank rapporteurs Drs. Fabián Novak Talavera and João Clemente Baena Soares for their report.

2. To approve the "Report of the Inter-American Juridical Committee: Strengthening the Inter-American System of Protection and Promotion of Human Rights" (CJI/doc.400/12 rev.3), attached to this resolution.

3. To transmit this resolution to the OAS Permanent Council for its due consideration and to send it to the General Assembly.

This resolution was adopted unanimously at the regular meeting held on 9 March, 2012, by the following members: Drs. Carlos Alberto Mata Prates, David P. Stewart, Fernando Gómez Mont Urueta, Jean-Paul Hubert, Miguel Aníbal Pichardo Olivier, Freddy Castillo Castellanos, Fabián Novak Talavera, José Luis Moreno Guerra, and Ana Elizabeth Villalta Vizcarra.

CJI/doc.400/12 rev.3

REPORT OF THE INTER-AMERICAN JURIDICAL COMMITTEE. STRENGTHENING THE INTER-AMERICAN SYSTEM OF PROTECTION AND PROMOTION OF HUMAN RIGHTS

1. Delimiting the Mandate granted to the Rapporteurs

The Organization of American States has long been concerned with enhancing and strengthening the inter-American human rights protection system. Thus, since the First Summit of the Americas and at successive General Assembly sessions since 1996, the Heads of State and Government of the OAS member countries have been underscoring the need to reflect on and improve the current system of human rights promotion and protection in the region.[1/]

Accordingly, and in order to fulfill the objectives articulated at the aforementioned Summits of the Americas and OAS General Assembly sessions, the last General Assembly of the OAS, in its fourth plenary session held on 7 June 2011, adopted resolution AG/RES. 2675 (XLI-O/11), whereby it acknowledged that there were gaps and areas that could be improved, and the need to consolidate progress in enhancing this system to protect human beings. It thus decided to take concrete action, including the creation of a Special Working Group within the framework of the Permanent Council for consideration of this issue.

Another action taken by the General Assembly was to request the Inter-American Juridical Committee to "prepare a priority study on ways of strengthening the Inter-American system of human rights" (article 3, letter d) of the resolution).

Thus, in strict fulfillment of the mandate received from the General Assembly, the Inter-American Juridical Committee, at its 79th regular session held in Río de Janeiro, Brazil, decided to appoint as rapporteurs for this theme Dr. Fabián Novak and Ambassador João Clemente Baena Soares.

At this session, the scope of this mandate was also broadly discussed, and it was agreed that the report to be prepared by the rapporteurs should have the following features:

a. The report should be expanded to include the necessary reforms to strengthen the work of the Committee and the Inter-American Court of Human Rights. In this sense the report should address not only substantive but also procedural and even budgetary aspects;

b. The report should be presented by the rapporteurs to the other members of the Committee in early 2012 to allow for an adequate exchange of opinions in order to approve a definitive version at the session scheduled for March of that year. This was in response to the mandate of the General Assembly's asking the Committee to prepare a report on the theme "on a priority basis";

c. To draft the report, the rapporteurs should be able to count on the support of the Secretariat of the Juridical Committee in obtaining all the necessary documentation, including the contributions of the Working Group to Reflect on Strengthening the Inter-

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[1]. OAS DEPARTMENT OF INTERNATIONAL LAW. *Diálogos sobre el fortalecimiento del Sistema Interamericano de Protección y Promoción de los Derechos Humanos*. July 18, 2011. See also, *inter alia*, resolutions AG/RES. 1828 (XXXI-O/01), AG/RES. 1890 (XXXII-O/02), AG/RES. 1925 (XXXIII-O/03), AG/RES. 2030 (XXXIV-O/04), AG/RES. 2075 (XXXV-O/05), AG/RES. 2220 (XXXVI-O/06), AG/RES. 2291 (XXXVII-O/07), AG/RES. 2407 (XXXVIII-O/08), AG/RES. 2521 (XXXIX-O/09), AG/RES. 2605 (XL-O/10), and AG/RES. 2675 (XLI-O/11).

American System of Human Rights created within the Permanent Council of the OAS.[2/] Accordingly, the rapporteurs should analyze and take into account the contributions made by the States in this regard, the agencies of the system itself, and the various civil society organizations.[3]

This report also aims to underscore the spheres of competence and responsibilities of each OAS organ, including the General Assembly itself, with all due respect to its autonomy, in achieving a stronger inter-American human rights system.

2. Opening Comments

Before presenting and analyzing the proposals presented before the Inter-American Juridical Committee, we feel that it is important to make some initial remarks of a general nature.

First, we must repeat that the purpose of this report is to strengthen the Inter-American Commission and the Inter-American Court of Human Rights, as well as the whole set of rules, regulations, and structures that make up the inter-American system of human rights. This strengthening entails working on several fronts: from strengthening the organizations in the system to the efforts of the States themselves to consolidate their internal systems of protection for human beings. It also involves the commitment of the organizations in the system to provide due process with full guarantees to the parties concerned, transparency, predictability and actions adjusted to the limitations imposed by the American Convention on Human Rights and its Statute and Regulations, as well as compliance by the American States with the obligations imposed by these same instruments and the binding decisions reached by these organs.

A second, especially relevant, aspect is the need to make the system universal. If we review the present situation of ratifications of the Inter-American multilateral treaties on human rights, we see that some of them regrettably show a very low level of ratifications and that basic, very old instruments of the system have not yet been ratified by all the American countries, as can be seen below:[4]

a. The American Convention on Human Rights (the Pact of San José) of 1969: The following are not party to the Convention: Antigua and Barbuda, Bahamas, Belize, Canada, Guyana, Saint Kitts and Nevis, Santa Lucia, Saint Vincent and the Grenadines, United States of America. Trinidad and Tobago denounced it: 10 States.

b. Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social, and Cultural Rights (Protocol of San Salvador) of 1988. The following are not party: Bahamas, Barbados, Belize, Canada, Chile (signed but did not ratify), Jamaica, Saint Kitts and Nevis, Santa Lucia, Saint Vincent and the Grenadines, Trinidad and Tobago, United States of America, Venezuela (signed but did not ratify): 12 States.

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2. This report took into account, among others, the document: PERMANENT COUNCIL OF THE OAS. *Informe del Grupo de Trabajo Especial de Reflexión sobre el funcionamiento de la Comisión Interamericana de Derechos Humanos para el fortalecimiento del Sistema Interamericano de Derechos Humanos para la consideración del Consejo Permanente.* December 13, 2011.

3. This report took into account, among others, the document: CENTER OF STUDIES OF LAW, JUSTICE AND SOCIETY. *Organizaciones de sociedad civil de las Américas presentan su posición sobre el informe final elaborado por el Grupo de Trabajo Especial de Reflexión sobre el funcionamiento de la Comisión Interamericana de Derechos Humanos para el fortalecimiento del Sistema Interamericano de Derechos Humanos.* December 2011.

4. Information provided by the Department of International Law of the OAS on 7 December 2011.

c. Protocol to the American Convention on Human Rights to abolish the death penalty of 1990. The following are not party: Antigua and Barbuda, Bahamas, Barbados, Belize, Bolivia, Canada, Colombia, Dominica, El Salvador, Grenada, Guatemala, Guyana, Haiti, Jamaica, Peru, Saint Kitts and Nevis, Suriname, Trinidad and Tobago, United States of America: 19 States.

d. Inter-American Convention to Prevent and Punish Torture of 1985. The following are not party: Antigua and Barbuda, Bahamas, Barbados, Belize, Canada, Dominica, Grenada, Guyana, Haiti, Honduras, Jamaica, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Trinidad and Tobago, United States of America: 16 States.

e. Inter-American Convention on Enforced Disappearance of Persons of 1994. The following are not party: Antigua and Barbuda, Bahamas, Barbados, Belize, Brazil, Canada, Dominica, the Dominican Republic, El Salvador, Grenada, Guyana, Haiti, Jamaica, Nicaragua (signed but did not ratify), Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Suriname, Trinidad and Tobago, United States of America: 20 States.

f. Inter-American Convention to Prevent, Sanction, and Eradicate Violence against Women (Convention of Belém do Pará) of 1994. The following are not party: Canada and the United States of America: 2 States.

g. Inter-American Convention for the Elimination of All Forms of Discrimination against Persons with Disabilities of 1999. The following are not party: Antigua and Barbuda, Bahamas, Barbados, Belize, Canada, Dominica, Grenada, Guyana, Jamaica (signed but did not ratify), Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Suriname, Trinidad and Tobago, United States of America: 15 States.

We must recognize that several States which are neither parties to the conventions nor subject to the jurisdiction of the Court, remain fully committed to human rights in the region. Furthermore, these States, which are parties to the OAS Charter and the American Declaration of the Rights and Duties of Man, are also part of the inter-American system for the protection of human rights. However, in order to strengthen the system, this Committee considers it essential to achieve its universalization, not only through the participation of a majority of the States in the aforementioned inter-American protection instruments, but also through recognition by all OAS member states of the contentious jurisdiction of the Inter-American Court of Human Rights. To that end, the Inter-American Juridical Committee calls for a joint effort of member states to increase the number of ratifications of the instruments named above.

3. Proposals

After reviewing all the pertinent information (doctrinal and documental), the Inter-American Juridical Committee presents below a set of proposals, all of which are meant to strengthen the system for protecting individuals and their rights in the region and provide fuller and better guarantees of due process.

While most of these proposals relate to the Inter-American Commission on Human Rights, there are also important proposals relating to the Court and to the system's member states. The first set is not only in response to the fact that debate within the Organization and in the working group set up to that end has been much more concerned with the procedure followed with respect to this regional body to protect human beings (i.e., the Commission) but is also in response to increased opportunities for improvement and enhancement found by the rapporteurs, in the case of the IACHR.

In each case the same structure and methodology will be followed to present the proposals, that is to say, the provisions or norms that regulate the institutions or aspects to be modified will be established, and their main characteristics will then be pointed out, together with any problems presented as well as the proposed changes (should that be the case).

An important clarification that the Inter-American Juridical Committee wishes to offer is that proposed amendments to the Statute or to the Rules of Procedure of the IACHR or the Court, as presented in this document, should be understood strictly as such, as proposals made pursuant to the mandate assigned to this advisory body by the OAS General Assembly. It will therefore fall to the states (in the case of the Statute) or to the IACHR or the Court (in the case of the Rules of Procedure) to decide whether these proposals are accepted and possibly implemented.

In this sense, we have:

Inter-American Commission on Human Rights

3.1 Friendly settlement[5]

The institution of the "friendly solution", designed so that the denounced State and the victim or complainants can reach an adequate, prompt and fair solution to the case before it becomes known to the Court, is regulated in Article 48.f of the American Convention on Human Rights, as well as in Article 40.1 of the Rules of Procedure of the Inter-American Commission on Human Rights (IACHR), which state the following:

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5. See PERMANENT COUNCIL OF THE OAS. Special Working Group to Reflect on the Workings of the Inter-American Commission on Human Rights with a view to Strengthening the Inter-American Human Rights System. *Presentación de la Delegación del Uruguay sobre el tema Soluciones Amistosas*. September, 27, 2011. Also, DEPARTMENT OF INTERNATIONAL LAW OF THE OAS. *Opinión sobre la aplicación de los diversos instrumentos jurídicos del sistema interamericano en materia de derechos humanos con relación a ciertos temas específicos*. July 18, 2011; PERMANENT MISSION OF MEXICO. *Intervención en el Grupo de Trabajo del Consejo Permanente sobre los desafíos y objetivos de mediano y largo plazo del sistema interamericano de derechos humanos*. September 12, 2011; PERMANENT COUNCIL OF THE OAS. *Exposición de la Delegación de Brasil sobre los temas desafíos y objetivos de mediano y largo plazo de la CIDH y medidas cautelares*. September 12, 2011; DEPARTMENT OF INTERNATIONAL LAW OF THE OAS. *Resumen de los temas y recomendaciones tratados durante los diálogos sobre el fortalecimiento y el perfeccionamiento del Sistema Interamericano de Derechos Humanos 2001-2011*. June 27, 2011; PERMANENT COUNCIL OF THE OAS. *Presentation on the* PERMANENT COUNCIL OF THE OAS *Federación Interamericana de Abogados (FIA) en la reunión del grupo de trabajo con la Sociedad Civil;* October 28, 2011; PERMANENT COUNCIL OF THE OAS. *Propuestas de la Delegación del Uruguay sobre los temas Financiamiento, Medidas Cautelares, Asuntos de Procedimiento en las tramitaciones de los casos y peticiones individuales, Soluciones Amistosas y Criterios para la construcción del capítulo IV del informe anual de la CIDH*. November 4, 2011; PERMANENT COUNCIL OF THE OAS. *Propuestas de la Delegación de Chile sobre los temas funciones de promoción, medidas cautelares, soluciones amistosas, asuntos de procedimiento en la tramitación de los casos y peticiones individuales y financiamiento*. November 11, 2011; PERMANENT COUNCIL OF THE OAS. *Informe del Grupo de trabajo especial sobre el funcionamiento de la CIDH para el fortalecimiento del Sistema Interamericano de Derechos Humanos para la consideración del Consejo Permanente*. December 6, 2011; PERMANENT COUNCIL OF THE OAS. *Propuestas de la Delegación del Perú sobre los temas de financiamiento, soluciones amistosas y promoción de los Derechos Humanos: Fortalecimiento de los sistemas jurisdiccionales nacionales.* December 5, 2011; PERMANENT COUNCIL OF THE OAS. *Propuestas de la Delegación de México*. December 7, 2011; PERMANENT COUNCIL OF THE OAS. *Propuestas de la Delegación de Paraguay;* December 6, 2011. Of particular importance for this and the other themes analyzed in this report are the Strategic Plan of the IACHR 2011-2015 and the Guidelines of the International Court of Human Rights 2011-2015.

> The Commission shall place itself at the disposal of the parties concerned with a view to reaching a friendly settlement of the matter on the basis of respect for the human rights recognized in this Convention.
>
> On its own initiative or at the request of any of the parties, the Commission shall place itself at the disposal of the parties concerned, at any stage of the examination of a petition or case, with a view to reaching a friendly settlement of the matter on the basis of respect for the human rights recognized in the American Convention on Human Rights, the American Declaration and other applicable instruments.

In turn, Article 23 of the Statute of the IACHR establishes that should a friendly settlement not be reached, the Commission shall draft, within 180 days, the report required by article 50 of the Convention.

We learn from reading these articles that the institution of "friendly settlement" enshrined in the above-mentioned inter-American instruments has the following characteristics:

a. The friendly-settlement initiative can come from the IACHR, any of the parties or from both together, at any stage of the petition or case;

b. The settlement is based on consensus of the parties (the petitioner, the denounced State and the IACHR);

c. The settlement reached must necessarily respect human rights;

d. Once the report of the IACHR that contains the settlement has been published, it shall be binding for the parties;

e. The IACHR fulfils a *facilitating* role in seeking this consensus (the conciliatory nature of the friendly settlement), since not only can it bring the parties together; it may also suggest bases for an understanding. It also fulfils an *inspecting* role, in that it should ensure that the agreed settlement respects human rights and has the agreement of the victims or their assignees. The IACHR also makes sure that the agreement is complied with (articles 40.5 and 48 of the Rules of Procedure of the IACHR).

The States in the region have been advocating a more active role of the IACHR in this matter. In the past 10 years, only 79 friendly-settlement agreements have been reached under the auspices of the IACHR. Accordingly, the following measures could be adopted for the purpose of enhancing the results and lending impetus to this mechanism of conciliation:

a. Strengthen the specialization of the IACHR on this theme through the Friendly Settlements Unit, similar to the groups that have existed since 2008 for each stage of the process of registration, administration of cases and litigation before the Court. This will help spur emphasis on friendly settlement.

b. Train the members and advisors of this Friendly Settlements Unit in techniques of negotiation and conciliation.

c. Reduce the time period that the IACHR uses in practice to evaluate and approve the friendly-settlement agreements reached by the parties. This approval period should not exceed six months; a stipulation that could be included in the Statute and in the Rules of Procedure of the IACHR.

d. Establish in the Statute and Rules of Procedure the possibility of IACHR holding follow-up hearings on compliance with friendly-settlement agreements, similar to existing arrangements at the Inter-American Court. This would allow for greater control and transparency as regards observance and implementation of these agreements, as well as guarantee greater efficacy.

e. The IACHR could prepare a good-practices guide for friendly settlements to be distributed among the States and the victims to facilitate their conciliatory efforts.

3.2 Precautionary measures[6]

The precautionary measures entrusted to the IACHR are not contemplated in the American Convention on Human Rights or in the IACHR Statute, but they are in article 25 of its Rules of Procedure.[7] In contrast, the provisional measures of the Inter-American Court of Human Rights are provided for in the American Convention.

Reading this article, we learn that the precautionary measures that can be dictated by the IACHR have the following characteristics:

a. The measures can only be decreed in connection with grave and urgent situations. Accordingly, the IACHR must take into account — besides the elements already pointed out — the context, the imminence of the hazard, whether the authorities have been notified of the risk situation, individual identification of the potential beneficiaries of the measure and the express consent of these individuals when the request is made to the IACHR by a third party;

b. The measures can be adopted at the initiative of IACHR itself or at the request of a party;

c. The IACHR is obliged to ask the State for relevant information before issuing the measure, except when the urgency of the matter justifies dispensing with this step;

d. The purpose of these measures is to prevent irreparable damage to the persons or object of the process in connection with a petition or pending case, to prevent damage to persons under the jurisdiction of the State regardless of any request, or due to their ties to an organization or community of determined or determinable persons;

e. The IACHR must periodically evaluate the pertinence of maintaining the measures adopted.

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6. See DEPARTMENT OF INTERNATIONAL LAW OF THE OAS. *Opinión sobre la aplicación de los diversos instrumentos jurídicos del sistema interamericano en materia de derechos humanos con relación a ciertos temas específicos*. July 18, 2011. Also, PERMANENT MISSION OF MEXICO. *Intervención en el Grupo de Trabajo del Consejo Permanente sobre los desafíos y objetivos de mediano y largo plazo del sistema interamericano de derechos humanos;* September 12, 2011; PERMANENT COUNCIL OF THE OAS. *Exposición de la Delegación de Brasil sobre los temas desafíos y objetivos de mediano y largo plazo de la CIDH y medidas cautelares*. September 12, 2011; PERMANENT COUNCIL OF THE OAS. *Exposición de la Delegación de Argentina sobre los temas de procedimiento en la tramitación de los casos y peticiones individuales ante la CIDH y medidas cautelares.* September 20, 2011; DEPARTMENT OF INTERNATIONAL LAW OF THE OAS. *Resumen de los temas y recomendaciones tratados durante los diálogos sobre el fortalecimiento y el perfeccionamiento del Sistema Interamericano de Derechos Humanos 2001-2011*. June 27, 2011; CENTER OF STUDIES OF LAW, JUSTICE AND SOCIETY, AND OTHERS. *Aportes para una agenda integral para el fortalecimiento del Sistema Interamericano de Derechos Humanos.* October 31, 2011; PERMANENT COUNCIL OF THE OAS. *Propuestas de la Delegación del Uruguay sobre los temas Financiamiento, Medidas Cautelares, Asuntos de Procedimiento en las tramitaciones de los casos y peticiones individuales, Soluciones Amistosas y Criterios para la construcción del capítulo IV del informe anual de la CIDH*. November 4, 2011; PERMANENT COUNCIL OF THE OAS. *Propuestas de la Delegación de México*. December 7, 2011.

7. There is also a reference to them in article XIII of the Inter-American Convention on Enforced Disappearance of Persons; PERMANENT COUNCIL OF THE OAS. *Informe del Grupo de trabajo especial sobre el funcionamiento de la CIDH para el fortalecimiento del Sistema Interamericano de Derechos Humanos para la consideración del Consejo Permanente*. 6 December 2011; PERMANENT COUNCIL OF THE OAS. *Presentación de la Secretaría Ejecutiva de la CIDH sobre el tema de medidas cautelares*. December 2, 2011.

In this respect, we should stress at the start that although—as has been said—this function of the IACHR is not contemplated in the Convention or in the Statute, but rather in the Rules of Procedure and in their practice, the States have long recognized this competence expressly and in practice, thereby ensuring its remaining in effect within the system.

In addition, we consider it important to recognize and emphasize that the IACHR has made efforts in its recent reports to determine the precise criteria for issuing precautionary measures in order to ensure greater transparency, predictability and juridical security in their application. Thus, in 2006 it established the criteria of gravity and urgency, as well as the context, as prerequisites for such measures,, in each case pointing out the following:

> With regard to the concept of gravity, the following aspect must be taken into account: (a) the tone of the threats received (oral, written, symbolic and other messages) and their materialization against one or more members of a group of persons; (b) the antecedents of acts of aggression against persons in similar situations; (c) any acts of direct aggression perpetrated against the possible beneficiary; (d) any increase in threats that shows the need to take preventive action; and (e) elements such as apology and incitation to violence against a person or group of persons.[8/]
>
> The concept of urgency entails the following:(a) the existence of cycles of threats and acts of aggression that reveal the need to act immediately; (b) the continuity and temporal proximity of the threats; (c) the existence of a credible "ultimatum" through which, for example, the possible beneficiary is shown that he should abandon the region he lives in or else he will be the victim of violations.[9]
>
> Finally, as regards context, the following factors are relevant: i) the existence of armed conflict, ii) the reality of a state of emergency, iii) the degree of efficiency and impunity in the functioning of the judicial system, iv) circumstantial evidence of discrimination against vulnerable groups, and v) controls exercised by the Executive over the other Branches of State.[10]

Likewise, we must stress that this is an exceptional mechanism that can only be applied in situations of gravity and urgency. The data show that between 2005 and 2009 the IACHR used the measures in 10% of cases, whereas of the 375 requests for precautionary measures received in 2010, 68 were granted, that is to say, 18% of cases.[11]

This, however, does not preclude making certain recommendations concerning the regulation of precautionary measures. Thus:

a. The contents of each of the criteria that lead to adopting precautionary measures should be included in the Rules of Procedure of the IACHR, bearing in mind the developments already fostered by the Commission in its above-mentioned reports, aimed at asserting such principles as transparency, predictability and juridical security, to guide the adopting of such measures.

b. Although Article 25.8 of the IACHR Rules of Procedure determines a criterion to take into account to suspend adoption of a precautionary measure (besides other sub-paragraphs from which other criteria may be derived), it is recommended that express mention be made in the IACHR Rules of Procedure of all the situations that normally entail lifting cautionary measures, so as to avoid situations that can result in the

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8. IACHR. *Informe sobre la Situación de las Defensoras y Defensores de Derechos Humanos en las Américas.* OAS/Ser.L/V/II.124, Doc. 5 rev. 1, March 7, 2006, paragraph 244.
9. *Idem.*
10. *Ibid*, paragraph 245.
11. GONZÁLEZ, Felipe. "Las medidas urgentes en el Sistema Interamericano de Derechos Humanos". In: Revista Sur, v. 7, n. 13, 2010, p.67.

unjustified suspension or maintenance of such measures. Here the criteria already pointed out by the IACHR should be kept in mind. They could also be expressly included in its Rules of Procedure.

c. Also, when a precautionary measure is adopted without having previously requested information from the State, because of the existence of an emergency situation, we propose that in such cases the decision be approved by an absolute or special majority of the members of the Commission (Articles 18 and 45 of the IACHR Rules of Procedure), in order to strengthen this vital mechanism to protect victims in situations of urgency.

d. It is to be recommended that the General Assembly instruct the competent organs to prepare a guide to good practices on this subject, explaining in detail the criteria followed by this organ to determine the need for precautionary measures and describing successful experiences in implementing them.

e. Likewise, it would be advisable for States to exchange information on successful experiences in implementing and complying with such measures.

f. Finally, it is important to set up a mechanism for periodical follow-up on the precautionary measures in effect, with the participation of the beneficiary, the petitioner and the State, with a view to facilitating compliance and determining the need to maintain or possibly suspend those measures.

3.3 Promoting Human Rights[12]

Article 106 of the Charter of the OAS and article 41 of the American Convention on Human Rights establish as the main function of the IACHR "to promote the observance and defense of Human Rights". In the same sense, Article 1 of the Statute and the Rules of Procedure of the IACHR add the function "to serve as [a] consultative organ of the Organization in this matter".

On the other hand, the content and scope of this function are detailed in particular in Article 41 of the American Convention and Articles 18, 19 and 20 of the IACHR Statute. These

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12. See DEPARTMENT OF INTERNATIONAL LAW OF THE OAS. *Opinión sobre la aplicación de los diversos instrumentos jurídicos del sistema interamericano en materia de derechos humanos con relación a ciertos temas específicos*. July 18, 2011. Also, PERMANENT MISSION OF MEXICO. *Intervención en el Grupo de Trabajo del Consejo Permanente sobre los desafíos y objetivos de mediano y largo plazo del sistema interamericano de derechos humanos*. September 12, 2011; PERMANENT COUNCIL OF THE OAS. *Exposición de la Delegación de Brasil sobre los temas desafíos y objetivos de mediano y largo plazo de la CIDH y medidas cautelares*. September 12, 2011; PERMANENT COUNCIL OF THE OAS. *Presentación de la Delegación de República Dominicana sobre el tema Promoción de los Derechos Humanos*. October 5, 2011; PERMANENT COUNCIL OF THE OAS. *Presentación de la Delegación de* Colombia *sobre el tema Criterios para la construcción del capítulo IV del informe anual de la CIDH*. October 5, 2011; DEPARTMENT OF INTERNATIONAL LAW OF THE OAS. *Resumen de los temas y recomendaciones tratados durante los diálogos sobre el fortalecimiento y el perfeccionamiento del Sistema Interamericano de Derechos Humanos 2001-2011*. June 27, 2011; CENTER OF STUDIES OF LAW, JUSTICE AND SOCIETY, AND OTHERS. *Aportes para una agenda integral para el fortalecimiento del Sistema Interamericano de Derechos Humanos.* October 31, 2011. PERMANENT COUNCIL OF THE OAS. *Informe del Grupo de trabajo especial sobre el funcionamiento de la CIDH para el fortalecimiento del Sistema Interamericano de Derechos Humanos para la consideración del Consejo Permanente*. December 6, 2011; PERMANENT COUNCIL OF THE OAS. *Propuestas de la Delegación del Perú sobre los temas de financiamiento, soluciones amistosas y promoción de los Derechos Humanos: Fortalecimiento de los sistemas jurisdiccionales nacionales.* December 5, 2011.

provisions describe the general functions that the IACHR can perform in fulfilling its role as promoter of human rights, as well as in relation to the members States of the OAS and the States that are party to the American Convention. These functions include stimulating awareness of human rights among the various American peoples, preparing studies and reports, presenting draft additional protocols or amendments to the American Convention on Human Rights, formulating recommendations for the States to adopt legislative or constitutional measures on behalf of human rights, attending to queries from States and lending them the advisory assistance requested on this and many other matters.

The first comment we should make refers to the need to understand that the activities meant to promote human rights and those meant to protect and defend them are not in contradiction with, but rather complement, one another. Furthermore, we can assert that when the IACHR works on behalf of protecting and defending human rights, it is also, in our opinion, promoting compliance with such rights through awareness of their content and scope.

In the same vein, it must be acknowledged that the IACHR, within its limited resources,[13/] has been engaged in the important task of promoting and disseminating these rights. Proof of this is its annual report for 2010, where we can read of the various activities undertaken, such as lectures, seminars, training, meetings with universities, inaugurations, commemorations, and so on.

Nevertheless, in order to further stimulate IACHR's work of promoting human rights, it is proposed:

a. To install a Working Group within the IACHR charged with designing, preparing, funding and carrying out projects meant to cooperate with and strengthen human rights in member countries. These projects should be focused on providing skill-building for employees, members of the armed forces, police and magistrates; offering answers to queries; and so on.

b. To set up a dialogue mechanism among the member States (for example, periodic meetings with the permanent missions accredited with the OAS) for the purpose of preventing future violations, disseminating good practices, training, assisting and advising state employees on critical issues, and the like.

c. To prepare IACHR guides for the States on best practices for proper implementation of the international obligations that exist on the inter-American level as regards human rights, with a view to enhancing compliance and putting their recommendations into effect.

[13.] For the 2010-2011 period, the OAS allocated only US$10,863,000 to the programmatic area of the IACHR and the Court.

3.4 Financing[14]

In accordance with Article 72 of the American Convention on Human Rights, the expenses and fees involved in the functioning of the IACHR and the Inter-American Court of Human Rights are covered by the budget of the Organization, which is financed by contributions from the member countries. In addition, voluntary contributions have been made by member and extra-continental countries, which has enabled these bodies devoted to the protection of human rights to cover their other needs.

Nonetheless, the amount allocated to these two organs of the system turns out to be patently insufficient, and precludes an adequate program of protection for human rights in the region. The financing problem is not only evidenced when the budget of the inter-American system is compared with other protection schemes, such as the European, but also when we see failures in the system caused in large measure by the volume of the earmarked budget. Thus, while in the last few years complaints filed with the IACHR have increased (between 2000 and 2010, 13,381 complaints were registered), and that increase has been replicated in the Court (which received 128 applications between 1997 and 2010), between 2008 and 2010 the budget allocated to both organs represented only 5% of the total budget of the Organization.

As maintained at the end this document, raising the budget should, for example, permit a gradual increase in the number of regular sessions, leading to a situation in which first the President and then all the commissioners and the judges would be working full time in the headquarters of the two organs (Washington and Costa Rica, respectively), thereby enhancing the capacity of the IACHR and the Court to fulfill the functions for which they were created. A larger

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[14]. PERMANENT MISSION OF MEXICO. *Intervención en el Grupo de Trabajo del Consejo Permanente sobre los desafíos y objetivos de mediano y largo plazo del sistema interamericano de derechos humanos*. September 12, 2011; PERMANENT COUNCIL OF THE OAS. *Exposición de la Delegación de Brasil sobre los temas desafíos y objetivos de mediano y largo plazo de la CIDH y medidas cautelares*. September 12, 2011; PERMANENT COUNCIL OF THE OAS. *Exposición de la Delegación de Argentina sobre los temas de procedimiento en la tramitación de los casos y peticiones individuales ante la CIDH y medidas cautelares*. September 20, 2011; SPECIAL WORKING GROUP TO REFLECT ON THE FUNCTIONING OF THE IACHR TO STRENGTHEN THE INTER-AMERICAN HUMAN RIGHTS SYSTEM. *Fortalecimiento financiero del sistema interamericano de derechos humanos*. October 13, 2011; DEPARTMENT OF INTERNATIONAL LAW OF THE OAS. *Resumen de los temas y recomendaciones tratados durante los diálogos sobre el fortalecimiento y el perfeccionamiento del Sistema Interamericano de Derechos Humanos 2001-2011*. June 27, 2011; PERMANENT COUNCIL OF THE OAS. *Aspectos señalados por la Delegación del Ecuador en las reuniones del Grupo de Trabajo.* November 2, 2011; PERMANENT COUNCIL OF THE OAS. *Propuestas de la Delegación del Uruguay sobre los temas Financiamiento, Medidas Cautelares, Asuntos de Procedimiento en las tramitaciones de los casos y peticiones individuales, Soluciones Amistosas y Criterios para la construcción del capítulo IV del informe anual de la CIDH*. November 4, 2011; PERMANENT COUNCIL OF THE OAS. *Propuesta de la Delegación de Canadá sobre el tema fortalecimiento financiero del Sistema Interamericano de Derechos Humanos.* November 16, 2011; PERMANENT COUNCIL OF THE OAS. *Informe del Grupo de trabajo especial sobre el funcionamiento de la CIDH para el fortalecimiento del Sistema Interamericano de Derechos Humanos para la consideración del Consejo Permanente.* December 6, 2011; PERMANENT COUNCIL OF THE OAS. *Propuestas de la Delegación del Perú sobre los temas de financiamiento, soluciones amistosas y promoción de los Derechos Humanos: Fortalecimiento de los sistemas jurisdiccionales nacionales.* December 5, 2011; PERMANENT COUNCIL OF THE OAS. *Propuestas de la Delegación de México*. December 7, 2011; PERMANENT COUNCIL OF THE OAS. *Propuestas de la Delegación de Ecuador*. December 5, 2011; PERMANENT COUNCIL OF THE OAS. *Propuestas de la Delegación de Paraguay*. December 6, 2011.

budget would also make it possible to increase the number of lawyers appointed to the Executive Secretariats of the Committee and the Court. All this should result in more extensive and better coverage and protection of the rights of individuals in our region.

Accordingly, and pursuant to the technical meetings held on this issue in Ottawa and San Salvador, it is necessary:

a. To establish in the short term a pluri-annual international fund of voluntary contributions from donors to attend to the more urgent needs in the next five years, in compliance with the programs and strategic plans of each organ of the system. This fund should be designed not to address specific themes that represent legitimate interests of the donors, but rather be aimed at strengthening the IACHR and the Inter-American Court of Human Rights as institutions.

b. To establish in the medium and long run a program to raise the annual contributions of the member States of the OAS for the specific purpose of strengthening the system of promoting and protecting human rights, making it permanent and guaranteeing its sustainability, which should enable the objectives mentioned in the third paragraph of this section to be achieved.

In our mind, this is a realistic proposal in that it is based on the present difficulty for the States of reaching a consensus on increasing their annual contributions immediately, bearing in mind the strained international economic and financial context. This proposal is also based on the unfeasibility of re-structuring the present budget, as this would imply cutting back in other areas or spheres that are equally priority questions for the Organization.

3.5 Chapter IV of the Final Report of the IACHR[15]

As regards the IACHR's practice of including in its annual report to the General Assembly of the OAS a chapter IV on the human-rights situation in some countries in the inter-American system, some States have expressed some criticism, fundamentally questioning the methodology, criteria, and objectivity of the Committee's inclusion of the countries in this chapter and pointing out that in essence these problems are common to the region.

Although, broadly speaking, this practice started in the annual report of 1970, the 1975 report is when the IACHR decided to include a whole chapter dedicated to certain countries because of the particularly vulnerable situation of human rights that existed there. So the practice

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15. CENTER OF STUDIES OF LAW, JUSTICE AND SOCIETY, AND OTHERS. *Aportes para una agenda integral para el fortalecimiento del Sistema Interamericano de Derechos Humanos.* October 31, 2011; PERMANENT COUNCIL OF THE OAS. *Aspectos señalados por la Delegación del Ecuador en las reuniones del Grupo de Trabajo.* November 2, 2011; PERMANENT COUNCIL OF THE OAS. *Propuestas de la Delegación del Uruguay sobre los temas Financiamiento, Medidas Cautelares, Asuntos de Procedimiento en las tramitaciones de los casos y peticiones individuales, Soluciones Amistosas y Criterios para la construcción del capítulo IV del informe anual de la CIDH*. November 4, 2011; PERMANENT COUNCIL OF THE OAS. *Informe del Grupo de trabajo especial sobre el funcionamiento de la CIDH para el fortalecimiento del Sistema Interamericano de Derechos Humanos para la consideración del Consejo Permanente*. December 6, 2011; PERMANENT COUNCIL OF THE OAS. *Presentación de la Secretaría Ejecutiva de la CIDH sobre el tema Capítulo IV del Informe anual de la CIDH*. December 2, 2011; PERMANENT COUNCIL OF THE OAS. *Propuestas de la Delegación de la República Bolivariana de Venezuela sobre la construcción del Capítulo IV del informe anual de la CIDH*. December 5, 2011; PERMANENT COUNCIL OF THE OAS. *Propuestas de la Delegación de Ecuador*. December 5, 2011.

is a very old one, and one that was definitely meant to catch the attention of the States so that they could make extra efforts to correct the vulnerable situations found in their territories.[16/]

In 1980 the IACHR included this practice in article 59.h of its Rules of Procedure, the same one that was changed in 2000 but remained basically with the same wording until the current Rules of Procedure of 2009. Also, between 1996 and 1997, some States requested the IACHR to establish a set of objective criteria to decide on the inclusion of certain countries in this chapter IV.[17/] This not only gave this practice a legal (regulatory) basis but also provided it with objective and transparent criteria concerning its application. Moreover, the State to be included in Chapter IV is given prior notice of this decision so that it can present any observations that it deems pertinent and can be taken into consideration by the IACHR when the time comes to publish its conclusions in the final, public report. It is also customary for the Commission to include the information provided by the State as an attachment to its final report.

Despite the progress already made on this matter, we consider that the following reforms would be useful:

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[16]. RODRÍGUEZ-PINZÓN, Diego. "La Comisión Interamericana de Derechos Humanos". In: *Derecho Internacional de los Derechos Humanos.* Universidad Iberoamericana, Academia de Derechos Humanos y Derecho Internacional Humanitario, 2006, p.177-178.

[17]. See the annual reports of the Inter-American Commission on Human Rights for 1996 (March 14, 1997) and 1997 (February 14, 1998): The first criterion refers to those States ruled by governments that have not come to power via popular elections, by secret, genuine, periodic and free vote in accordance with internationally accepted standards. The Commission has repeatedly emphasized how essential representative democracy and democratically constituted systems are to ensure the rule of law and respect for human rights. With regard to States which do not observe the political rights enshrined in the American Declaration and the American Convention, the Commission has the duty to inform the other member States of the OAS of the political and civil liberties situation of the inhabitants.

The second criterion involves States where the free exercise of the rights enshrined in the American Convention or the American Declaration has in effect been completely or partially suspended due to the imposition of exceptional measures such as the state of emergency, state of siege, emergency security measures, and so on.

The third criterion to justify a State being included in this Chapter applies when reliable proof exists that it commits massive, grave violations of the human rights guaranteed in the American Convention, the American Declaration and other applicable human-rights instruments. In this case, special concern is warranted in cases of violation of rights that cannot be suspended, such as extrajudicial executions, torture, and enforced disappearance. Accordingly, when the Commission receives trustworthy communications denouncing such violations committed by a particular State, violations that are attested or corroborated by reports or conclusions of other inter-governmental agencies and/or reputable national and international human-rights organizations, it considers that it has the moral and legal duty to inform the Organization and member States of such situations.

The fourth criterion refers to States that find themselves in the process of transition from any of the three above-mentioned situations.

The fifth criterion has to do with either short-term circumstances or or more deeply rooted structural factors in States that for different reasons encounter situations that substantially and gravely affect the enjoyment and exercise of the fundamental rights enshrined in the American Convention or American Declaration. This criterion includes, for instance: serious violence that disrupts the proper workings of the rule of law; grave institutional crises; institutional reform processes with grave negative effects on human rights; or serious omissions in adopting the provisions needed to make fundamental rights effective.

a. Include in the IACHR Rules of Procedure the five above-mentioned criteria (see footnote 17) for a State to be included in Chapter IV, as this would provide the States not only with more legal certainty but also greater transparency and predictability.

b. Broaden the contents of Chapter IV in such a way that it is based on an analysis of the general situation of human rights (civil, political, economic, social and cultural) in the region, without this precluding the report's emphasis on critical cases pursuant to the five criteria determined by the IACHR as well as articles 41 of the American Convention and 18 of the IACHR Statute.

c. Extend the current deadline for answering the preliminary reports of the IACHR,[18/] since the States usually need to conduct complex and delicate internal consultations. An initial deadline could be set at six months, renewable for another six.

3.6 Questions of Procedure[19]

As far as procedure is concerned, several improvements could be made:

a. *Setting a short timeframe for initial review of petitions*: At present, there is no pre-established deadline for initial evaluation by the IACHR of the complaints filed with it and in practice it takes too long (three years on average). There are even cases in which it takes seven years from the time the petition is formalized in the Executive Secretariat till it is transferred to the State. This not only goes against the right of the victims whose claim is thereby thwarted; it also contradicts the time period stipulated in Article 46.1.b of the American Convention, which requires the petitioner to present his appeal within six months. Also, this can render the State's answer ineffective, or the friendly-settlement mechanism useless, since the case may come to the notice of the State when

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18. See Article 47 of the Rules of Procedure of the IACHR.

19. See PERMANENT COUNCIL OF THE OAS. *Exposición de la Delegación de Argentina sobre los temas de procedimiento en la tramitación de los casos y peticiones individuales ante la CIDH y medidas cautelares*. September 20, 2011; SPECIAL WORKING GROUP TO REFLECT ON THE FUNCTIONING OF THE IACHR TO STRENGTHEN THE INTER-AMERICAN HUMAN RIGHTS SYSTEM. *Documento Resumen de las posiciones de los Países Miembros*. September 20, 2011; PERMANENT COUNCIL OF THE OAS. *Presentación de la Delegación de Colombia sobre el tema asuntos de procedimiento en la tramitación de los casos y peticiones individuales ante la CIDH*. October 7, 2011; DEPARTMENT OF INTERNATIONAL LAW OF THE OAS. *Resumen de los temas y recomendaciones tratados durante los diálogos sobre el fortalecimiento y el perfeccionamiento del Sistema Interamericano de Derechos Humanos 2001-2011*. June 27, 2011; PERMANENT COUNCIL OF THE OAS. *Presentación de la Federación Interamericana de Abogados (FIA) en la reunión del grupo de trabajo con la Sociedad Civil.* October 28, 2011; CENTER OF STUDIES OF LAW, JUSTICE AND SOCIETY, AND OTHERS. *Aportes para una agenda integral para el fortalecimiento del Sistema Interamericano de Derechos Humanos.* October 31, 2011; PERMANENT COUNCIL OF THE OAS. *Aspectos señalados por la Delegación del Ecuador en las reuniones del Grupo de Trabajo.* November 2, 2011; PERMANENT COUNCIL OF THE OAS. *Propuestas de la Delegación del Uruguay sobre los temas Financiamiento, Medidas Cautelares, Asuntos de Procedimiento en las tramitaciones de los casos y peticiones individuales, Soluciones Amistosas y Criterios para la construcción del capítulo IV del informe anual de la CIDH*. November 4, 2011; PERMANENT COUNCIL OF THE OAS. *Propuestas de la Delegación de Colombia*. November 11, 2011; PERMANENT COUNCIL OF THE OAS. *Informe del Grupo de trabajo especial sobre el funcionamiento de la CIDH para el fortalecimiento del Sistema Interamericano de Derechos Humanos para la consideración del Consejo Permanente*. December 6, 2011; PERMANENT COUNCIL OF THE OAS. *Propuestas de la Delegación de México*. December 7, 2011; PERMANENT COUNCIL OF THE OAS. *Propuestas de la Delegación de Paraguay*. December 6, 2011.

the facts are irreversible. Thus, we consider that the IACHR Rules of Procedure should stipulate a deadline and that this should be short; in concrete terms, from reception of the petition to the decision on its eventual processing, the timeframe should not exceed 3 months.

b. *Increasing the time allowed for contesting petitions*: The practice shows that the time period currently in place for the State to contest the petitions (two months, according to Article 30.3 of the IACHR Rules of Procedure) is extremely short, which means that the States constantly request extensions, thereby eventually making the procedure even longer. For this reason it is suggested that, depending on the nature and complexity of the case, the IACHR should have the power to grant a longer initial period for contesting (4 months), without this affecting any deadline extensions that might be considered.

c. *Regulating the exceptional nature of joining admissibility and merits proceedings*: With regard to the possibility of accumulating the admissibility and merits stages, it must be stated that this should be an exceptional measure, because otherwise due process would be impaired. It should not be forgotten that this stage of the process establishes the alleged facts, the allegedly violated rights and the alleged victims: in other words, the general characterization of the case. In this sense, it is appropriate to set forth in the Rules of Procedure the specific criteria that can qualify the IACHR to proceed with such a measure in order to invest this procedure with more legal certainty, transparency, and predictability. Also, the reasons for the joinder must be explained in and supported by the resolution of the IACHR.

d. *Considering other grounds for archiving a petition*: In addition to the two grounds for archiving a petition pointed out article 42.1 of the IACHR Rules of Procedure, other equally important grounds should count, such as when the petitioner has not complied with the obligation of exhausting domestic remedies, when the petitioner does not pursue the matter for a prolonged period of time, or when the case is no longer legally relevant, all this without prejudice to the petitioner's being able to restart the procedure. This will enable the IACHR to order the flow of its pending business and dedicate its time and limited resources to cases that are really pressing. Should the IACHR consider in some cases that the petition should not be archived but rather kept on hold until the requisites are satisfied, we propose that the IACHR should report annually on such cases not actively being processed as this will allow everyone, and in particular the States, to have a clear and sure notion of the cases or petitions that are really pending.

e. According priority to the processing of serious and urgent cases: In line with the proposal on the issue of precautionary measures, it is suggested that the IACHR accord priority to addressing those petitions that due to their severity and urgency justify the adoption of precautionary measures, so that the IACHR can apply the applicable provisions of its Rules of Procedure such as article 30.4 or Article 37.3. If precautionary measures are lifted, the case in question should no longer receive preferential treatment.

f. *Making certain deadlines more flexible*: It is necessary that in certain cases the time given to the State to follow up on the recommendations of the IACHR be made more flexible, for example when a recommendation entails the Congress of the Republic derogating or passing a law, the trying of those responsible by the Judiciary, or coordinating with different regional or federal entities that have total or some degree of autonomy. In these cases, it is particularly important that the IACHR analyze the conduct of the State, how it heeds the principle of good-faith, and how it acts accordingly.

Inter-American Court of Human Rights

Besides the recommendations already pointed out in this report, the following is proposed with regard to the Court:

3.7 Mechanisms to make follow-up and compliance with the resolutions effective

On this issue, we believe that it is vital that the OAS General Assembly make effective use of its powers to oversee compliance with the resolutions handed down by the Inter-American Court of the Human Rights. When the Court's annual reports point to cases of noncompliance, the General Assembly must instruct the Permanent Council of the Organization to conduct a detailed investigation of such cases and inform the Assembly, at its next session, regarding the status of execution of said resolutions. However, if continued non-compliance is confirmed, we recommend that the Assembly take appropriate measures, under the OAS Charter, aimed at ensuring execution of the resolutions and verdicts of this Court.

This reform should be complemented with actions within the member states, such as setting up a Multisectoral Commission for Compliance with International Decisions (of the kind already found in several countries in the region), entrusted with coordinating with the competent sectors of the State to ensure full compliance with those decisions.

Another domestic measure could be to set aside in the State's annual budget a fund for paying compensation ordered in the judgments of international jurisdictional bodies.

These international and domestic reform measures could effectively help facilitate observance of the measures decreed by the Court, thereby strengthening the system and making it more effective.

3.8 Full-time functioning of the Court and the IACHR

Finally, as mentioned in section 3.4 of this report, the Inter-American Juridical Committee considers that, in order to achieve the consolidation of the inter-American system for the promotion and protection of human rights, it is inevitable, essential, and necessary and to gradually ensure the full-time functioning of both the Court and the Inter-American Commission of the Human Rights. We strongly believe that this measure will allow better and more effective protection of human rights in the region as well as a number of other positive outcomes, such as: greater dedication on the part of the members of these organs, more expeditious proceedings to the benefit of the alleged victims, more effective reparation, and so on. This would put our system of promotion and protection of human rights on a level similar to other systems. However, this important measure should not be taken in isolation; it needs to be accompanied by all the recommendations presented in this report.

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2. Protection of personal data

Documents

CJI/RES. 186 (LXXX-O/12)	Proposed Statement of Principles for Privacy and Personal Data Protection in the Americas
CJI/doc.402/12 rev. 2	Proposed Statement of Principles for Privacy and Personal Data Protection in the Americas (presented by Dr. David P. Stewart)

During the forty-first regular session of the OAS General Assembly (El Salvador, June 2011), the Inter-American Juridical Committee was requested "to present, prior to the forty-second regular session, a document of principles for privacy and personal data protection in the Americas", AG/RES. 2661 (XLI-O-11).

At the 79th regular session of the Inter-American Juridical Committee (Rio de Janeiro, Brazil, August 2011), Dr. Stewart explained the General Assembly mandate and the documents available to the Committee to carry it out. He also voiced concern regarding the submission of a final document in June 2012, in light of the large number of discussions under way and the also large number of studies on the subject. In this regard, he suggested as a working method that an initial inventory be compiled on existing studies and developments in the Americas.

He then highlighted some of the key elements of his report, "Preliminary comments on a statement of principles for privacy and personal data protection in the Americas," document CJI/doc.382/11:

- Privacy is a basic human right that is endangered by countless sources of intrusion, with varying degrees of risk.
- Governments have a role to play and should act responsibly. Private institutions have responsibilities as well.
- There are elements linked to trade or business.
- It is important to maintain a balance between free circulation and its limiting factors.
- The rules in the European Union have a certain extraterritorial application.
- The rules in the United States are complex. There are many limitations on government action. Other rules apply in the corporate world.

Finally, he proposed initiating a process of consultations with both governmental and nongovernmental experts in different countries, with the support of the Secretariat. He further requested suggestions from members on how to proceed.

Dr. Mauricio Herdocia supported the idea of compiling an inventory on the situation in member states and on having the rapporteur present a document at the next session. He urged the rapporteur to include the right to privacy linked to judicial protection, a right established in the American Convention on Human Rights.

Chairman Fernández de Soto and Dr. Baena Soares supported Dr. Stewart's approach to the topic, and thanked him for presenting his paper, which provided the initial guidelines on the topic. Finally, the Chair asked Dr. Stewart if he would agree to be the rapporteur on the subject, to which he assented.

During the 80th regular session of the Inter-American Juridical Committee (Mexico City, March 2012), the rapporteur, Dr. David Stewart, presented the document entitled "Proposed Statement of Principles for Privacy and Personal Data Protection in the Americas," CJI/doc.402 /12

of February 23, 2012. He also thanked the Department of International Law for presenting and forwarding the supporting document (document DDI/doc.03/12).

In his explanation, the rapporteur mentioned the 12 general principles cited in Appendix A. He pointed out that there was no single approach to the sources of threats: in some cases, governments may pose a threat, while in others commercial practices appear to be a threat. Nor was there any agreement on the definition of privacy, although everyone thought it was important to protect it. In that connection, he announced that in the United States there were different rules for different actors. In his view, the topic should be addressed as one aspect of protecting human rights, an area that was constantly evolving.

Dr. Fernando Gómez Mont Urueta thanked the rapporteur for his remarks and said that the document had identified the core issues involved. Unlawful use of information, whether by government or private enterprise, could constitute a violation [of human rights]. He went on to say that the mission entrusted to the rapporteur should be restricted to drawing up a list of principles, not a model law, a viewpoint that was backed by the plenary, after the mandate had been read out.

In response to Dr. Jean-Paul Hubert, the rapporteur said he had striven to strike a balance with respect to the sources of threats participating in information gathering, considering that fundamental human rights principles were at stake.

The Chair, Dr. Novak, thanked Dr. David Stewart for his summary and pointed out several problems with the Spanish translation of the last three principles. In the tenth principle, the Spanish version was not clear with respect to accountability. In Principle 11, the translation was unclear regarding record keepers. Finally, mention should be made in Principle 12 of “exceptions”, rather than “invalidations” or disqualifications.

Dr. Carlos Mata Prates agreed with the Chair, Dr. Novak, on the need to revise the Spanish translation of the aforementioned principles. He also noted a disconnect between the overall policy of transparency and the principles in the second part. The rapporteur for this area said he appreciated the comments and explained that, with respect to the last mentioned comments, it had not been his intention to make a separate document. The term “*derogation*” rather than “*invalidation*” was used in human rights terminology. As for “accountability,” it struck him as a rather tenuous concept within the broader notion of responsibility. In the tenth principle, “record keeper” was a neutral term for someone sometimes described as a data “comptroller” or “processor”; essentially it was a reference to someone who handles data.

The Chair, Dr. Novak, explained that the observations referred to the Spanish version of principles 10, 11, 12 and the link between the two parts. Dr. Jean-Paul Hubert proposed using “general policy and transparency” in the English version, while the Chair, Dr. Novak, suggested making a reference to “persons or entities responsible for keeping records.”

On March 9, the Committee proceeded to review the new version of the report, document CJI/doc.402/12 rev.2. Dr. Dante Negro said that the document in Spanish that had had issues had been sent for “technical revision.” In Principle 10, the idea was to replace “*medidas*” (measures) with “*procedimientos*” (procedures), and in Principle 11 to delete “*hechas*” (done). There was a discussion about the tense of the verb, since it was not the intention of the rapporteur in this area to impose an instrument on the States, but rather to propose an optional instrument. Dr. Elizabeth Villalta noted the importance of the meaning of conventions. Dr. Freddy Castillo Castellanos suggested using: “*adoptarán*” (will adopt) in Principle 10 and “*cooperarán* entre *si*” (will cooperate with one another) in Principle 11. Dr. Luis Moreno Guerra proposed making some grammatical changes to the Spanish translation of Principle 12. He had queries regarding the suppression of crime topic and about the

difference between public safety and national security. The rapporteur explained the difference between "national security" (security vis-à-vis external threats) and "public safety" (which refers to internal threats). Here, the Chair, Dr. Novak, proposed using "external and internal security," while Dr. Carlos Mata Prates considered that public safety covered both. However, the plenary supported the Chair's proposal. Under no circumstances should the English phrase "homeland security" be used.

It was also agreed to delete the term "derogations" and, at Dr. Elizabeth Villalta's behest, the adjective "public" was added to "compliance with regulations or other [public] prerogatives." Finally a title was given to the objection relating to publicity/disclosure: "Disclosure of Objections" (*Publicidad de las excepciones*).

With respect to the preambular paragraph of the proposal, Dr. Carlos Mata Prates recommended including the following phrase: "Based on the above, the Inter-American Juridical Committee recommends that the OAS General Assembly adopt the following principles.

After completing its analysis of the report, the Committee agreed to submit it to the General Assembly. The Chair, Dr. Novak, explained that the resolution to be adopted by the Committee would include the principles, while the report would appear as an Attachment.

CJI/RES. 186 (LXXX-O/12)

PROPOSED STATEMENT OF PRINCIPLES FOR PRIVACY AND PERSONAL DATA PROTECTION IN THE AMERICAS

THE INTER-AMERICAN JURIDICAL COMMITTEE,

CONSIDERING that resolution AG/RES. 2661 (XLI-O/11) requested the Inter-American Juridical Committee to prepare "a document of principles for privacy and personal data protection in the Americas";

TAKING INTO ACCOUNT the emergence of a global information economy based on the development of new forms of digital information and communication technology;

EMPHASIZING the importance of personal privacy as a fundamental human right;

ALSO EMPHASIZING the importance of the freedom of speech, opinion and expression and the free flow of information across borders;

BEARING IN MIND the "Proposed Statement of Principles for Privacy and Personal Data Protection in the Americas" (CJI/doc.402/12), presented by the rapporteur of the subject, Dr. David P. Stewart;

NOTING THAT each national system should adopt and implement a clear and effective policy of openness and transparency with respect to all the events, practices and policies related to data and personal information,

RESOLVES:

To propose to the General Assembly the adoption of the following principles:

Introduction

The following list sets forth the basic principles which should be adopted and followed in national law and practice. They are intended to prevent harm to individuals from the wrongful or unnecessary collection or use of personal data and information. The twelve principles are interrelated and should be interpreted together as whole. In addition, each national system should

adopt a clear and effective policy of openness and transparency about all developments, practices and policies with respect to personal data and information.

First principle: Lawful and Fair Purposes

Personal data and information should be collected only for lawful purposes and by fair and lawful means.

Second Principle: Clarity and Consent

The purposes for which personal data and information are collected should be specified at the time the information is collected. As a general rule, personal data and information should only be collected with the knowledge or consent of the individual concerned.

Third Principle: Relevant and Necessary

The data and information should be accurate, relevant and necessary to the stated purposes for which they are collected.

Fourth Principle: Limited Use and Retention

Personal data and information should be kept and used only in a lawful manner not incompatible with the purpose(s) for which it was collected. It should not be kept for longer than necessary for that purpose or purposes and in accordance with relevant domestic law.

Fifth Principle: Duty of Confidentiality

Personal data and information should not be disclosed, made available or used for purposes other than those for which it was collected except with the consent of the concerned individual or under the authority of law.

Sixth principle: Protection and Security

Personal data and information should be protected by reasonable and appropriate security safeguards against unauthorized access, loss, destruction, use, modification or disclosure.

Seventh Principle: Accuracy of Information

Personal data and information should be kept accurate and up-to-date to the extent necessary for the purposes of use.

Eighth Principle: Access and Correction

Reasonable methods should be available to permit individuals whose information has been collected to seek access to that information and to request that the record keeper amend, correct or delete that information. If such access or correction needs to be restricted, the specific grounds for any such restrictions should be specified in accordance with domestic law.

Ninth Principle: Sensitive Information

Some types of information, given their sensitivity and in particular contexts, are especially likely to cause material harm to individuals if misused. Record keepers should adopt privacy and security measures that are commensurate with the sensitivity of the data and its capacity to harm individual data subjects.

Tenth Principle: Accountability

Record keepers should adopt appropriate procedures to demonstrate their accountability for their compliance with these principles.

Eleventh Principle: Trans-border Flow of Information and Accountability

Member states should cooperate with one another in developing mechanisms and procedures to ensure that record keepers operating in more than one jurisdiction can be effectively held accountable for their adherence to these principles.

Twelfth Principle: Disclosing Exceptions

When national authorities make exceptions to these principles for reasons relating to national sovereignty, internal or external security, the fight against criminality, regulatory compliance or other public order policies, they should make those exceptions known to the public.

This resolution was approved unanimously at the regular meeting held on March 9, 2012, by the following members: Carlos Alberto Mata Prates, David P. Stewart, Fernando Gómez Mont Urueta, Jean-Paul Hubert, Miguel Aníbal Pichardo, Freddy Castillo Castellanos, Fabián Novak Talavera, José Luis Moreno and Ana Elizabeth Villalta Vizcarra.

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CJI/doc.402/12 rev. 2

PROPOSED STATEMENT OF PRINCIPLES FOR PRIVACY AND PERSONAL DATA PROTECTION IN THE AMERICAS

(presented by Dr. David P. Stewart)

The OAS General Assembly, at its 41st meeting in San Salvador in 2011, directed the Inter-American Juridical Committee to "present, prior to the forty-second regular session, a document of principles for privacy and personal data protection in the Americas … with a view to exploring the possibility of a regional framework in the area." AG/RES. 2661 (XLI-O/11) (June 7, 2011).

In preparing these principles, the Committee has been instructed to take into account (i) the draft preliminary principles and recommendations on the protection of personal data which have been prepared by the Department of International Law (CP/CAJP-2921/10 rev. 1) and (ii) a comparative study of different existing legal regimes, policies and enforcement mechanisms for the protection of personal data which will be prepared by the Department of International Law.

At its 79th Regular Session in August 2011, the Committee gave initial consideration to this assignment on the basis of Preliminary Comments set forth in CJI/doc.382/11 (March 18, 2011). The Committee also named a Rapporteur for the purpose of preparing a set of proposed principles in response to the mandate of the General Assembly.

In the meantime, the Department of International Law has presented a document setting forth "Preliminary Principles and Recommendations on Data Protection (The Protection of Personal Data)," CP/CAJP-2921/10 rev. 1 corr. 1, 11 October 2011. On October 31, 2011, the Department circulated to all OAS member states a questionnaire on privacy and data protection in order to ascertain the current status of legislative developments and proposals in this field (CP/CAJP-3026/11). More recently, the Department has circulated a lengthy and detailed "annotated outline" of its "comparative study of different existing legal regimes, policies and enforcement mechanisms for the protection of personal data" (DDI/doc.03/12, 10 February 2012).

There can be no question the concept of privacy is well-established in international law or that it underpins the fundamental principles of personal honor and dignity as well as freedom of speech, opinion and association. Within our hemisphere, these principles are clearly established in the American Declaration of the Rights and Duties of Man (1948)[1/] as well as the American Convention on Human Rights ("Pact of San Jose").[2/] Provisions on privacy, protection of personal

1. See Art. IV of the American Declaration of the Rights and Duties of Man.
2. See Arts. 11 and 13 of the American Convention on Human Rights.

honor and dignity, freedom of expression and association, and the free flow of information are found in all the major human rights systems of the world.[3/]

These fundamental principles are increasingly challenged by the revolution in digital information and communication technology. We live today in a "global information economy." More information about individuals is collected, processed and made available faster than ever, by governments as well as private entities including commercial companies, journalists and members of the media, and even by non-commercial advocacy groups. In the face of these developments, it is more important than ever to take measures to protect the fundamental rights of individuals to privacy. At the same time, it must be recognized that the collection of personal data and information from and about individuals is often not just appropriate but necessary, and that many applications are entirely legitimate and lawful. It is also essential to recognize that in a rapidly globalizing economy, the free flow of information across borders remains a prerequisite for a free and vibrant economy; unnecessary restrictions can impose significant (and often unintended) non-tariff barriers to trade and development. While abuses do occur and must be addressed, excessive regulation and overly restrictive provisions can do more harm than good.

Throughout the world, national authorities are working to address these issues and, not surprisingly, they sometimes adopt differing approaches and apply competing values in inconsistent ways. Today, a majority of countries recognize a constitutional right of privacy, and many others provide additional privacy protections by statute or regulation, including in particular by imposing restrictions on the government and public agencies. More than 80 countries now have data protection and privacy laws extending beyond the public sector, and legislative efforts are under way in many others.[4/] But the specific provisions are by no means identical. The result is a diversity of national laws, rules and regulations reflecting divergent approaches in many important respects.[5/]

In addition, intensive efforts have been undertaken over the past several decades to adopt agreed principles at the regional and international level, in particular within the Organization for Economic Cooperation and Development (OECD), the Council of Europe (COE), the European Union (EU), and the Asia-Pacific Economic Cooperation (APEC) forum.[6/] The most significant of

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3. See, e.g., the Universal Declaration of Human Rights (arts. 12, 18-20), the International Covenant on Civil and Political Rights (arts. 17-19), the European Convention on Human Rights and Fundamental Freedoms (arts. 8-10), the Charter of Fundamental Freedoms of the European Union (arts. 1, 7, 8, 10-12), and the African Charter of Human and Peoples' Rights (arts. 5, 8-11 and 28). Only the EU Charter specifically addresses privacy in the context of data protection. Art. 8 provides (1) that everyone has the right to the protection of personal data concerning him or her, (2) that such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law, and that everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified, and (3) compliance with these rules shall be subject to control by an independent authority.

4. Among others, they include Mexico, Uruguay, Peru, Colombia, Costa Rica, Canada and Brazil.

5. As noted in CP/CAJP-2921/10 rev. 1 corr. 1, "the meaning of privacy and the origins of an individual's right to privacy can vary. As a result, policies and laws governing the right to privacy differ from country to country. Because of this divergence in the treatment of the right to privacy, legislation protecting the treatment of personal data can vary between or even within regions."

6. The EU will soon replace the scheme established by Directive 95/46 (Oct. 24, 1995) on the protection of individuals with regard to the processing of personal data, under which both the public and private sectors in member countries have been operating for thirteen years. Amendments announced on January 25, 2012 (to become effective after some years) promise a new EU "regulation" aimed at building a "digital single market" to replace the various national approaches to implementing the prior Directive. The new regulation will enshrine the "right to be forgotten," which has been the subject of considerable debate. Within the COE, the Grand Chamber of the European Court of Human Rights

these efforts were summarized in the previous report to the Committee (in CJI/doc.382/11, March 18, 2011). But the documents adopted by these various bodies are by no means identical and often differ both in detail and in basic approach.

A review of these varying national and regional approaches reveals both a measure of commonality but also significant divergences in principle as well as approach. For example, it does not appear that there is a single, commonly accepted definition of "personal" or "sensitive" information or "data protection," much less "privacy" itself. Nor is there a single, agreed upon concept of the "threat" or of the proper response to that threat. Some see the gathering and use of private information by the government and its agencies as the main threat and seek to constrain it, while others fear the private sector more and look to government oversight and regulation for protection.

Some seek to empower individuals, especially consumers, though an emphasis on consent, transparency, corporate "accountability" and "data stewardship," while others prefer direct government regulation of all "data collectors, managers and controllers." Some endeavor to address the issues through a single, comprehensive law, while others take a sectoral or topical approach providing varying levels of government oversight for different types of activities in different ways. Some advocate the individual's "right to be forgotten" or "right to oblivion" (including a right to the removal of all information even if accurate) while others propose a right to "rectification" or "remediation" (meaning a right to have errors and misstatements corrected).

It is evident that the issues are dynamic, the discussion remains active, and national as well as regional approaches continue to evolve. Which specific practices are acceptable, and which must be circumscribed or prohibited, is likely to depend on how one approaches the problem. The answers may differ when considered from a national security or law enforcement perspective, or as a matter of social regulation, or from the perspective of protecting technological innovation, promoting trade and development, protecting against foreign intrusion, etc. At the current time, it must be concluded that "one size does not fit all." An effort to describe or impose a single, detailed regulatory approach stands little chance of gaining widespread approval in the short run.

What is more likely to be acceptable, and what the OAS General Assembly appears to have requested, is a statement of general principles to guide further consideration of the issues. Towards that goal, the following principles (attached as Annex A) have been prepared on the basis of a review of emerging national law and practice, as well as the agreed (but differing) principles of the various regional and international groups which have addressed the problem to date.

In addition to the draft preliminary principles and recommendations on the protection of personal data which have been prepared by the Department of International Law (CP/CAJP-2921/10 rev. 1 corr. 1), and its "annotated outline" of a "comparative study of different existing legal regimes, policies and enforcement mechanisms for the protection of personal data" (DDI/doc.03/12), the Rapporteur considered the following international sources in the preparation of these proposed principles:

- The APEC Privacy Principles adopted as part of the APEC Privacy Framework and its 2011 Cross-Border Privacy Rules System

  http://www.apec.org/Groups/Committee-on-Trade-and-Investment/~/media/Files/Groups/ECSG/05_ecsg_privacyframewk.ashx, and http://aimp.apec.org/Documents/2011/ECSG/DPS2/11_ecsg_dps2_010.pdf

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recently issued a significant ruling on privacy in Axel Springer v. Germany, App. No. 39954/08 (Feb. 7, 2012), holding that the rights of the publisher of the German tabloid "Bild" under art. 10 had been violated when it was prevented from publishing articles about the arrest and conviction of a well-known television actor for possession of cocaine.

- The 1980 OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal Data

  http://www.oecd.org/document/18/0,3343,en_2649_34255_1815186_1_1_1_1,00.html

- The 1981 Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data

  http://conventions.coe.int/treaty/en/treaties/html/108.htm

- Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the Protection of Individuals with regard to the Processing of Personal Data and on the Free Movement of Such Data, Official Journal L 281, 23/11/1995 P. 0031 – 0050

  http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31995L0046:EN:NOT

- Proposal for a Regulation of the European Parliament and of the Council on the Protection of Individuals with regard to the Processing of Personal Data and on the Free Movement of such Data (General Data Protection Regulation), Brussels, 25.1.2012, COM(2012) 11 final, 2012/0011 (COD)

  http://ec.europa.eu/justice/data-protection/document/review2012/com_2012_11_en.pdf

- UN Guidelines for the Regulation of Computerized Personal Data Files, adopted by the UN General Assembly Resolution 45/90 (Dec. 14, 1990)

  http://www.un.org/documents/ga/res/45/a45r095.htm

While drawing in significant part from these earlier efforts (as well as from a variety of national laws), the attached principles are intentionally aimed at a level of generality which will permit their acceptance in national legal systems which are at different stages in their consideration of the issues and which may have different orientations and priorities. They also reflect the fact that the OAS as a regional organization differs in many respects from the European Union and the Council of Europe, as well as from APEC and the OECD. The proposed principles are intended to establish a broadly acceptable base-line for further development, rather than to impose any one particular model or approach to be directly implemented by all OAS member states.

Annex A

PROPOSED STATEMENT OF PRINCIPLES FOR PRIVACY AND PERSONAL DATA PROTECTION IN THE AMERICAS

Introduction

The following list sets forth the basic principles which should be adopted and followed in national law and practice. They are intended to prevent harm to individuals from the wrongful or unnecessary collection or use of personal data and information. The twelve principles are interrelated and should be interpreted together as whole. In addition, each national system should adopt a clear and effective policy of openness and transparency about all developments, practices and policies with respect to personal data and information. In this context, the Inter-American Juridical Committee proposes to the General Assembly of the Organization of American States the adoption of the following principles.

First principle: Lawful and Fair Purposes

Personal data and information should be collected only for lawful purposes and by fair and lawful means.

Second Principle: Clarity and Consent

The purposes for which personal data and information are collected should be specified at the time the information is collected. As a general rule, personal data and information should only be collected with the knowledge or consent of the individual concerned.

Third Principle: Relevant and Necessary

The data and information should be accurate, relevant and necessary to the stated purposes for which they are collected.

Fourth Principle: Limited Use and Retention

Personal data and information should be kept and used only in a lawful manner not incompatible with the purpose(s) for which it was collected. It should not be kept for longer than necessary for that purpose or purposes and in accordance with relevant domestic law.

Fifth Principle: Duty of Confidentiality

Personal data and information should not be disclosed, made available or used for purposes other than those for which it was collected except with the consent of the concerned individual or under the authority of law.

Sixth principle: Protection and Security

Personal data and information should be protected by reasonable and appropriate security safeguards against unauthorized access, loss, destruction, use, modification or disclosure.

Seventh Principle: Accuracy of Information

Personal data and information should be kept accurate and up-to-date to the extent necessary for the purposes of use.

Eighth Principle: Access and Correction

Reasonable methods should be available to permit individuals whose information has been collected to seek access to that information and to request that the record keeper amend, correct or delete that information. If such access or correction needs to be restricted, the specific grounds for any such restrictions should be specified in accordance with domestic law.

Ninth Principle: Sensitive Information

Some types of information, given their sensitivity and in particular contexts, are especially likely to cause material harm to individuals if misused. Record keepers should adopt privacy and security measures that are commensurate with the sensitivity of the data and its capacity to harm individual data subjects.

Tenth Principle: Accountability

Record keepers should adopt appropriate procedures to demonstrate their accountability for their compliance with these principles.

Eleventh Principle: Trans-border Flow of Information and Accountability

Member states should cooperate with one another in developing mechanisms and procedures to ensure that record keepers operating in more than one jurisdiction can be effectively held accountable for their adherence to these principles.

Twelfth Principle: Disclosing Exceptions

When national authorities make exceptions to these principles for reasons relating to national sovereignty, internal or external security, the fight against criminality, regulatory compliance or other public order policies, they should make those exceptions known to the public.

* * *

3. Cultural Diversity in the Development of International law

Documents

CJI/RES. 185 (LXXX-O/12)	Guide to Principles Regarding Cultural Diversity in the Development of International Law
CJI/doc.404/12 rev.1 corr.1	Guide to Principles Regarding Cultural Diversity in 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 rev.1. After presenting it, the Inter-American Juridical Committee decided to include the topic on its agenda and to elect Dr. Freddy Castillo as rapporteur.

In 2009, by resolution AG/RES. 2515 (XXXIX-O/09), the General Assembly requested the Inter-American Juridical Committee to report to it on the progress made on the topic.

During the 75th regular session of the Inter-American Juridical Committee (Rio de Janeiro, Brazil, August 2009), Dr. Freddy Castillo Castellanos presented a report on the topic, entitled "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. States were called on to adopt measures to ensure the full enjoyment of those rights, which were later expanded to include 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 countries of the region.

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 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 in 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 Jaime Aparicio 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.

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, and ended his presentation with the following proposals:

- Diversity should be recognized as cultural heritage;
- Different cultural expressions should be promoted;
- Cultural goods should be considered as spiritual assets and not simply 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 arising from 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 expressed appreciation for the reception given to the report and the contributions made for preparation of a complete report in August. With regard to cultural exception, he underlined the importance of striking appropriate balances. He also agreed to prepare a set of guiding principles for the Committee's next session.

In 2010, the OAS General Assembly (Lima, June 2010), requested the Committee to report on the gradual advances on this issue in the development of international law AG/RES. 2611 (XV-O/10).

At the 77th regular session of the Inter-American Juridical Committee (Rio de Janeiro, Brazil, August 2010), Dr. Freddy Castillo presented a 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, *inter alia*, the adoption of measures to protect endangered languages, the recovery of areas destroyed by natural disasters, and the creation of diversity observatories. 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. 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. Freddy Castillo proposed taking a first step by implementing a register of endangered languages and agreed to continue working on the proposal and to submit a report at the next sessions.

During the 78th regular session of the Inter-American Juridical Committee (Rio de Janeiro, Brazil, March 2011), Dr. Freddy Castillo presented a report entitled "Recommendations on Cultural Diversity and the Development of International Law" (CJI/doc.377/11). It referred to the concepts of cultural diversity and interculturalism, and explained developments regarding the Universal Declaration of Cultural Diversity and the UNESCO Convention. The following principles adopted by the Convention were highlighted:

- Recognition of the positive right to cultural diversity
- Return to a treatment of cultural property that is not exclusively mercantile
- Recognition of the diversity of people's wisdom, tradition, and creations
- Principles of solidarity and cooperation to strengthen the means of cultural expression in developing countries

In addition, the rapporteur referred to the legal foundations underpinning the topic, in Articles 3 m) and 52 of the OAS Charter, and proposed consideration of the twelve principles below in addition to those presented in his earlier paper:

1. Constitutional and legal recognition of cultural diversity
2. Fostering of a process in which culture is used as a tool to strengthen democracy and its components
3. Constitutional recognition of multi-ethnicity without favoring any single group
4. Development of effective processes for preserving surviving languages and recovering those at imminent risk of disappearing
5. Bilingual intercultural education programs
6. Recovery of spaces destroyed by natural disasters in keeping with cultural traditions
7. Use of observatories to promote and protect diverse cultural expressions
8. Cultural diversity as part of integration processes in the Americas
9. Inclusion of subjects linked to diversity in educational curricula
10. Dissemination of international laws on the diversity of cultural expressions
11. Coordination of cultural diversity policies with the strengthening of democracy
12. Creation of cooperation networks to facilitate the strengthening of existing cultural industries.

Dr. Baena Soares agreed with the inclusion of the subject in education systems, as stipulated in item 9, and on item 11, he suggested that governments be encouraged to provide resources. On this point, the rapporteur suggested that they foster the idea of creating a "fund to finance culture in our countries."

Dr. Mauricio Herdocia emphasized the novelty of this topic, which is why it is absent from the protocols and conventions pertaining to economic, social, and cultural rights. He further noted the importance of cultural diversity in the development strategy in Central American countries. The rapporteur on the topic requested that this item remain on the Committee's agenda so that a paper including diversity in development could be prepared. This proposal was supported by Drs. Villalta and Stewart.

Dr. Stewart also thanked the rapporteur for the report, and asked that this discussion be taken to a more concrete level, in view of the important contribution that preservation of cultural diversity could make in areas such as protection of languages, action in the event of natural disasters, establishment of observatories, and the threats of new technologies.

Dr. Hubert in turn referred to the ongoing debate in various countries over multiculturalism and inter-culturalism. He also proposed that the rapporteur's paper be presented at the General Assembly.

The rapporteur on the topic thanked Drs. Stewart and Hubert for their contributions and indicated that they would be incorporated into the revised paper. In this regard, he suggested that member states be consulted regarding problems they are experiencing in the area of cultural diversity.

The Chairman asked the rapporteur to complete his report by adding practical aspects to present as recommendations to States. A letter will also be addressed to States to invite them to propose topics that they would like to explore, and too give the status of the rapporteur's work.

During the forty-first regular session of the OAS General Assembly (El Salvador, June 2011), the Inter-American Juridical Committee was requested to "present to the General Assembly a final report on the topic of cultural diversity in the development of international law" AG/RES. 2671 (XLI-O/11).

During the 79th regular session of the Inter-American Juridical Committee (Rio de Janeiro, Brazil, August 2101), the rapporteur, Dr. Freddy Castillo, presented a "List of principles on cultural diversity in the development of international law" document (CJI/doc.391/11). This report includes the contributions made by the Committee's members and lists general principles on diversity. On this occasion, the rapporteur voiced his interest in keeping the item on the Committee's agenda and, once the mandate pertaining to the list of principles is completed, work could proceed on the link between free trade treaties and cultural diversity.

Dr. Hubert thanked him for the document and proposed that the term "*demanda"* [demand, request] be replaced by "suggest," and the rapporteur suggested that the term "propose" could be used instead. Dr. Novak expressed appreciation for the document, and requested an explanation of the term "*arbitra*r;" and that Article 3 m) be added to Article 52 of the Charter. Dr. Baena Soares suggested that references should be avoided in the part citing principles, and that whenever explanations need to be included, as in the case of Haiti, they be incorporated in other sections of the document. Paragraph 14 should refer to cooperation instead of alliances or partnerships. Finally, he requested that the characteristics of the observatory be explained. Drs. Herdocia and Villalta supported the rapporteur's proposal to ensure the continuity of the new project.

The Chairman proposed that the principles be laid out in a positive format. He also invited English-speaking members to make their comments once they receive the revised text with the comments included. As for the continuity of the topic, the Chairman proposed that the topic be concluded once the revised document is approved. As regards the discussion of new topics, he requested that precise criteria be submitted. The rapporteur promised that he would present a revised document at the next session, and that it would include the comments by English-speaking members.

During the 80th regular session of the Inter-American Juridical Committee (Mexico City, March 2012), the rapporteur, Dr. Freddy Castillo Castellanos, presented a new version of the document entitled "List of principles on cultural diversity in the development of international law", CJI/doc.404/12, of March 4, 2012. He told the Committee that this new version contained all the comments made at the previous session and was available to all. He added he would particularly welcome comments from the English-speaking members.

Dr. Fernando Gómez Mont Urueta asked that mention be made early on in the document, as a form of tribute, of experiences in Haiti. The Chair, Dr. Novak proposed eliminating the Appendix and suggested reviewing the use of certain turns of phrases, such "*agonísticamente*" (competitively), "*naciones*" (nations), "*reconocimiento cultural del carácter pluriético de todos los países*" (cultural

recognition of the multi-ethical nature of all countries). Dr. Hubert asked that the term "*pluriétnicos*" (multi-ethnic) be replaced with "*multicultural*" (multi-cultural), which the rapporteur agreed to do. For his part, Dr. Carlos Mata Prates asked that the concepts developed in the Convention on Cultural Diversity be incorporated into the document. Dr. David Stewart asked what was meant by the reference early on in the document to the practice of "*interculturalidad*" (intercultural relations or exchanges, or interculturalism).The rapporteur explained that it was meant to be a reference to legislative development of precise rules to regulate the principles of intercultural relations. He proposed deleting the reference to the "precise legal order mindful of each country's particularities" and making the necessary changes requested by the Committee members.

The Chair, Dr. Novak, said he thought that the revised document, with the changes indicated, could be adopted. On March 9, 2012, the Committee adopted the document entitled "Guide to principles regarding cultural diversity in the development of international law", (CJI/doc.404/12 rev.1 corr.1). At the same time, it was agreed to forward the document, through resolution CJI/RES. 185 (LXXX-O/12), to the General Assembly for due consideration.

CJI/RES. 185 (LXXX-O/12)

GUIDE TO PRINCIPLES REGARDING CULTURAL DIVERSITY IN THE DEVELOPMENT OF INTERNATIONAL LAW

THE INTER-AMERICAN JURIDICAL COMMITTEE,

CONSIDERING that resolution AG/RES. 2671 (XLI-O/11) requested the CJI to present to the General Assembly a final report on the topic of cultural diversity in the development of international law;

CONSIDERING the importance that cultural diversity has been acquiring in international law, as well as the need to establish basic orientation on the topic for its development;

CONSIDERING the report on ¨Guide to Principles regarding Cultural Diversity in the Development of International Law¨ (CJI/doc.404/12), presented by the rapporteur on the topic, Dr. Freddy Castillo Castellanos,

RESOLVES:

To propose to the General Assembly the following guide to principles:

1. Constitutional and legal recognition of cultural diversity must be accompanied by intercultural practices characterized by equity, balance, respect and tolerance, pursuant to what Article 52 of the OAS Charter calls "inter-American understanding."

2. The commitment to cultural diversity demands promoting a process in which culture becomes for our states a sphere of dialogue and fruitful exchange of differences and a place where limits interact in harmony so as to achieve peace and understanding among our peoples. From this viewpoint, effective application of cultural diversity has to be an appropriate tool for strengthening democracy and its essential elements.

3. Cultural diversity, besides being an essential characteristic of humanity, is a right we all have and one that concerns us all. Accordingly, constitutional recognition of the multiculturalism of our countries should not be understood as an act to favor exclusively one type of population, but rather as an active manifestation of respect for all populations regardless of their origin, without prejudice to the duty to support those cultures that have been disadvantaged, or are at risk and are threatened with deterioration or extinction.

4. The Americas are an example of idiomatic plurality with the existence of a significant and vibrant variety of numerous languages. Therefore, the region would do well to take advantage of successful experiences of language preservation and recuperation in order to advance effective processes designed to maintain the surviving languages and recover those that are in imminent danger of extinction.

5. The diversity of languages requires elaborating and implementing bilingual inter-cultural education programs in populations where ethnic groups prevail that possess a language different from the official language of the country, as an appropriate mechanism for the preservation of our idiomatic heritage.

6. Care must be taken to recover areas destroyed by natural disasters, taking into account the cultural traditions of the corresponding environment.

7. In order to promote and protect different expressions of culture it is essential to highlight and study them carefully. To that end, it is suggested that regional bodies be established for the purpose of strengthening cultural diversity by identifying suitable and successful initiatives that might be taken as examples of best intercultural practices. We need to continuously update cultural inventories, detect threats to cultural heritage, and reflect on how the legal system and the various disciplines can harmonize the basic principles of cultural diversity and settle the tensions that it creates.

8. Cultural diversity must be a core component in the processes of integration and international cooperation in the Americas.

9. The application and development of these principles presuppose acquiring real awareness of diversity, which can only be done through an ongoing educational process. Consequently, as a matter of priority, diversity issues need to be built into curricula at every level of the educational system. Above all, students must be properly prepared for a balanced dialogue among cultures.

10. All possible means must be used to disseminate the norms of international law on the diversity of cultural expressions and to assist states, civil society, and communities in this promotional work.

11. Cultural diversity policies need to be coordinated with those for the strengthening of democracy, by promoting the values of freedom, solidarity and dialogue based on recognition of the differences and of the areas where these policies interact.

12. An effort must be made to set up cooperation networks that facilitate strengthening the existing cultural industries and to create emerging and innovative approaches in this field. These networks could help with the preparation of plans and requests for financing from the International Fund for Cultural Diversity or other similar organizations.

13. Regional Funds for Cultural Diversity in the Americas or some similar mechanism should be encouraged to support policies promoting national or regional cultural industries.

14. More robust cooperation with civil society, non-governmental organizations, and the private sector is recommended for promoting the diversity of cultural expressions.

This resolution was approved unanimously at the meeting held on March 9, 2012, by the following members: Drs. Carlos Alberto Mata Prates, David P. Stewart, Fernando Gómez Mont Urueta, Jean-Paul Hubert, Miguel A. Pichardo Olivier, Freddy Castillo Castellanos, Fabián Novak Talavera, José Luis Moreno Guerra and Ana Elizabeth Villalta Vizcarra.

CJI/doc.404/12 rev.1 corr.1

GUIDE TO PRINCIPLES REGARDING CULTURAL DIVERSITY IN THE DEVELOPMENT OF INTERNATIONAL LAW

(presented by Dr. Freddy Castillo Castellanos)

The following principles were elaborated on the basis of the conceptual structure expressed in previous reports in order to respond the request of the General Assembly concerning cultural diversity in the development of international law. As you will recall, the Inter-American Juridical Committee first began to address this topic on its own initiative during the 74th regular session held in Bogotá in March 2009. Later on the General Assembly of the OAS, at its 39th regular session held in San Pedro Sula, Honduras in June 2009, requested the Inter-American Juridical Committee, through resolution AG/RES. 2515 (XXXIV-O/09), to report on the gradual progress in developing topic. On later reports, at the 41st regular session of the General Assembly of the OAS (El Salvador, June 2011), the Inter-American Juridical Committee was asked to present a final report on the topic before the General Assembly.

Previous reports have been restated and the valuable contributions made by members of this Committee have been incorporated. In accordance with these reports and contributions, we propose the following principles as a guide for member states on the matter of Cultural Diversity:

1. Constitutional and legal recognition of cultural diversity must be accompanied by intercultural practices characterized by equity, balance, respect and tolerance, pursuant to what Article 52 of the OAS Charter calls “inter-American understanding.”

2. The commitment to cultural diversity demands promoting a process in which culture becomes for our states a sphere of dialogue and fruitful exchange of differences and a place where limits interact in harmony so as to achieve peace and understanding among our peoples. From this viewpoint, effective application of cultural diversity has to be an appropriate tool for strengthening democracy and its essential elements.

3. Cultural diversity, besides being an essential characteristic of humanity, is a right we all have and one that concerns us all. Accordingly, constitutional recognition of the multiculturalism of our countries should not be understood as an act to favor exclusively one type of population, but rather as an active manifestation of respect for all populations regardless of their origin, without prejudice to the duty to support those cultures that have been disadvantaged, or are at risk and are threatened with deterioration or extinction.

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5. The diversity of languages requires elaborating and implementing bilingual inter-cultural education programs in populations where ethnic groups prevail that possess a language different from the official language of the country, as an appropriate mechanism for the preservation of our idiomatic heritage.

6. Care must be taken to recover areas destroyed by natural disasters, taking into account the cultural traditions of the corresponding environment.

7. In order to promote and protect different expressions of culture it is essential to highlight and study them carefully. To that end, it is suggested that regional bodies be established for the purpose of strengthening cultural diversity by identifying suitable and successful initiatives that might be taken as examples of best intercultural practices. We need to continuously update

cultural inventories, detect threats to cultural heritage, and reflect on how the legal system and the various disciplines can harmonize the basic principles of cultural diversity and settle the tensions that it creates.

8. Cultural diversity must be a core component in the processes of integration and international cooperation in the Americas.

9. The application and development of these principles presuppose acquiring real awareness of diversity, which can only be done through an ongoing educational process. Consequently, as a matter of priority, diversity issues need to be built into curricula at every level of the educational system. Above all, students must be properly prepared for a balanced dialogue among cultures.

10. All possible means must be used to disseminate the norms of international law on the diversity of cultural expressions and to assist states, civil society, and communities in this promotional work.

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13. Regional Funds for Cultural Diversity in the Americas or some similar mechanism should be encouraged to support policies promoting national or regional cultural industries.

14. More robust cooperation with civil society, non-governmental organizations, and the private sector is recommended for promoting the diversity of cultural expressions.

With these considerations, this rapporteur considers that the Assembly can be informed that the mandate has been fulfilled, and remains available for any follow-up on the matter, given its importance and recent insertion in International Law.

* * *

4. Access to Justice in the Americas

Documents

CJI/RES. 187 (LXXX-O/12)	Guide to Principles of Access to Justice in the Americas
Annex: CJI/doc.405/12 rev.2	Report of the Inter-American Juridical Committee. Access to Justice in the Americas

At its 66th regular session (Managua, February 28–March 11, 2005), the Inter-American Juridical Committee included the topic Principles of Judicial Ethics on its agenda.

In June 2005, the General Assembly called on the Juridical Committee 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 resolution AG/RES. 2069 (XXXV-O/05).

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.

During the 71st regular session of the Inter-American Juridical Committee (Rio de Janeiro, August 2007), the rapporteurs were instructed 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".

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 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.

Dr. Jean-Michel Arrighi, Secretary for Legal Affairs, reported on the program of judicial facilitators in rural areas, which originated in Nicaragua and has now been extended to Panama, Paraguay, and Ecuador, and soon to Honduras. He also reported on the work with Ecuador to implement mediation centers in civil matters.

After an exchange of views, with respect to the Juridical Committee's mandate, it was agreed to address access to justice in innovative ways with a view to expanding access to it, and that the role of the Committee in this effort would be similar to that played in the area of the right to access to information. In other words, it would approve general guidelines to promote access to justice.

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 forth principles and gives alternatives with a view to guiding the Committee's future work. After a rich exchange of views, the Rapporteur was asked to present an initial draft of principles for the Committee to look at in March 2010.

During the 76th regular session of the Inter-American Juridical Committee, (Lima, Peru, March 2010), the rapporteur on the topic, Dr. Freddy Castillo Castellanos, presented the report CJI/doc.353/10 on the "Comprehensive training of judges: a requirement for justice," drafted in light of the manual on principles presented at the previous regular session and the debates that ensued. On that occasion, he highlighted the importance of providing more solid training for judges.

Members then commented on the training and election of judges in their countries, and confirmed that the manual of principles to be approved by the Committee should underline the fundamental importance of an independent Judiciary, and of modernizing it and ensuring that all communities have equal, timely, and proportional access to it.

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. This report follows up on the various international instruments that uphold the right of access to justice as an inherent element of human rights, the rule of law, and the principle of social justice. The report contains some 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 suggestions from 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 public awareness of the enjoyment of rights. In addition, the rapporteur reaffirmed certain principles that should prevail, such as an intercultural approach in all countries, an independent administration of justice, attention to 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 importance of training justice system workers, continuing education for judges, and the availability of resources to foster more simplified judicial proceedings. To summarize, a set of actions is needed to reduce bureaucratic barriers to access to justice, as well as ongoing educational efforts for both employees of the judiciary and society in general.

Dr. Fabián Novak, after congratulating the rapporteur on 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. At the end of the discussion, the rapporteur on the subject welcomed the suggestions made by the members and thanked them for presenting them. Finally, the rapporteur proposed presenting a document with the suggested amendments at the next period of sessions.

During the 78th regular session held in Rio de Janeiro in March 2011, the President Fernández de Soto recommended postponing considering the theme until August, which was accepted by the plenary. The rapporteur of the theme, Dr. Freddy Castillo Castellanos, voiced his intention to present a guide of principles with developments of the main points of his work, one with regard to training of judges and another concerning the independence of judicial power.

During the 79th regular session (Rio de Janeiro, August 2011), Dr. Freddy Castillo, the rapporteur, presented document CJI/doc.392/11, "Access to Justice". It addressed two key elements: the training of judges and judicial autonomy. He also indicated that he had incorporated the comments made by members at earlier sessions, such as reference to judicial autonomy. A series of principles is set forth at the end of the report.

Dr. Gómez Mont Urueta referred to the relationship between access to justice and the strengthening of democracy. On the training of judges, he proposed that judicial mechanisms be interpreted in light of justice mechanisms. On item four, he suggested that reference to judicial centralism in capitals be clarified. The rapporteur explained that an "adequate social audit service" is meant to be an instrument to ensure that interpretations respect the law, but that he would change it and include other opinions.

Dr. Jean-Paul Hubert requested that the rapporteur include in the preambular section of his report the fact that it was a mandate of the Juridical Committee itself, as well as a description of the cases of persons in a vulnerable situation, and that he modify the state's obligation with regard to the reference to customary law.

Dr. Mauricio Herdocia urged the rapporteur to use more neutral language and avoid examples. More specifically, he recommended that "means of access to justice" be included in paragraph 15, and that paragraph 16 refer to modernization rather than reform of the judicial system.

Dr. Fabián Novak supported Dr. Herdocia's proposal, and requested that the preamble include an explanation regarding alternative mechanisms for access to justice, and that the reference to equitable results in paragraph 3 and "management" of the judicial apparatus in paragraph 5 be amended.

Dr. Stewart asked the rapporteur about the state's presence in paragraph 5, and the Rapporteur stated that it referred to justice by consensus In paragraph 7 on judicial review, Dr. Stewart warned that in the United States, not all cases are subject to such review by an independent court. Finally, on social control referred to in paragraph 12, he clarified that in some courts in his country, judges are not necessarily attorneys and that there is no magistrate school.

Dr. Elizabeth Villalta suggested that the principles be given a general description, to ensure consensus between the two systems of civil and common law.

The Chairman Fernández de Soto proposed to the rapporteur that he revise the text, specify the innovative justice mechanisms, and separate the reference to the judgment from the subject of prisons in paragraph 3. With regard to training of the judiciary, consideration should be given to those countries that do not have institutions of this kind.

From a procedural standpoint, he requested the rapporteur to incorporate the proposed changes and then send the translated revised text with all the proposed changes to the English-speaking

members, so that they can then submit their comments to the rapporteur, who will be presenting the final version during the next session to be held in March 2012.

During the forty-first regular session of the OAS General Assembly (El Salvador, June 2011) the Inter-American Juridical Committee was asked "to present to the General Assembly a final report on the topic of cultural diversity in the development of international law," AG/RES. 2671 (XLI-O/11).

During the 80th regular session of the Inter-American Juridical Committee (Mexico City, March, 2012), the rapporteur, Dr. Freddy Castillo, presented the document "Access to Justice in the Americas", document CJI/doc.405/12, of March 4, 2012. He explained that this topic had been addressed both in the OAS and in other organizations and countries, and said that he would include the OAS work on the subject in the introduction. As for the principles cited in the report, he considered it best to include them directly in the resolution to be sent to the General Assembly. After reviewing the text, the rapporteur proposed deleting the negative expression in the fourth principle and the reference to participation in the fifth.

Dr. Fernando Gómez Mont Urueta proposed some stylistic changes in the eighth principle; introducing the notion of "communities" instead of indigenous peoples in the tenth; and, finally, including individuals' rights and duties.

Dr. Carlos Mata Prates suggested replacing the expression "*desconcentración*" (deconcentration) in the fourth principle with "*descentralización del sistema*" (decentralization of the system) rather than "*procesos*" (processes); and putting "*formas alternativas*" (alternative forms) instead of "*innovadoras*" (innovative forms) in the fifth principle. With respect to principles seven and eight, he warned that the subjection of State organs' decision to judicial review should not be construed as precluding the public administration's duty [to exercise its authority].He suggested replacing the expression "*que no tienen por qué llegar*" (who have no reason to access) (Here the rapporteur suggested "*que no pueden llegar*" [who cannot access]). As regards the tenth principle, he suggested rewording it in such a way as not to contrast, access to alternative justice for certain groups and another kind of justice for all other individuals. The thirteenth principle should include a reference to verdicts being obtained in a reasonable period of time. In the fourteenth principle, Dr. Carlos Mata Prates asked for clarification of the word "*pregrado*" (undergraduate). In each case, the rapporteur on the subject, explained the nature of the principles and proposed a final wording that preserved the spirit of the document.

Dr. Jean-Paul Hubert requested that the substance of the already revised principles be preserved and that only stylistic changes be made.

Dr. David Stewart presented a few considerations pointing mainly to translation problems. With respect to the fourth principle, he asked for clarification of the use of the notion of "democratization" and of the distinction, in the ninth principle, between "*nacionales o personas originarias*" (nationals or native persons). Finally, he asked that the fourteenth principle take into consideration cases in which judges are not elected.

Once the rapporteur had described the changes made to the aforementioned numbered paragraphs (first, fourth, fifth, seventh, eighth, ninth, twelfth, and 14.d) and to the title (so as to include "in the Americas"), the Committee adopted the document "Report of the Inter-American Juridical Committee. Access to Justice in the Americas", CJI/doc.405/12 rev.2. The plenary requested that said document be forwarded, by means of a resolution (CJI/RES. 187/12 (LXXX-O/12) to the Permanent Council for due consideration.

CJI/RES. 187 (LXXX-O/12)

GUIDE TO PRINCIPLES OF ACCESS TO JUSTICE IN THE AMERICAS

THE INTER-AMERICAN JURIDICAL COMMITTEE,

TAKING INTO ACCOUNT the report on "Access to Justice in the Americas" (CJI/doc.405/12), presented by the rapporteur, Dr. Freddy Castillo Castellanos,

RESOLVES:

1. To thank the rapporteur, Dr. Freddy Castillo Castellanos, for his report.

2. To adopt the "Report of the Inter-American Juridical Committee: Access to Justice in the Americas" (CJI/doc.405/12 rev.2), which is annexed to this resolution.

3. To transmit the present resolution to the Permanent Council of the Organization for its due consideration.

This resolution was approved unanimously at the meeting held on March 9, 2012, by the following members: Drs. Carlos Alberto Mata Prates, David P. Stewart, Fernando Gómez Mont Urueta, Jean-Paul Hubert, Miguel Aníbal Pichardo Olivier, Freddy Castillo Castellanos, Fabián Novak Talavera, José Luis Moreno Guerra and Ana Elizabeth Villalta Vizcarra.

* * *

CJI/doc.405/12 rev.2

REPORT OF THE INTER-AMERICAN JURIDICAL COMMITTEE.
ACCESS TO JUSTICE IN THE AMERICAS

Preliminary considerations

This report confirms the content of the works that have been presented previously, embodying now the suggestions and recommendations provided by several members of this Committee.

As is known, the topic on access to justice, both in its traditional forms and its innovative arrangements, has been the source of concern and study by several multilateral organizations for many decades now. The work of the Inter-American Commission on Human Rights, as well as several research studies and proposals from public and private entities in the Americas, have represented a highly valuable source of information for this rapporteurship. Alter reading them I can affirm that the crisis involving justice represents one of the most common concerns worldwide. Criticisms and nihilist versions regarding possible and illusory solutions abound, as well as projects for transforming the systems, in addition to the formulation of environments and alternative mechanisms for the delivery of the service, as well as resigned plans for mere updating and many other responses to the problem. In addition, the descriptions of the problem affecting justice are also numerous, and the one on access to justice represents one of the most sensitive points. Particularly on this issue, although the lack of reliability in the system has undeniably been growing, apparently the demands on access to justice grow higher day after day. Particularly on this issue, although the lack of confidence in the system has been growing, it is undeniable that apparently the demand of access to justice is increasing every day.

The Venezuelan author and expert on human rights, Dr. Ligia Bolívar (researcher at the Andres Bello Catholic University), has expressed that an explanation to this situation may perhaps be related to the criminalization of certain conduct, "the result of which is that, at least in our

criminal system, the demand of services of justice has increased". She also refers that the increase of delinquency related to the growth of poverty may perhaps have helped to harden certain repressive policies, in view of the pressure that comes from the population. A sort of disastrous spiral is woven within this picture: more demand for justice and less ability to provide a response to these demands. More delinquency, yes, but also more impunity. Although the classification of crimes in criminal law is getting broader and although some punishing instruments to penalize conducts subsumed in that classification are activated, the speed with which the system of justice operates is not fast enough to reach the rhythm required by the demand.

One of the principles consecrated in the American Convention on Human Rights is precisely that of having effective judicial resources, whose access should be ensured to all, in order to avoid damaging the rights enshrined in the aforementioned legislation. Access to appeals, equality before the law and judicial guarantees constitute essential tools for the effective enjoyment of human rights. For this reason, the perspective to address the theme cannot be deflected entirely to the organization of the services. Justice is a service, but first of all it is a right. There is an administration of justice, because there are some rights that such an administration must enforce. The enunciates that we have proposed in relation to the access to justice and innovative forms of same, are expressed from that perspective. Similarly, everything that we have expressed on the players that participate in the management of justice has its conceptual roots on the idea of justice as a right and as a human value.

Qualification of judges

"Impart justice" does not mean solely the mechanical application of a certain law. It is a challenging exercise of intelligence that often forces the judge to harmonize the sense of justice with the not always fair and foreseeable legal provisions. But this *desideratum* is not easy to achieve when the administration of justice is composed of judges who provide more protection to the enforcement of certain procedures than to justice itself. What we used to call "judicial crash" in many of our countries continues to be a pitiful reality expressed in labyrinth-like procedures or in irrelevant formalities. With judges who limit themselves to the inertial application of procedural norms, it is difficult to speak properly about access to justice in the non-functional sense of this term.

The complete qualification of judges necessarily entails a firm ethical and philosophical basis. The School of Law and the Academies for the Qualification of Magistrates, or their equivalent, should permanently review, improve and update the teaching curricula in order to ensure the most adequate qualification of judges or candidates. The qualification of a judge should be continuous, theoretically and practically speaking. The judge should not be qualified only for his/her initial admission, but rather has to continuously qualify during his/her whole career. Hence the need for general and specialized curricula so as to ensure their education for life.

Autonomy of the courts

Little will be achieved if we improve the qualification of the candidates to the courts but do not complement it with professional – and not political – criteria during the selection process. The diverse national constitutions, as well as the legislation governing the judicial career, clearly declare the independence or autonomy of the judicial power. In general, this type of autonomy is political, functional, administrative, economic and disciplinary. However, we cannot ignore the existence in some countries of many claims that seem to indicate the lack of enforcement of this statement. Without analyzing any of these cases in detail, as this is not the opportunity to do so, we must emphasize the need to preserve the regime of autonomy of the Judicial Power, a real autonomy and, beyond nominal, that switch the courts to authentic venues of justice without any tie to other public powers. This essential condition alone will allow the existence of a judiciary career, judge stability, due process and, in short, the full operation of the Rule of Law.

Guidelines Principles:

1. The access to justice is an inalienable human right.

2. Equal access to justice is a need of the Rule of Law.

3. One of the duties of the States is to ensure access to justice to all, trying to achieve its utmost in the deliverance of services, operationality.

4. The policies addressing the equal social access to justice should not be reduced to what we call "judicial charity", gratuity of defense, exemption of court costs and other liberalities, which are of course necessary, though insufficient. They should refer also to an authentic system of effective protection for the weakest. On the other hand, in order to make the service of justice more accessible, concentration of judicial organs should be avoided in order to decentralize them.

5. State juridical activity is not incompatible with social and communal alternative forms of justice. Alternative forms of justice aimed to restore civilized coexistence, such as conciliation, mediation, arbitration and other appropriate forms of justice by consensus, since they are not in conflict with the justice system provided by the State.

6. Alternative or innovative mechanisms of justice should receive support from the State and a legal base to grant them full validity.

7. The inalienable guarantee that every State organs decision is under judicial review, does not exclude the public administration duty to exercise its authority on a decision in a fair and timely way regarding all matters that affect the population.

8. States will prioritize care to existing vulnerable groups. So, they should promote appropriate conditions for effective access to justice for vulnerable people and to ensure all-citizens rights in equal conditions.

9. The States recognize the existence of pluri-culturality. The State's duty to guarantee access to justice is not finished when a qualified judicial system is provided, but presupposes the recognition and support of special jurisdictions based on the cultural identity of the indigenous communities, for which purpose will be set up coordination mechanisms. The States will respect common law and the traditional forms of settling disputes provided fundamental rights are not violated.

10. Guarantee must be given to effective independence of the administration of justice.

11. A rigorous selection of judges contribute to invigorate judicial autonomy and to improve the quality of decisions. Similarly, the sufficient and timely supply by the State of the necessary resources for the integral operation of the judicial organisms contribute to a better running of their activities.

12. Both the judicial process and its resolution must be resolved on a timely manner. For this purpose, appropriate measures should be accelerated in order to obtain verdicts on reasonable time for the benefit of people.

13. The juridical and ethical qualifications of judges should be a permanent concern for society and for the State. In states with a career judicial services, a system of integral judicial qualification should be set up right from the undergraduate courses and strengthen the existing schools or colleges for those who wish to follow the judicial career.

14. The legal education of the population should be encouraged, so that people may know their fundamental rights and duties as citizens and thus facilitate their effective enjoyment and fulfillment.

15. The renewal of the judicial system focusing full access to justice requires State decisions that should be demanded as a priority, as it involves a fundamental right that crosses transversally all the areas of human life.

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5. Simplified joint stock companies

Documents

CJI/RES. 188 (LXXX-O/12)	Project for a Model Act on Simplified Stock Corporation
Annex: CJI/doc.380/11 corr. 1	Report of the Inter-American Juridical Committee: Recommendations on the Proposed Model Act on the Simplified Stock Corporation

During the 78th regular session of the Inter-American Juridical Committee (Rio de Janeiro, Brazil, March 2011), the Chairman Fernández de Soto presented the topic of simplified joint stock companies. On that occasion, he asked Dr. Stewart to review the proposed Model law of Colombia and compare it to legislation in other countries. Dr. Stewart accepted the request and pledged to present an analysis at the August session. In response to Dr. Hubert, the Chairman Fernández de Soto explained that one of the possible results of Dr. Stewart's work would be adoption of a model law on the subject by the Committee, considered as an initiative that could have a major impact, and he suggested that the topic be included on the agenda once Dr. Stewart presents his opinion in August. It was so agreed.

During the 79th regular session of the Inter-American Juridical Committee (Rio de Janeiro, Brazil, August 2011), Dr. Stewart gave a brief summary of the Model law adopted in Colombia, and referred to his report on "Recommendations on the proposed model act on the simplified stock corporation," document CJI/doc.380/11. He explained that he had consulted with professors from his university working on the subject, and the initiative was supported unanimously. He then proposed that this topic be included on the agenda, and that the Committee draft a model law for OAS member states. The purpose of this instrument would be to facilitate the creation of new companies and to protect the parties involved.

The Chairman Fernández de Soto then turned to Professor Francisco Reyes Villamar to explain the Law of Simplified Joint Stock Companies adopted in Colombia. Professor Reyes was one of the authors of the Colombian law and has had a brilliant public career in his country as a professor and an attorney.

Professor Reyes expressed thanks for the invitation and the excellent summary prepared by Dr. Stewart. His P*owerPoint* presentation included the following points:

- Justification of reform of Latin American Corporate Law in the light of the efficiencies of Latin American corporate law
- What are simplified joint stock companies?
  - They are part of a modernization process
  - Law adopted on December 5, 2008
  - The five characteristics of their operations are: limited liability; flexible management structure; easy establishment and minimal formalities; favorable tax regime; and, ample contractual freedom
  - Based on limited liability partnerships, limited liability companies, *societies par actions simplifiées*
  - Countries that have adopted them: Civil law countries in Europe, and in China, Japan, India, and Singapore
  - There has been an exponential growth since the law was adopted, equivalent to 92% by July of this year, for a total of 90,000 companies, as compared to 8% for other

types of companies in Colombia. The number of companies created between 2009 and 2010 increased by 25%.

- Doctrinal reactions
  - He cited European professors, the United Nations (doing business), specialized periodicals in Colombia
- Objective of a model law
  - A model law drafted by CJI is expected to guide legislative reform processes in Latin America
- Characteristics of simplified joint stock companies
  - The possibility of redefining essential elements
  - Simplified establishment procedures
  - Prevent dichotomy
  - Limited liability
  - Contractual autonomy
  - Flexible capitalization structure
  - Misuse of law, rejection of legal personality
  - Conflict settlement
  - Flexible purpose
  - Freedom regarding internal organic structure
  - Updating of rules on assembly
  - Very free rules governing stock trading
  - Sophisticated operations
  - Rules on dissolution and liquidation

In his final comments, the professor called for a harmonization of Latin American legal systems, and invited the OAS to contribute by establishing guidelines for coordination of laws in Latin American countries.

In response to questions from Dr. Gómez Mont Urueta, who expressed appreciation for the presentation and pointed out that preparation of simple rules is a very positive contribution, Professor Reyes clarified that the name of the company is protected by a sophisticated registration that avoids problems related to homonyms, but does not in itself cover intellectual property considerations which are exercised by other means. The prototype does not prohibit supervisory agencies. He also noted that there are no statistics regarding the impact of these companies in the case of conflicts, but as he understands it, the contractual flexibility of this type of company should help it keep conflicts to a minimum.

In response to the questions of Dr. Novak, Professor Reyes observed that the economic impact in his country had to do with the channeling of foreign investment, in addition to increased tax revenue. On the topic of security, and especially with regard to money laundering, he noted that these are issues that escape this discipline, although it would be viable to include an article to establish a register. Finally, he commented that the weaknesses of simplified joint stock companies could be seen in their practical application, which could be illustrated in effective compliance with the rules that rely on arbitration centers. The Chairman Fernández de Soto reaffirmed that the problem of money laundering is highly controlled in his country by the banking system. Professor Reyes indicated in conclusion that the stock is registered, i.e., it must be entered in a register.

Dr. Stewart, referring to the attachments to his report, asked about the origin of the model law proposed by Professor Reyes, and asked the members for their opinion regarding the possibility of endorsing the idea of having the Committee propose a model law on the subject, something that

would be highly productive for States. Professor Reyes clarified that two model laws are involved, one on substantive issues and the other on procedural matters. It is a comparative law project that took many years, and was part of a doctoral thesis and based on academic experience accumulated over 20 years. The model proposed is taken almost verbatim from the Colombian law, which has demonstrated its usefulness, and reflects advances in this area in the past 20 years, and is adapted to the countries of the region, with the exception of the United States. He considered it to be extremely useful in civil systems, and noted that this model law does not claim to be a complete corporate regime, or to derogate or replace existing statutes.

In view of the successful results in Colombia and the dynamic nature of its economy at present, Dr. Baena Soares supported the idea of presenting a model law to member countries.

In response to a question from Dr. Hubert on the threats posed by these laws with respect to tax revenue, Professor Reyes explained that there were no incentives in the law with regard to this issue. Tax problems are not the fault of the type of company, but are linked to adequate control and supervision. There are tax planning mechanisms, but simplified joint stock companies were not created to avoid taxes; in fact there is a public register that shows the companies.

Dr. Hyacinth expressed Jamaica's interest in this subject, and thanked him for the presentation which will be useful in her work to prepare a draft law on this topic.

In response to Dr. Villalta, who asked about the work done in Colombia with notaries, Professor Reyes made clear that they did not participate in the creation and establishment of the model, but that they have become incorporated into it over time. Notary procedures are not eliminated, but they are voluntary, and in actual practice only 5% are using them.

The Chairman Fernández de Soto thanked Professor Reyes, and showed the value of legislation on the subject and the possibility of making an extraordinary contribution to the inter-American system by drafting a model law. Dr. Gómez Mont Urueta proposed that a mandate be adopted at the next session of the Committee to approve a model law. Dr. Novak supported preparation of a model law that would be very simple in light of the advantages apparent in Colombia. He proposed that Dr. Stewart serve as rapporteur, and that a model law be approved at the March session in Mexico. Dr. Stewart accepted the task of preparing a model law, but he asked the other members of the Committee to carefully review his report and comment on it at the next session when a resolution to accompany the model law may be adopted. The Chairman proposed that the topic be included on the agenda, and designated Dr. Stewart as the rapporteur on the topic, and he placed on record the positive reception given to this topic.

During the 80th regular session of the Inter-American Juridical Committee (Mexico City, March 2012), the rapporteur on the subject, Dr. David Stewart, explained the background to it. He pointed to the successes achieved by this kind of corporation, which aimed to make it easier to establish companies and protect the parties involved, and illustrated his point with examples taken from this Hemisphere, Europe and India. He went on to say that he had not received any comments from members of the Juridical Committee regarding the aforementioned document. Consequently, he proposed to remit the document to the CAJP for the member states to study and asked the Committee plenary to endorse the document.

For his part, Dr. Dante Negro explained that the Committee had two options with regard to this topic: either to include it in the annual report and wait until next year, or else to send it immediately to the Permanent Council for the General Assembly to review this year.

Dr. Fernando Gómez Mont said he was uneasy with the name given to this corporation and asked that the prerequisites explicitly refer to the name and the need to specifically identify the corporation.

The Chair, Dr. Novak noted that the Committee plenary preferred to send the document immediately to the Permanent Council. To that end, the plenary adopted the resolution entitled "Project for a Model Act on Simplified Stock Corporation," CJI/RES. 188 (LXXX-O/12). The Committee's report was classified as document CJI/doc. 380/11 corr. 1 of March 9 2012.

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CJI/RES. 188 (LXXX-O/12)

PROJECT FOR A MODEL ACT ON SIMPLIFIED STOCK CORPORATION

THE INTER-AMERICAN JURIDICAL COMMITTEE,

RECOGNIZING the emergence of new forms of hybrid corporate organizations with respect to micro-businesses and small and medium enterprises;

CONSIDERING the contribution that these new forms of corporate organizations can make to the economic development in member states;

BEARING IN MIND the presentation made to the Inter-American Juridical Committee by Professor Francisco Reyes regarding these new forms of corporate organizations, his proposed Model Act and the Colombian experience in these matters;

CONSIDERING the "Recommendations on the proposed model act on the simplified stock corporation" (CJI/doc.380/11) presented by the rapporteur of the subject, Dr. David P. Stewart,

RESOLVES:

1. To express its gratitude to the rapporteur Dr. David P. Stewart for his report.

2. To approve the "Report of the Inter-American Juridical Committee: Recommendations on the proposed model act on the simplified stock corporation," (CJI/doc.380/11 corr.1), which is attached to this resolution.

3. To transmit this resolution to the OAS Permanent Council for its due consideration and to send it to the General Assembly.

This resolution was approved unanimously at the meeting held on March 9, 2012 by the following members: Drs. Carlos Alberto Mata Prates, David P. Stewart, Fernando Gómez Mont Urueta, Jean-Paul Hubert, Miguel Aníbal Pichardo Olivier, Freddy Castillo Castellanos, Fabián Novak Talavera, José Luis Moreno Guerra and Ana Elizabeth Villalta Vizcarra.

CJI/doc.380/11 corr.1

REPORT OF THE INTER-AMERICAN JURIDICAL COMMITTEE.

RECOMMENDATIONS ON THE PROPOSED MODEL ACT ON THE SIMPLIFIED STOCK CORPORATION

At our March 2011 regular session, the Chair proposed that the Committee should consider the topic of a "simplified stock corporation," with particular reference to the new law adopted by the Congress of the Republic of Colombia in December 2008. In the interim, I have had an opportunity to review the draft of a new book by Professor Francisco Reyes entitled "A New

Policy Agenda for Latin American Company Law: Reshaping the Closely-Held Entity Landscape." This volume discusses in detail the background of Colombia Law 1258 and argues in favor of the adoption of similar legislation by other countries in Latin America. For that purpose, it proposes a "model act" for a Simplified Stock Corporation (as well as another for the resolution of conflicts arising from such corporations). It is my understanding that Professor Reyes will make a presentation on this subject to the Committee at its forthcoming meeting.

I believe that Professor Reyes' proposal, and in particular the Model Act, is worthy of the Committee's endorsement. Professor Reyes makes a very credible case in favor of legislative reforms to permit such innovative business forms and argues convincingly that these reforms would promote economic growth.

As contemplated by the Model Act, the simplified stock corporation (or "SAS") is a hybrid business entity. It blends features of two business forms: partnerships and corporations. It is related to what are known in some legal systems as "closely held" corporations, limited liability partnerships, and *sociétés par actions simplifiées*. In the United States, various forms have been successfully adopted in Delaware, Wyoming and Texas; variations have also been adopted in the United Kingdom, France, Japan, Singapore, China, India and Canada. In Latin America, however, it is my understanding that besides Colombia, only Chile has enacted a similar law but it has encountered difficulty in implementation.

Under the Colombian approach, the SAS can be formed by one or more shareholders and can be incorporated by a relatively simple private or electronic document (as opposed to an expensive notarial deed of incorporation). The cost is minimal. The act of incorporation provides limited liability to its shareholders (except when the corporate veil is used to perpetrate a fraud or abuse the corporate form). It also provides protection to third party victims of the abusive or fraudulent use of the *ultra vires* doctrine by corporate officials. It enables the founders to choose an unlimited duration for the incorporation, and replaces the costly and ineffective formality of mandatory internal comptrollers (*comisarios*) with a more effective and less expensive supervision of external but fully qualified auditors. It also provides flexibility to corporate capital, greater contractual freedom, and increased access to capital.

The benefits of simplified business associations to economic development are supported by strong evidence. A recent study by Dr. Boris Kozolchyk and Dr. Cristina Castaneda of the National Law Center for Inter American Free Trade indicates that in our hemisphere, both big and small economies depend upon informally-created micro, small and medium-sized enterprises ("MiPymes") for much of their employment. In El Salvador, MiPymes accounted for 99.6% of all of businesses in 2005, and 90.52% of these were microenterprises located in urban areas and especially in the capital city of San Salvador. Most Salvadoran micro-businesses are conducted by a single individual or with the assistance of one or two additional employees. In Brazil, according to a report from the Serviço Brasileiro de Apoio às Micro e Pequenas Empresas (Brazilian Service for the Support of Micro and Small Businesses), the number of microenterprises grew 9.1% from 1997 to 2003, from 9,477,973 to 10,335,962, employing over 13 million people. In Mexico, 99% of all Mexican businesses fall under the rubric of "micro," "small" or "medium-sized" enterprises, employing approximately 60% of the population, and MiPymes are responsible for more than 20% of Mexico's gross domestic product.

The lack of a progressive legislative framework permitting simpler and more modern business associations is often described as a major impediment to economic development within our hemisphere. Under many national legal codes, only certain types of business associations are permitted, such as (i) regular general partnerships (*sociedades en nombre colectivo*), (ii) limited partnerships (*sociedades en comandita*), (iii) joint stock companies or corporations (*sociedades anónimas*), whether of a fixed or variable capital, and (iv) limited liability companies (*sociedades de responsabilidad limitada*), which are often used as substitutes for family or closely-held corporations. These business forms have roots in European legal codes of the last century and often require businessmen to follow elaborate and costly notarial and administrative processes

("*trámites*"). These *trámites* supply missing formalities including the execution of verbose notarial *Escrituras* Públicas (public deeds) and numerous licenses often in the form of central or municipal taxes. These formalities cannot be ignored, since failure to comply might lead courts or administrators to declare a micro or small business "relatively null", "absolutely null" or even a "non-existent" legal entity devoid of its "legal personality" (*personalidad jurídica*).

The Colombian Law of Simplified corporations (SAS) enacted in 2008 is the first and most successful Latin American statutory effort to correct this situation by requiring only formalities that have a functional and salutary effect upon the marketplace. It was authored by Professor Reyes, who is a highly regarded scholar and practitioner and who served as Colombia's Superintendent of Companies. Professor Reyes' book makes a strong case for the benefits that would result from a new system. He begins by presenting evidence that the formalistic structure of traditional corporate law in Latin America remains a hindrance to the development of the economy of the region. Articles 2.7 through 2.12 show the continued adherence to outdated corporate law rules developed in a prior era and in other legal cultures. Tables 1 and 2 are particularly powerful in illustrating how much longer it takes to form a business and to enforce contracts in Latin American economies as compared to elsewhere in the world. The reforms in Colombia are discussed in Part 6, where Table 8 shows a notable reduction in the procedures, time and cost of enforcement of contracts.

Professor Reyes points out ways in which the financial, economic and legal structure of corporate business is different in Latin America than in source countries for traditional corporate law (particularly in the more concentrated and family-controlled nature of many entities, as compared to the more market-centric economies of the United States and the United Kingdom). An even more important difference is the difference between the needs of publicly held corporations from those which are "closely held." Professor Reyes correctly wants to move the focus of legal reform to this part of the corporate landscape.

The Model Act proposed by Professor Reyes (Annex A to the book) suggests focuses on two of the key relationships in a closely held corporation — (i) the relationship of participants to outsiders and (ii) the relationship between the participants themselves. As to the first, the key concept is limited liability, which results from the simple act of incorporation. At the same time, protection of the interests of outsiders—creditors, employees, tort victims, etc.—is provided through the "piercing the corporate veil" concept in Article 42. As to the second relationship, the Model Act recognizes and enhances freedom of private contracting while at the same time protecting the interests of participants through the possibility of judicial relief through Article 43 on Abuse of Rights.

The SAS would have "legal personality" and could be organized as its shareholders might wish. It could issue various classes or series of shares, those shares and any other securities it issues could not be registered on any stock exchange nor traded in any market. The Model Law provides relatively simple rules regarding dissolution and "winding up." Annex B to Prof. Reyes' book proposes a separate Model Act on Procedural Rules for that process. Copies of Annexes A and B are attached for information.

Annex A

MODEL ACT ON THE SIMPLIFIED STOCK CORPORATION (MASSC)

CHAPTER I

GENERAL PROVISIONS

ARTICLE 1. NATURE.--The simplified stock corporation is a for profit legal entity by shares, the nature of which will always be commercial irrespective of the activities set forth in its purpose clause.

ARTICLE 2. LIMITED LIABILITY.--The simplified stock corporation may be formed by one or more persons or legal entities.

Shareholders will only be responsible for providing the capital contributions promised to the simplified stock corporation.

Except as set forth in Article 41 of this Act, shareholders will not be held liable for any obligations incurred by the simplified stock corporation, including, but not limited to, labor and tax obligations.

There shall be no labor relationship between a simplified stock corporation and its shareholders, unless an explicit agreement has been executed to that effect.

ARTICLE 3. LEGAL PERSONALITY.--Upon the filing of the formation document before the Mercantile Registry [include the name of corresponding company registrar's office], the simplified stock corporation will form a legal entity separate and distinct from its shareholders.

ARTICLE 4. INABILITY TO BECOME A LISTED ENTITY.--The shares of stock and other securities issued by a simplified stock corporation shall not be registered within a stock exchange, nor traded in any securities market.

CHAPTER II

FORMATION AND PROOF OF EXISTENCE

ARTICLE 5. CONTENTS OF THE FORMATION DOCUMENT.--A simplified stock corporation will be formed by contract or by the individual will of a single shareholder, provided that a written document is granted. The formation document shall be registered before the Mercantile Registry [include the name of corresponding company registrar's office], and shall set forth:

1) The name and address of each shareholder;
2) The name of the corporation followed by the words "simplified stock corporation" or the abbreviation "S.A.S.";
3) The corporation's domicile;
4) If the simplified stock corporation is to have a specific date of dissolution, the date in which the corporation is to dissolve;
5) A clear and complete description of the main business activities to be included within the purpose clause, unless it is stated that the corporation may engage in any lawful business;
6) The authorized, subscribed and paid-in capital, along with the number of shares to be issued, the different classes of shares, their par value, and the terms and conditions in which the payment will be made;
7) Any provisions for the management of the business and for the conduct of the affairs of the corporation, along with the names and powers of each manager. A simplified stock corporation shall have at least one legal representative in charge of managing the affairs of the corporation in relation with third parties.

No additional formalities of any nature shall be required for the formation of the simplified stock corporation.

ARTICLE 6. ATTESTATION.--The Mercantile Registrar [include the name of corresponding company registrar's office] shall attest to the legality of the provisions set forth in the formation document and any amendments thereof.

The Registrar shall only deny registration where the requirements provided under Article 5 have not been met. The decision rendered by the Registrar shall be issued within three days after the relevant filing has been made. Any decision denying registration will only be subject to a rehearing conducted by the Registrar.

Upon the approval of a formation document by the Mercantile Registrar, challenges will not be heard against the existence of the simplified stock corporation and the contents of the formation document will constitute the simplified stock corporation's by-laws.

ARTICLE 7. ASSIMILATION TO PARTNERSHIP.--Where a formation document has not been duly approved by the Mercantile Registrar [include the name of corresponding company registrar's office], the purported corporation will be assimilated to a partnership. Accordingly, partners will be jointly and severally liable for all obligations in which the partnership is engaged. If the partnership has only one member, such member will be held liable for all obligations in which the partnership is engaged.

ARTICLE 8. PROOF OF EXISTENCE.--The certificate issued by the Mercantile Registrar [include the name of corresponding company registrar's office] is conclusive evidence as regards the existence of the simplified stock corporation and the provisions set forth in the formation document.

CHAPTER III

SPECIAL RULES REGARDING SUBSCRIBED, PAID-IN CAPITAL AND SHARES OF STOCK

ARTICLE 9. CAPITAL SUBSCRIPTION AND PAYMENT.--Capital subscription and payment may be carried out under terms and conditions different to those set forth under the Commercial Code or corporate statute [include the name of the relevant Code, Decree, Law or Statute]. In any event, payment of subscribed capital shall be made within a period of two years to be counted from the date in which the shares were subscribed. The rules for subscription and payment may be freely set forth in the by-laws.

ARTICLE 10. CLASSES OF SHARES.-- The simplified stock corporation may issue different classes or series of shares, including preferred shares with or without vote. Shares may be issued for any consideration whatsoever, including in-kind contributions or in exchange for labor, pursuant to the terms and conditions contained in the by-laws.

Any special rights granted to the holders of any class or series of shares shall be described or affixed upon the back of the stock certificates.

ARTICLE 11. VOTING RIGHTS.--The by-laws shall depict in full detail the voting rights corresponding to each class of shares. Such document shall also determine whether each share will grant its holder single or multiple voting rights.

ARTICLE 12. SHARE TRANSFERS TO A TRUST.--Any shares issued by a simplified stock corporation may be transferred to a trust provided that an annotation is made in the corporate ledger concerning the trustee company, the beneficial owners and the percentage of beneficial rights.

ARTICLE 13. LIMITATION ON THE TRANSFERABILITY OF SHARES.--The by-laws may contain a provision whereby the shares may not be transferred for a period not to exceed ten years, to be counted from the moment in which the shares were issued. Such term can only be extended by consent of all the holders of outstanding shares.

Any such limitation on share transferability shall be described or affixed upon the back of the stock certificate.

ARTICLE 14. AUTHORIZATION FOR THE TRANSFER OF SHARES.--The by-laws may contain provisions whereby any transfer of shares or of any given class of shares will be subject to the previous authorization of the shareholders' assembly, which shall be granted by majority vote or by any supermajority included in the by-laws.

ARTICLE 15. BREACH OF RESTRICTIONS ON NEGOTIATION OF SHARES.-- Any transfer of shares carried out in a manner inconsistent with the rules set forth in the by-laws shall be null and void.

ARTICLE 16. CHANGE OF CONTROL IN A CORPORATE SHAREHOLDER.-- The by-laws may impose upon an incorporated shareholder the duty to notify the simplified stock corporation's legal representative about any transaction that may cause a change in control regarding such shareholder.

Where a change in control has taken place, the shareholders' assembly, by majority decision, shall be entitled to exclude the corresponding incorporated shareholder.

Aside from the possibility of being excluded, any breach of the duty to inform changes in control may subject the concerned shareholder to a penalty consisting of a 20% reduction of the fair market value of the shares, upon reimbursement.

In the event set forth in this article, all decisions concerning the exclusion of shareholders, as well as the determination of any penalties, shall require an approval rendered by the shareholders' assembly by majority vote. The votes of the concerned shareholder shall not be taken into account for the adoption of these decisions.

CHAPTER IV

ORGANIZATION OF THE SIMPLIFIED STOCK CORPORATION

ARTICLE 17. ORGANIZATION.--Shareholders may freely organize the structure and operation of a simplified stock corporation in the by-laws. In the absence of specific provisions to this effect, the shareholders' assembly or the sole shareholder, as the case may be, will be entitled to exercise all powers legally granted to the shareholders' assemblies of stock corporations, whilst the management and representation of the simplified stock corporation shall be granted to the legal representative.

Where the number of shareholders has been reduced to one, the subsisting shareholder shall be entitled to exercise the powers afforded to all existing corporate organs.

ARTICLE 18. MEETINGS.--Meetings of shareholders may be held at any place designated by the shareholders, whether it is the corporate domicile or not. For these meetings, the regular quorum provided in the by-laws will suffice, pursuant to Article 22 hereof.

ARTICLE 19. MEETINGS BY TECHNOLOGICAL DEVICES OR BY WRITTEN CONSENT.--Meetings of shareholders may be held through any available technological device, or by written consent. The minutes of such meetings shall be drafted and included within the corporate records no later than 30 days after the meeting has taken place. These minutes shall be signed by the legal representative or, in her absence, by any shareholder that participated in the meeting.

ARTICLE 20. NOTICE OF MEETING.--In the absence of stipulation to the contrary, the legal representative shall convene the shareholders' assembly by written notice addressed to each shareholder. Such notice shall be made at least five days in advance to the meeting. The agenda shall in all cases be included within any notice of meeting.

Whenever the shareholders' assembly is called upon to approve financial statements, the conversion of the corporation into another business form, or mergers or split-off proceedings, shareholders will be entitled to exercise information rights concerning any documents relevant to the proposed transaction. Information rights may be exercised during the five days prior to the meeting, unless a longer term has been provided for in the by-laws.

Any notice of meeting may determine the date in which the Second Call Meeting will take place, in case the quorum is insufficient to hold the first meeting. The date for the second meeting may not be held prior to ten days following the first meeting, nor after thirty days from that same moment.

ARTICLE 21. WAIVER OF NOTICE.--Shareholders may, at any moment, submit written waivers of notice whereby they forego their right to be convened to a meeting of the

shareholders' assembly. Shareholders may also waive, in writing, any information rights granted under Article 20.

In any given shareholders assembly and even in the absence of a notice of meeting, the attendees will be deemed to have waived their right of being summoned, unless such shareholders make a statement to the contrary before the meeting takes place.

ARTICLE 22. QUORUM AND MAJORITIES.--Unless otherwise specified in the by-laws, quorum to a shareholders' meeting will be constituted by a majority of shares, whether present in person or represented by proxy.

Decisions of the assembly shall be taken by the affirmative vote of the majority of shares present (in person or represented by proxy), unless the by-laws contain supermajority provisions.

The sole shareholder of a simplified stock corporation may adopt any and all decisions within the powers granted to the shareholders' assembly. The sole shareholder will keep a record of such decisions in the corporate books.

ARTICLE 23. VOTE SPLITTING.--Shareholders may split their votes during cumulative voting proceedings for the election of directors or the members of any other corporate organ.

ARTICLE 24. SHAREHOLDERS' AGREEMENTS.--Agreements entered into between shareholders concerning the acquisition or sale of shares, preemptive rights or rights of first refusal, the exercise of voting rights, voting by proxy, or any other valid matter, shall be binding upon the simplified stock corporation, provided that such agreements have been filed with the corporation's legal representative. Shareholders' agreements shall be valid for any period of time determined in the agreement, not exceeding 10 years, upon the terms and conditions stated therein. Such 10 year term may only be extended by unanimous consent.

Shareholders that have executed an agreement shall appoint a person who will represent them for the purposes of receiving information and providing it whenever it is requested. The simplified stock corporation's legal representative may request, in writing, to such representative, clarification as regards any provision set forth in the agreement. The response shall be provided also in writing within the five days following the request.

SubArticle 1.--The President of the shareholders' assembly, or of the concerned corporate organs, shall exclude any votes cast in a manner inconsistent with the terms set forth under a duly filed shareholders' agreement.

SubArticle 2.--Pursuant to the conditions set forth in the agreement, any shareholder shall be entitled to demand, before a court with jurisdiction over the corporation, the specific performance of any obligation arising under such agreement.

ARTICLE 25. BOARD OF DIRECTORS.--The simplified stock corporation is not required to have a board of directors, unless such board is mandated in the by-laws. In the absence of a provision requiring the operation of a board of directors, the legal representative appointed by the shareholders' assembly shall be entitled to exercise any and all powers concerning the management and legal representation of the simplified stock corporation.

If a board of directors has been included in the formation document, such board will be created with one or more directors, for each of whom an alternate director may also be appointed. All directors may be appointed either by majority vote, cumulative voting, or by any other mechanism set forth in the by-laws. The rules regarding the operation of the board of directors may be freely established in the by-laws. In the absence of a specific provision in the by-laws, the board will be governed under the relevant statutory provisions.

ARTICLE 26. LEGAL REPRESENTATION.--The legal representation of the simplified stock corporation will be carried out by an individual or legal entity appointed in the manner provided in the by-laws. The legal representative may undertake and execute any and all acts and

contracts included within the purpose clause, as well as those which are directly related to the operation and existence of the corporation.

The legal representative shall not be required to remain at the place where the business has its main domicile.

ARTICLE 27. LIABILITY OF DIRECTORS AND MANAGERS.--All Commercial Code [include the name of the relevant Code, Decree, Law or Statute] provisions relating to the liability of directors and managers may also be applicable to the legal representative, the board of directors, and the managers and officers of the simplified stock corporation, unless such provision is opted out of in the by-laws.

SubArticle 1.--Any individual or legal entity who is not a manager or director of a simplified stock corporation that engages in any trade or activity related to the management, direction or operation of such corporation shall be subject to the same liabilities applicable to directors and officers of the corporation.

SubArticle 2.--Whenever a simplified stock corporation or any of its managers or directors grants apparent authority to an individual or legal entity to the extent that it may be reasonably believed that such individual or legal entity has sufficient powers to represent the corporation, the company will be legally bound by any transaction entered into with third parties acting in good faith.

ARTICLE 28. AUDITING ORGANS.--A simplified stock corporation shall not, in any case, be legally mandated to establish or provide for internal auditing organs [include the name of corresponding auditing entity, e.g., fiscal auditor, auditing committee, etc.].

CHAPTER V

BY-LAW AMENDMENTS AND CORPORATE RESTRUCTURINGS

ARTICLE 29. BY-LAW AMENDMENTS.--Amendments to the corporate by-laws shall be approved by majority vote. Decisions to this effect will be recorded in a private document to be filed with the Mercantile Registry [include the name of corresponding company registrar's office].

ARTICLE 30. CORPORATE RESTRUCTURINGS.--The statutory provisions governing conversion into another form, mergers and split-off proceedings for business associations will be applicable to the simplified stock corporation. Dissenters' rights and appraisal remedies shall also be applicable.

For the purpose of exercising dissenters' rights and appraisal remedies, a corporate restructuring will be considered detrimental to the economic interests of a shareholder, inter alia, whenever:

1) The dissenting shareholder's percentage in the subscribed paid-in capital of the simplified stock corporation has been reduced;

2) The corporation's equity value has been diminished, or

3) The free transferability of shares has been constrained.

ARTICLE 31. CONVERSION INTO ANOTHER BUSINESS FORM.--Any existing business entity may be converted into a simplified stock corporation by unanimous decision rendered by the holders of all issued rights or shares in such business form. The decision to convert into a simplified stock corporation shall be registered before the Mercantile Registry [include the name of corresponding company registrar's office].

A simplified stock corporation may be converted into any other business form governed under the Commercial Code [include the name of the relevant Code, Decree, Law or Statute] provided that unanimous decision is rendered by the holders of all issued and outstanding shares in the corporation.

ARTICLE 32. SUBSTANTIAL SALE OF ASSETS.--Whenever a simplified stock corporation purports to sell or convey assets and liabilities amounting to 60% or more of its equity value, such sale or conveyance will be considered to be a substantial sale of assets.

Substantial sales of assets shall require majority shareholder approval. Whenever a substantial sale of assets is detrimental to the interests of one or more shareholders, it shall give rise to the application of dissenters' rights and appraisal remedies.

ARTICLE 33. SHORT-FORM MERGER.--In any case in which at least 90% of the outstanding shares of a simplified stock corporation is owned by another legal entity, such entity may absorb the simplified stock corporation by the sole decision of the boards of directors or legal representatives of all entities directly involved in the merger.

Short-form mergers may be executed by private document duly registered before the Mercantile Registry [include the name of corresponding company registrar's office].

CHAPTER VI

DISSOLUTION AND WINDING UP

ARTICLE 34. DISSOLUTION AND WINDING UP.--The simplified stock corporation shall be dissolved and wound up whenever:

1) An expiration date has been included in the formation document and such term has elapsed, provided that a determination to extend it has not been approved by the shareholders, before or after such expiration has taken place;
2) For legal or other reasons, the corporation is absolutely unable to carry out the business activities provided under the purpose clause;
3) Compulsory liquidation proceedings have been initiated;
4) An event of dissolution set forth in the by-laws has taken place;
5) A majority shareholder decision has been rendered or such decision has been made by the will of the sole shareholder, and
6) A decision to that effect has been rendered by any authority with jurisdiction over the corporation.

Whenever the duration term has elapsed, the corporation shall be dissolved automatically. In all other cases, the decision to dissolve the simplified stock corporation shall be filed before the Mercantile Registry [include the name of corresponding company registrar's office].

ARTICLE 35. CURING EVENTS OF DISSOLUTION.-- Events of dissolution may be cured by adopting any and all measures available to that effect, provided that such measures are adopted within one year, following the date in which the shareholders' assembly acknowledged the event of dissolution.

Events of dissolution consisting of the reduction of the minimum number of shareholders, partners or members in any business form governed under the Commercial Code [include the name of the relevant Code, Decree, Law or Statute] may be cured by conversion into a simplified stock corporation, provided that unanimous decision is rendered by the holders of all issued shares or rights, or by the will of the subsisting shareholder, partner or member.

ARTICLE 36. WINDING UP.--The simplified stock corporation shall be wound up in accordance with the rules that govern such proceeding for stock corporations. The legal representative shall act as liquidator, unless shareholders appoint any other person to wind up the company.

CHAPTER VII

MISCELLANEOUS PROVISIONS

ARTICLE 37. FINANCIAL STATEMENTS.--The legal representative shall submit financial statements and annual accounts to the shareholders' assembly for approval.

In the event that there is a single shareholder in a simplified stock corporation, such person shall approve all financial statements and annual accounts and will record such approvals in minutes within the corporate books.

ARTICLE 38. SHAREHOLDER EXCLUSION.--The by-laws may contain causes by virtue of which shareholders may be excluded from the simplified stock corporation. Excluded shareholders shall be entitled to receive a fair market value for their shares of stock.

Shareholder exclusion shall require majority shareholder approval, unless a different procedure has been laid down in the by-laws.

ARTICLE 39. CONFLICT RESOLUTION.--Any conflict of any nature whatsoever, excluding criminal matters, that arises between shareholders, managers or the corporation may be subject to arbitration proceedings or to any other alternative dispute resolution procedure. In the absence of arbitration, the same disputes will be resolved by (include specialized judicial or quasi-judicial tribunal).

The decisions rendered by the tribunal are final and shall not be subject to appeals before any court.

ARTICLE 40. SPECIAL PROVISIONS.--The legal mechanisms set forth under Articles 13, 14, 38 and 39 may be included, amended or suppressed from the by-laws only by unanimous decision rendered by the holders of all issued and outstanding shares.

ARTICLE 41. PIERCING THE CORPORATE VEIL.--The corporate veil may be pierced whenever the simplified stock corporation is used for the purpose of committing fraud. Accordingly, joint and several liability may be imposed upon shareholders, directors and managers in case of fraud or any other wrongful act perpetrated in the name of the corporation.

ARTICLE 42. ABUSE OF RIGHTS.--Shareholders shall exercise their voting rights in the interest of the simplified stock corporation. Votes cast with the purpose of inflicting harm or damages upon other shareholders or the corporation, or with the intent of unduly extracting private gains for personal benefit or for the benefit of a third party shall constitute an abuse of rights. Any shareholder who acts abusively may be held liable for all damages caused, irrespective of the judge's ability to set aside the decision rendered by the shareholders' assembly. A suit for damages and nullification may be brought in case of:

1) Abuse of majority;
2) Abuse of minority; and
3) Abusive deadlock caused by one faction under equal division of shares between two factions.

ARTICLE 43. CROSS-REFERENCES.--The simplified stock corporation shall be governed:

1) By this Law;
2) By the formation document, as amended from time to time; or
3) By statutory provisions contained in the Commercial Code [include the name of the relevant Code, Decree, Law or Statute] governing stock corporations.

Promulgation.--This Act shall be effective as of the date of its promulgation, and it repeals any and all statutes, acts, codes, decrees, or provisions of any nature that are inconsistent with this Act.

Annex B

MODEL ACT ON PROCEDURAL RULES FOR THE RESOLUTION OF CONFLICTS IN SIMPLIFIED STOCK CORPORATIONS

CHAPTER I

GENERAL PROVISIONS

Article 1. Purpose. The purpose of this Act is to provide the procedural rules that shall apply to the resolution of conflicts arising within a simplified stock corporation, as provided in Law [include name or number of the Act that regulates the simplified stock corporation].

All conflicts that arise between shareholders, or between them and the corporation, its managers, officers, auditors or third parties, including those related to the abuse of rights, piercing the corporate veil, liability of shadow directors and officers, shareholders' agreements, and decisions rendered by the shareholders' assembly or the board of directors, shall be subject to the special proceedings regulated in this Act.

Article 2. Principles. The following principles shall prevail in the special proceedings regulated herein: concentration, celerity, and brevity.

The principle of concentration requires that each step in a proceeding consolidate as many procedural acts as possible. A deferral of a proceeding may take place only under exceptional circumstances.

The principle of celerity requires that all procedures take place in the shortest amount of time. All decisions, measures, agreements, and, in general, any action that reduces the time frame of a proceeding, shall be preferred.

The principle of brevity requires that in a proceeding, the act that requires the least amount of procedures shall be preferred.

Article 3. Jurisdiction. The [include name of the administrative authority or specialized court in charge of proceeding] (hereinafter, referred to as "the authority") will have judicial powers with regard to any proceeding concerning the simplified stock corporation.

The [include name of the administrative authority or specialized court in charge of proceeding] shall have exclusive jurisdiction over such proceedings.

Article 4. Legal Standing. Legal standing shall be presumed with regard to shareholders and officers in any proceeding involving a simplified stock corporation, as well as with regard to the corporation itself. Third parties may provide summary evidence as proof of their legal standing.

CHAPTER II

PROCEDURES

Article 5. Petition. The special proceeding for simplified stock corporations shall be deemed to have commenced with the filing of a complaint or petition. Such petition must contain: the name of the parties, the claims and pleadings, a brief description of the facts, a listing of the probative materials to be used as evidence, the legal foundations for each claim, the plaintiff's address and e-mail address for notification purposes, and the assumed defendant's address and e-mail for the same purpose.

A single petition may include all the pleadings involving one or more simplified stock corporations.

The anticipated evidence and documents that are in possession of the plaintiff are, under no circumstance, required to be attached to the petition as an exhibit. The mere listing of such evidence will suffice for all legal purposes.

Article 6. Filing of the Petition. The petition that complies with the above-mentioned requirements may be filed in writing or through a data message sent to the Electronic System for Conflict Resolution of Simplified Stock Corporations that will be created by [include name of the administrative authority or specialized court in charge of proceeding].

If the petition is filed in writing, the authenticity of such document shall be presumed, provided that it has been executed by the plaintiff or her legal representative. If the petition is filed as a data message, the rules contained in [include name or number of the act or rule that regulates e-commerce and data messages] shall apply.

Article 7. Preliminary Study of the Petition. Within three days following the date in which the petition has been filed, the [include name of the administrative authority or specialized court in charge of proceeding] will determine if it complies with all legal requirements and will decide on its admissibility or inadmissibility.

If such authority finds that the petition complies with all legal requirements, it will be admitted. If the petition does not comply with the requirements provided for in this law, the aforementioned authority shall declare its inadmissibility and order the plaintiff to make the necessary corrections. The appropriate corrections will have to be undertaken within the next five days following the date in which the request was made.

An action may be dismissed only when the plaintiff has not made the necessary corrections within the aforementioned period, or when the authority has determined that it has no jurisdiction over the issues brought before it under this Act.

Article 8. Preliminary Measures. In proceedings regarding the specific performance of obligations contained in a shareholders' agreement, the authority will be entitled to issue preliminary injunctions immediately after determining the admissibility of the complaint. In all other proceedings, the authority will only be allowed to issue such injunctions after service of process has been made.

Article 9. Anticipated Judgment. If during the preliminary analysis of the petition the authority finds that the pleadings and facts brought forward by the plaintiff are fundamentally similar to the pleadings and facts that have been the matter of a previous dismissal by such authority, the authority shall dispense service of process to the defendant and render immediately a final decision or judgment on the merits of the case by resolving the matter in the same terms in which it was done in the previous case.

Should the plaintiff bring a motion to set aside the judgment, the authority shall decide, in no more than five days, if the decision will be revoked. In this case the proceedings will continue pursuant to the provisions of this Act. If the authority rejects the motion, the judgment shall be definitive, unless the special appeal contained in Article 28 shall be applicable.

Article 10. Service of Process. The petition shall be admitted by an order rendered by the authority. Service of process to the defendant or defendants shall take place in accordance with Article 29 of this Act. Along with the service of process, notification of the petition shall also take place.

Article 11. Notice to the Corporation and Joint Litigation. Notice concerning the commencement of proceedings shall be sent to the corporation or corporations involved in the complaint. It will be the corporation's legal representative duty to inform all shareholders, officers, directors, and auditors of the action that has been initiated before the authority. Any persons who may have an interest in the matter will be entitled to become a party to the process by filing a written statement in support of the plaintiff's pleadings, or bringing an opposition to them. Such statements must be filed within the five days following the notice given to the corporation.

The notice to the corporation shall also be published in the Electronic System for Conflict Resolution of Simplified Stock Corporations on the same date that it is sent to the corporation.

Article 12. Response to Complaint. After the expiration of the five-day term referred to in Article 11 above, the defendant or defendants shall have five additional days to provide a written response to the petition. Such answer may also be presented through a data message. The response shall include a response to all pleadings and claims included in the petition, as well as the defendant's counterclaims and legal defenses, a listing of the evidence, and the correct address and e-mail address for notifications (in the event that those presented by the plaintiff are incorrect).

Grounds for dismissal related to formal requirements shall only be heard in the preliminary hearing.

Article 13. Preliminary Hearing. Within the following five days after the expiration of the term referred to in Article 12 above, the authority shall summon the parties to a preliminary hearing in order to conduct mediation proceedings, curing any defects that may exist in the process, and make all determinations concerning the requests for evidence. The parties shall attend the hearing in person, or through their legal representative.

The preliminary hearing will be subject to the following rules:

1. Opening: The hearing will commence at the time provided in the summons. If any of the parties is unable to attend the hearing due to force majeure, such event shall have to be argued in advance to the commencement of the hearing. The hearing may be postponed only once. In this case, the new hearing shall take place within the five days following the initial date.
2. Mediation. Once the hearing has started, the parties will be asked if an agreement to resolve the issues has been reached or, in the alternative, if they have agreed on a method to solve the matter. In case the parties have reached an agreement, the authority shall verify its validity and approve it (if the case may be). If the parties have agreed on a method to solve the dispute, such procedure shall be validated by the authority.

If after the mediation has been conducted the parties fail to reach an agreement, the hearing will continue.

3. Curing Defects in the Process. The authority shall interrogate the parties on the defects that are deemed to affect the process. Immediately afterwards, the authority shall adopt the necessary measures to cure the defects in order to prevent nullities within the proceedings.
4. Pleadings. Subsequently, the parties will be entitled to present their pleadings and defenses before the authority.
5. Requests for Discovery and Production of Evidence. In the following stage of the preliminary hearing, the parties shall produce the evidence in their possession. The first to disclose the evidence will be the plaintiff, followed by the defendant.

After the production of evidence, the parties will have the opportunity to present the evidentiary stipulations governed under Article 23 of this Act.

Subsequently, the authority will solve all requests for production of evidence that have been made by the parties.

Afterwards, the parties will be ordered to produce evidence, which will be ascertained by the authority taking into account its relevance and conduciveness to the purposes claimed by each party.

The hearing referred to in this Article shall take place in one single day. It may, however, be deferred once or several times, provided that such deferral does not exceed three hours.

As soon as the hearing is concluded, the authority shall summon the parties to a new hearing for the taking of evidence, the presentation of closing arguments, and the rendering of the final decision.

Article 14. Hearing for the Taking of Evidence. After the commencement of the hearing, the taking of evidence shall take place in the following manner:

1. The deposition of expert witnesses designated by the parties shall be taken first. The authority may interrogate them on the issues that are not clear. The parties shall also be entitled to interrogate or refute them.
2. All records concerning evidence taken by in situ inspection of books and records conducted by the parties or their legal representatives shall be shown during the hearing.

After the evidence has been taken, each of the parties will provide the closing arguments by means of an oral presentation not to exceed 30 minutes. Subsequently, the authority will render the final decision orally.

After rendering the decision, the authority shall hear any requests for the special appeal contained in Article 28 of this Act.

The hearing referred to in this Article shall take place in one single day. It may, however, be deferred once or several times, provided that such deferral does not exceed three hours.

Article 15. Summary Decision. If at any juncture during the process the authority finds that there is sufficient evidence from which a definitive and unequivocal decision can be made, it may omit any subsequent procedural stages and render a final decision or judgment on the merits of the case.

CHAPTER III

SPECIAL PROVISIONS CONCERNING EVIDENCE

Article 16. Procedural Moment for the Request of Evidence. All evidence that the parties may wish to present during the proceeding shall be either listed or requested in the petition or its response. A request for the production of evidence cannot be made in any other stage of the proceedings.

Article 17. Prohibitions. The authority shall only admit or authorize the production of evidence that is pertinent, useful and conducive to the pleadings and defenses of the parties. A request for the production of evidence that has only an indirect or relation with the case shall be dismissed.

The authority shall not hear more than three witnesses for each of the parties.

The production of evidence by physical examination of exhibits shall only be ordered under exceptional circumstances. It shall be permitted only in the event that the alleged fact cannot be proven by any other means.

Article 18. Reading of Documents. Under no circumstances shall the actual reading of documentary evidence be required in any hearing. Access to such documents shall be permitted through the exhibits included in the docket.

Article 19. Presumption of Authenticity of Originals and Copies. All documents produced as originals or copies that contain the signature of the plaintiff, the defendant, their attorneys, the legal representative or any officer or manager of the corporation, shall be presumed to be authentic.

Article 20. Electronic Documents. Data messages shall be considered probative material under the terms of law [include name or number of the Act that regulates e-commerce and data messages].

Article 21. Deposition of Expert Witnesses. The deposition of all witnesses shall be taken orally. Rebuttals can only take place in the hearing regulated under Article 14 of this Act.

In the case of expert witnesses, summary proof of the technical or scientific ability, skill or knowledge on the subject upon which the witness has been called to testify, will suffice. Such

proof concerning the expert witness' qualifications must be presented during the interrogation of the expert witness conducted by the authority.

Article 22. Evidence through *in situ* inspection of books and records. Once the authority has ordered the production of evidence by an inspection carried out in a specifically designated place pursuant to Article 14-2 of this Act, the party who requested it shall be responsible for carrying out the corresponding inspection, recording or filming the examination in an appropriate medium and assuming all costs that such procedure may demand.

The authority shall not be required to attend the inspection, as the recording will suffice. The other party will be entitled to attend the examination, for which it must previously and timely be informed as to the date and time in which the inspection will take place.

Article 23. Stipulations Concerning Evidence. During the hearing for the taking of evidence, the parties may agree on the facts and circumstances that are to be considered proven in the case. For these facts and circumstances, the production of evidence will not be necessary.

The stipulations shall be duly recorded in writing, and must contain the signature of all plaintiffs and defendants or their legal representatives. Once the document has been executed, the stipulations will be informed to the authority for it to decide on their validity. If the stipulations are deemed to be valid, they will be taken into consideration by the authority when ordering the production of evidence.

Stipulations that are contrary to facts that are evident in the proceeding shall be deemed to be invalid by the authority.

Article 24. Burden of Proof. Each of the parties will be bound to prove the existence of the facts that support their claims and defenses. Nevertheless, when one of the parties is in a difficult position to produce evidence regarding a specific fact, whilst another party is in a better position to produce it, the authority may shift the burden of proof to the party with the ability to provide such evidence.

The shift in the burden of proof must be duly informed in the hearing for the taking of evidence.

CHAPTER IV

TIME LIMITS AND DEADLINES

Article 25. Waiver of Time Limits. The parties may, in all cases, renounce, expressly or implicitly, to the time limits and deadlines of a proceeding.

An implicit waiver of a time limit takes place when it can be inferred from the conduct of the parties that they do not wish to exhaust the time period that the law provides as when writings are filed by the parties before the time limit has elapsed.

Article 26. Observation of Time Limits. Time limits and deadlines shall be strictly observed and complied with by the parties and the authority.

CHAPTER V

APPEALS

Article 27. Motion to Set Aside Decisions of Authority and other Appeals. Orders or resolutions and decisions rendered by the authority regarding procedural aspect are not subject to appeal.

All other decisions rendered by the authority will only be subject to a motion to have them set aside by the same officer. Such motions shall have to be presented within three days after the challenged decision has been rendered or notified, as the case may be. The authority will have a five-day term to decide on these motions. Nevertheless, If the challenged decision is rendered in

the course of a hearing, the motion to have it set aside will have to be presented and resolved during the same hearing.

Article 28. Special Appeal before a Superior. Under special circumstances provided for in this act, the final decision may be appealed before [include name of the highest administrative or specialized judicial authority with jurisdiction over the issues].

The appeal shall have to be presented orally in the hearing where the final decision is rendered. In that same hearing, the authority shall decide if the recourse is to be granted. The appeal will only proceed if the amount at stake exceeds [include amount in local currency].

Once the appeal has been granted, the party filing the recourse will have to file the appeal in writing within the following five days. Immediately afterwards, the authority will remand the entire docket to [include name of the highest administrative authority or specialized court with jurisdiction over the issues] in order to be resolved.

The final decision resolving the special appeal may only be rendered on the grounds of the written appeal filed by the objecting party, and the proceedings that have already taken place. New evidence will not be admitted at this stage.

CHAPTER VI

SERVICE OF PROCESS

Article 29. Service of Process Types. Service of process may take place under any of the following means: through personal notification, by publication, by the parties' tacit behavior, service during a hearing, and service by e-mail or any other data message.

Service through personal notification and service by publication shall be made as provided by [include name or number of procedural act or rules that regulate service of process]. In any event, service by publication will always be included in the authority's website.

Service by e- mail shall be made by sending the respective order or decision through an e-mail address that is certified by the authority as the official address for the purposes of service of process.

Article 30. Service Concerning Resolution that Admits the Complaint. The resolution whereby the petition for the initiation of a proceeding is admitted shall be served simultaneously to all the involved parties through any of the service of process mechanisms described in the preceding Article.

Article 31. Service of Other Resolutions or Decisions. Orders or decisions different from the resolution whereby the petition for the initiation of the proceeding is admitted shall be served by publication or by e-mail. However any decisions or order rendered during a hearing, including the final decision, shall be understood to have been served in the same hearing.

Article 32. Service through the Parties' Tacit Behavior. In any event in which a party behaves in a manner that could allow the authority to infer that such party has knowledge of the decision that was to be served, such party will be considered to have been tacitly served.

Article 33. Waiver of Defects Regarding Service of Process. In any case in which a defect in the service of process has been detected, the affected party will be entitled to send a written statement to the authority waiving any such defect that may have occurred.

CHAPTER VII

MISCELLANEOUS PROVISIONS

Article 34. Abuse of Rights. Whenever the authority finds that the parties have behaved in an abusive manner during the process, will be entitled to impose fines to the party responsible for such abuse of rights.

Article 35. Alternative Procedural Provisions. The parties to any case governed under this law may propose to the authority procedural alternatives regarding the manner in which the process will take place, even if such proposals modify the order that has been provided in Chapter II of this Act.

If the authority considers that such proposals are relevant, that they will have a positive impact in expending the process, it will approve the suggested changes and proceed to undertake any required modifications in order for the process to continue as proposed by the parties.

Article 36. Stay of Proceedings. Any act performed by the parties with the objective of staying or delaying the process shall be considered as a serious indication of noncompliance and will be used against such party. If the authority becomes aware of such acts, it will adopt the necessary measures to counteract them in order for the proceeding to continue in the most expedited fashion.

Article 37. Recording of Hearings. All hearings must be recorded by any accepted technological which are considered appropriate according to the circumstances.

Minutes for each hearing must be drafted in which at least the following aspects must be included: time and date, type of hearing, the name of the persons who participated in the hearing, any adjournments that could have taken place, a description of proceedings, decisions, recourses and appeals that might have been presented by the parties.

Article 38. Decisions Made by the Authority. Decisions made by the authority shall be included in resolutions or orders that may have a substantive or procedural nature. The decision by which the case is resolved is referred to as the final decision or judgment.

Article 39. Prohibitions. Preliminary exceptions and amendments to the pleadings, defenses, or petitions shall not be permitted in this proceeding.

Article 40. Statute of Limitations. The statute of limitations applicable to any action regarding the special proceeding for the simplified stock corporations will elapse in a term of five years.

The time prescribed herein shall be counted in accordance with the following rules:

1. If the cause of action, claim or issue is related to the piercing of the corporate veil, abuse of rights, or liability of SAS officers, directors and shadow directors, the term prescribed herein shall initiate from the moment in which the abusive or fraudulent act occurred.
2. If the cause of action, claim or issue involves the challenging of a decision of the shareholders' assembly or board of directors, the term prescribed herein shall initiate from the moment in which such decision was rendered.
3. If the cause of action, claim or issue involves the performance of obligations contained in a shareholders' agreement, the term prescribed shall initiate from the moment in which such obligation was to be performed.

Article 41. Application of additional Rules. Any issue that is not specifically regulated in this law will be governed under the [include name or number of act or rules of civil procedure].

* * *

6. Guide on regulation of the use of force and protection for persons in situations of internal violence that do not qualify as an armed conflict

Document

CJI/doc.401/12 rev.4	Report of the Inter-American Juridical Committee. Guide for Regulating the Use of Force and Protection of People in Situations of Internal Violence that do Not Qualify as Armed Conflict

During the 79th regular session of the Inter-American Juridical Committee (Rio de Janeiro, Brazil, August 2011), Dr. Novak reported on a request presented by the ICRC representative in his country at a meeting in Lima with Dr. Negro. It would involve preparation of a study on situations of violence or conflict in the context of public protests against a specific regime or political situation. To follow up on this request, and should the Committee agree, Dr. Novak proposed that Dr. Gómez Mont Urueta serve as rapporteur for this topic. On this point, Dr. Elizabeth Villalta explained that she had participated in a meeting in Toluca, Mexico that referred to this phenomenon and to the role played by private police. As regards the situation of private police, Dr. Gómez noted the importance of giving operators and institutions relevant instruments so that they are aware of the systems and rules that apply and can confront criminal organizations. He regarded it as a highly positive exercise to illustrate the legal framework that should be in place. Dr. Baena Soares asked the members to define precisely the work to be done and the desired objective. The exercise should make it possible to strengthen the democratic state in the face of threats in its major cities and in rural areas. Dr. Mauricio Herdocia agreed on the importance of this topic and the need to reflect on closer cooperation that would take into account existing needs. There are certain acts by organized groups that cannot be considered as common crimes, since they use indiscriminate, systematic methods and cross-border resources, to which the state continues to respond in a traditional way. This underlines the importance of work the Committee could do on security. Dr. Novak agreed with the members regarding the decisive role the Committee should play in developing this topic. From a methodological standpoint, he proposed preparation of a guide on regulation of the use of force and protection for persons in situations that do not qualify as armed conflict. Dr. Stewart requested more details on the proposal presented. The Chairman Fernández de Soto shared concern over identification of the mandate and development of the topic. He suggested that they exercise caution to prevent the use of these materials by entities with criminal interests or to ensure that they do not have the effect of limiting the state's power to preserve public order and punish criminal conduct. He also pointed to challenges that arose in his country regarding the distinction between laws that are international in scope and their enforcement internally. The situation in Central America is very similar to the one in his country 20 years ago. There are current sociological and cultural problems that call for caution. Dr. Gómez shared these concerns regarding the need to approach this issue with caution, and the importance of giving the system clear rules for institutional operators, that would make it possible to combat and mitigate irregularities. He emphasized the need for security and certainty for countries suffering from the abuses of criminal organizations. Dr. Novak explained that it was not a matter of regulating internal armed conflicts, but rather of regulating situations that doctrine qualified as "internal tensions and hostilities," ambiguous situations that are not qualified as non-international armed conflicts. He further clarified that despite the fact that this was an initiative of the ICRC, the CJI had considerable freedom to establish the criteria or standards that should be used and that its final opinion should be consensual. Finally, the intention is not to focus solely on crime, but rather to include mass demonstrations where law enforcement does not know how to react

due to the absence of rules. In this context, the proposal would be to identify the space in which the police or security forces could act. Dr. Stewart agreed with the proposal to work on a document that respects the right of democratic governments to defend themselves and the limits of the use of force, a major challenge.

On concluding the discussion, the Chairman requested Drs. Novak and Gómez Mont Urueta to present a written proposal on the topic.

During the 80th regular session of the Inter-American Juridical Committee (Mexico City, March 2012), the rapporteur on the subject, Dr. Fernando Gómez Mont, described the mandate and presented the document "Guide for Regulating the Use of Force and Protection of People in Situations of Internal Violence that do Not Qualify as Armed Conflict," document CJI/doc.401/12 of February 23, 2012.

In his commentary, the rapporteur noted that in past decades, the Americas experienced situations that warrant more in-depth consideration of the topic. He underlined the importance of clearly defining situations of internal violence so as to distinguish them from those that qualify as an armed conflict. Whereas the former are governed by international human rights law, the latter are governed by international humanitarian law. The rapporteur proposed that the definition of non-international armed conflict must require that the armed groups involved have political objectives. He emphasized that that criterion was especially useful for showing that the situations of violence generated by organized crime do not qualify as armed conflict, because criminal organizations form for the sole purpose of conducting illegal activities. He stressed that if one went so far as to claim that international humanitarian law applied to organized crime, the absurd conclusion could be recognition of the right of criminal organizations to make "legitimate" use of, even lethal, force against State security forces by equating them with legitimate military targets.

Dr. David Stewart said he was pleased with the quality of the work. He asked the rapporteur whether the humanitarian criteria of proportionality and necessity, which are both taken from international humanitarian law, had already been incorporated into the regulations of international human rights law on the use of force by law enforcement officers in situations of internal violence, given that he had seen them mentioned in the study.

The Chair, Dr. Novak, asked whether it was appropriate to include five prerequisites for the use of force, instead of the three mentioned by the ICRC and legal doctrine. He had noted, moreover, a discrepancy between the definition of "non-international armed conflict" proposed by the rapporteur and that proposed by international jurisprudence, particularly that of the International Criminal Court in the case of the former Yugoslavia and that of the ICRC. Third, with respect to the list of rights that are particularly violated in situations of internal violence, he asked the rapporteur to include forced disappearance of persons and judicial guarantees. As regards Conclusion No. 6, he asked about the binding nature of the above-mentioned international instruments and international rules governing the use of force in situations of internal violence. In reference to Conclusion No. 9, he asked about the State's participation in the investigation of cases involving victims of the use of force, and emphasized that in such cases the investigation should be conducted, regardless of whether or not the victim had filed a claim. As for Conclusion No. 20, Dr. Novak warned of the difficulty with restricting exceptions to constitutional matters only, because such restrictions could be based on international instruments or on laws. Finally, in light of the case law on these topics, he asked the rapporteur to include the armed forces in the list of persons/entities to be consulted when drawing up regulations.

Dr. Elizabeth Villalta mentioned that situations of internal violence were governed not only by international human rights law and by domestic law, but also by humanitarian principles. For his part,

the Chair, Dr. Novak, expressed the same concern as Dr. Elizabeth Villalta, acknowledging that while international humanitarian law is not applicable to these situations, some humanitarian principles should nevertheless be applied, particularly since the international human rights law framework has its shortcomings. He stressed that, although international human rights law is always applicable, it was crafted mainly for times of peace and that situations of internal violence are in a limbo somewhere between peace and armed conflict.

The rapporteur on the subject, Dr. Fernando Gómez Mont, underscored the view that human rights are applicable not just in times of peace, but at all times. For its part, international humanitarian law applies to armed conflicts in which the parties in conflict are driven by the political incentive of taking power. He mentioned that that study addresses the reasons for suspending human rights, which is allowed under international human rights law, which proves that human rights law is not just applicable in times of peace. In this context, he suggested taking as a basis different "war and peace" hypotheses. On the subject of private security, touched on by Dr. Elizabeth Villalta, the rapporteur pointed out that the democratic State needs to develop its institutions. On the question of "phasing in" (*gradualidad),* the rapporteur noted that it was necessary for the states' Constitutions to define the frameworks within which rights could be curtailed. He also recalled that the study calls for independent inquiry mechanisms for investigating the misuse of force. In that connection, the rapporteur asked the Plenary for its views on the topics referred to and asked to be given examples of the humanitarian principles that are regarded as excluded from international human rights law in the proposal by the Chair, Dr. Novak.

The Chair, Dr. Novak agreed that it would be inappropriate to apply international humanitarian law, but he also acknowledged that certain humanitarian principles are indeed applicable in situations of violence, such as those addressing access by humanitarian organizations. This is not found in international human rights law, but rather in the Statutes of the ICRC and in the resolutions of the latest International Conferences of the Red Cross and Red Crescent. As regards incentives, he noted that in some areas such concepts were not used, especially when there are irrational claims.

Dr. Freddy Castillo Castellanos congratulated the rapporteur on his report and asked for more time to evaluate the document. He agreed with the rapporteur that it was appropriate for restrictions on rights to be set forth in Constitutions. He added that, although they could also be reflected in laws or regulations, they should never be excluded from constitutional regulation.

Dr. Elizabeth Villalta reminded the Committee that, in the judgment of the Inter-American Court of Human Rights in the Case of the Serrano Cruz Sisters vs. El Salvador, said Court established that international human rights law applied in both times of peace and times of conflict, whereas international humanitarian law envisages certain obligations of a preventive nature that also apply in times of peaces.

The Chair asked the rapporteur to take the morning's proposals into account in a final document to be ready by August.

The rapporteur suggested a revised version of the document, which he would ask the Plenary to comment on in writing. With respect to the nature of the instruments addressing the use of force, especially the Code of Conduct and Basic Principles, he explained that they constituted "soft law," on the way to taking shape in the form of international custom, so that he would change the word "*cumplimiento*" (compliance) in the text.

Dr. Carlos Alberto Mata Prates thought it was necessary not to distinguish between international and domestic law, because the role of courts was to resolve in light of the law, as a

single body. Given the challenges States were up against in such matters, he suggested it would be better not to be so categorical.

Dr. Luis Moreno Guerra thanked the rapporteur for the document that he considered to be clear and didactical. He explained that international human rights law was applied tirelessly in times of peace, semi-peace, and war. When a war is being waged, a second set of rules applies, which the State is obliged to abide by, and that is international humanitarian law. He reminded the Committee that this matter is different from the matter of the activities of the International Committee of the Red Cross in the various different countries. He emphasized that the ICRC's activities, such as its verification of how prisoners or detainees are being treated or the assistance it provides in response to a natural disaster, do not mean that the ICRC is applying international humanitarian law. He pointed out that those are low-profile humanitarian acts, performed discreetly by the ICRC. He mentioned that in situations of sustained violence, which in Latin America had much more to do with the narcotic drugs trade than with armed conflict, the State was obliged to provide an immediate and adequate response. That was of the essence, the substance of the matter.

Dr. Jean-Paul Hubert asked the rapporteur to produce a document that could be adopted, preferably with the support of all the Committee members.

During the 81st regular session of the Inter-American Juridical Committee (Rio de Janeiro, Brazil, August 2012), the rapporteur on the subject, Dr. Fernando Gómez Mont Urueta, presented a new version of his report, document CJI/doc.401/12 rev. 1. He recalled that the Guide alludes to cases in which the legitimacy of the State is not in question but its actions are jeopardizing the safety of public persons. In addition, he said, the underlying premise was that the aforementioned situations of internal violence that do not qualify as armed conflict (CANI) should be covered by the inter-American system for the protection and promotion of human rights, and not by international humanitarian law.

Dr. Fabián Novak underscored the quality of the work submitted by the rapporteur and thanked him for having incorporated the observations made. He identified one reference alluding to the opinion of the rapporteur and asked whether there would be any objection to restating it as the opinion of the Committee. Here, the rapporteur stressed that his intention had been to facilitate consensus among the Committee members and that, in his understanding, for a case to be qualified as a CANI, the organizations involved would have to be pursuing political objectives. Regarding the purpose of rescue operations in which nobody was supposed to be killed, Dr. Novak inquired about a situation in which terrorists might have to be killed in order to protect the victims. In response, the rapporteur acknowledged that the nature of each situation had to be ascertained and that lethal action was permissible in hostage situations. However, the primary objective could not be to kill someone. Dr. Novak noted that it did not seem necessary to include a reference to *ex oficio* investigations by the State, because they always had to be conducted. To that the rapporteur replied that he considered it essential to document the use of force in democratic states, however obvious it might be, in order to prevent such actions being taken in an undisciplined manner and in order to have benchmarks for future reference. Finally, Dr. Novak asked about the legal basis for ICRC participation. The rapporteur explained that intervention by humanitarian agencies was not restricted only to humanitarian conflicts [Tr. sic]; there was also collaboration in other matters, such as assistance in response to natural disasters, so that there was no contradiction. In view of that explanation, Dr. Novak asked that an express reference be made to ICRC participation in humanitarian intervention cases. For his part, the rapporteur undertook to also include a reference to the necessary consent of the State to permit the presence of the humanitarian organization and another reference to the role of humanitarian organizations as providers of assistance.

In response to Dr. Elizabeth Villalta's query regarding the lack of reference to international humanitarian law, the rapporteur explained that the States have remedies for responding to cases of internal violence within a human rights rationale, without having to extrapolate other principles. Furthermore, in the final version of the rapporteur's report, two references were included that allow for assistance from humanitarian organizations to mitigate human suffering in situations of internal violence.

Dr. David Stewart shared Dr. Fabián Novak's views on the purpose of operations and the rapporteur's opinion regarding ICRC participation, provided that the States assented to it. With regard to the use of lethal forces, Dr. Stewart said he understood the division between the powers of the State and of non-state entities, but he did not approve of the mandatory nature of the proposal, because in his country that could contravene the right to bear arms. On that point, the rapporteur suggested avoiding having the discussion revolve around the bearing of arms. Rather it should be about each person's legitimate right to self-defense when the State cannot guarantee protection.

Dr. Stewart also requested that a reference be included to the situation of persons acting "in the name of the State" and that a more detailed explanation be given of the purpose of the State's acting, a suggestion the rapporteur agreed with. Finally, Dr. Stewart asked that there be an indication of the particular circumstances relating to the establishment of a legal framework and that the core message to States should be the need to exercise effective oversight.

Dr. José Luis Moreno stated that international humanitarian law cannot function if a conflict does not exceed the internal sphere. That, however, did not preclude the participation of humanitarian organizations, for instance in the form of visits to prisons or assistance in disaster situations.

Dr. Carlos Mata Prates asked the rapporteur how the objective of a group seeking to create tensions in a country would be assessed. He also asked that the document establish the principle or rule that the use of force is a prerogative of the State, and that use of it by non-state entities was to be considered an exception. He suggested using the judicial remedies criterion with respect to the limits the State should set on the use of force vis-à-vis the right of association. Finally, he recommended putting the "effective judicial remedies" point as the first point, rather than the last. In response to that suggestion, the rapporteur said that the numbering of the conclusions was not meant to indicate any ranking of their importance.

Dr. Jean-Paul Hubert asked everyone to avoid expounding on issues relating to the bearing of arms, because that was a complex field. He also asked for explanations regarding the "political purpose" of a situation, in light of student demonstrations infiltrated by armed groups. On this, the rapporteur noted that the reference to political motives was needed to differentiate that case from others in which criminal organizations acted solely for their own enrichment.

On Wednesday, August 7, the rapporteur on the subject, Dr. Gómez Mont Urueta, presented a new version of his report, incorporating the previous day's proposals (document CJI/doc.401/12 rev.2). He pointed to each of the changes made, which included, especially, the following additions: an exception to the State's protection function, allowing for self-defense; a reference to persons acting on instructions from the State; and a call to States to permit interventions by humanitarian organizations, "taking into consideration that their record shows them to have provided an effective remedy, mitigating the suffering that these occurrences cause in our communities." The document underwent a few changes proposed by Dr. Novak and Dr. Mata Prates in an effort to improve the final wording.

Following the aforementioned analysis, the Plenary approved the "Report of the Inter-American Juridical Committee. Guide for regulating the use of force and protection of people in situations of internal violence that do not qualify as armed conflict" CJI/doc.401/12 rev.4.

CJI/doc.401/12 rev.4

REPORT OF INTER-AMERICAN JURIDICAL COMMITTEE.

GUIDE FOR REGULATING THE USE OF FORCE AND PROTECTION OF PEOPLE IN SITUATIONS OF INTERNAL VIOLENCE THAT DO NOT QUALIFY AS ARMED CONFLICT

I. MANDATE OF THE INTER-AMERICAN JURIDICAL COMMITTEE

In resolution CJI/RES. 182 (LXXIX-O/11), adopted unanimously on August 5, 2011, the Inter-American Juridical Committee decided to include the following topic on the agenda for its eightieth regular session, to be held in Mexico City, starting on March 5, 2012: "Guide for regulating the use of force and protection of people in situations of internal violence that do not qualify as armed conflict." Accordingly, it designated Dr. Fernando Gómez Mont Urueta as Rapporteur for this topic.

During its eightieth regular session, the Committee examined and exchanged ideas concerning the draft Guide presented by the Rapporteur, and received the observations made by representatives of the International Committee of the Red Cross (hereinafter the "ICRC") on the subject. The Committee again decided to include this topic on the agenda for its eighty-first regular session, to be held in Rio de Janeiro starting on August 6, 2012. It also asked the Rapporteur to introduce a new draft Guide that would include the relevant changes based on the comments received. The Committee plans to take up the new draft at that eighty-first regular session.

The challenges that internal violence poses for the protection of human rights is not a new topic in our Hemisphere. Various instruments, case law and articles have been developed and written in recent decades that, either directly or indirectly, deal with the scope of and limits to a State's use of force in such situations and the need to protect persons affected by internal violence.

Within the United Nations system, the *Universal Declaration of Human Rights* (1948), the *International Covenant on Civil and Political Rights* (1969), the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (1966), the *International Convention for the Protection of All Persons from Enforced Disappearances* (2006) and other instruments recognize the rights to life, to humane treatment, to personal security and to peaceful assembly. They prohibit arbitrary detentions and recognize the right that persons deprived of their liberty have to receive humane treatment. They also prohibit arbitrary interference in a person's private life or domicile. These instruments also provide that the right to life and the right not to be subjected to torture or cruel, inhuman or degrading treatment or punishment, among other rights, are not subject to suspension under any circumstance. They also enumerate the restrictions allowed to the right to peaceful assembly.

The human rights recognized in the above instruments are the bases for a number of United Nations "soft law" instruments that address the specific problems associated with the use of force and rights of detained persons. The following "soft law" instruments are particularly germane to the scope of and limitations to the use of force and their relationship to the observance of human rights: the *Code of Conduct for Law Enforcement Officials* [1/] (1979) (hereinafter the "Code of Conduct") and the *Basic Principles on the Use of Force and Firearms by Law Enforcement*

1. Adopted through United Nations General Assembly resolution 34/169 of December 17, 1979.

Officials (1990)[2] (hereinafter the "Basic Principles"). The following should be cited in connection with the rights of persons deprived of liberty: the *Standard Minimum Rules for the Treatment of Prisoners* (1965)[3] and the *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment* (1988).[4]

In the academic realm, the protection of persons affected by violent situations has been addressed in a declaration of experts on the subject, titled the *Declaration of Minimum Humanitarian Standards* (1990)[5] (hereinafter the "Turku Declaration"), which affirms the minimum, nonderogable rights of persons in all situations, including internal violence, disturbances, tensions, and public emergency.

The European Court of Human Rights has developed case law pertaining to the use of force. Of particular interest are its judgments in *McCann and Others v. United Kingdom* (1995)[6] *and Makaratzis v. Greece* (2004).[7] The principles established in that case law have been echoed in a number of subsequent cases.[8]

Within the Organization of American States, the *American Declaration of the Rights and Duties of Man* (1948) (hereinafter the "American Declaration"), the *American Convention on Human Rights* (1979) (hereinafter the "American Convention"), the *Inter-American Convention to Prevent and Punish Torture* (1985), and the *Inter-American Convention on Forced Disappearance of Persons* (1994) recognize, *inter alia*, the right to life, the right to personal liberty, the right to personal security and integrity, the right of peaceful assembly, and the inviolability of the home. They prohibit arbitrary deprivation of life and recognize the right of persons deprived of liberty to be treated with the respect for the inherent dignity of the human person. They also provide that the rights to life and to personal integrity, among others, and the judicial guarantees essential for the protection of those rights may not be suspended under any circumstances.

In a number of its reports, the Inter-American Commission on Human Rights (hereinafter the "IACHR") has examined the issue of the use of force and the protection of persons in situations of violence. Salient among these are following: the Commission's reports in the case of

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2. Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in Havana, Cuba, August 27 to September 7, 1990.

3. Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in Geneva in 1965, and approved by the Economic and Social Council in its resolutions 663 C (XXIV) of July 31, 1967, and 2076 (LXII) of May 13, 1977.

4. Adopted through United Nations General Assembly resolution 43/173 of December 9, 1988.

5. Adopted by an expert meeting convened by the Institute for Human Rights, Åbo Akademi University, in Turku/ Åbo (Finland), November 30 to December 2, 1990, and subsequently revised at a meeting of the Norwegian Institute of Human Rights held in Oslo (Norway) on September 29-30, 1994.

6. ECHR, *McCann and Others v. the United Kingdom*, judgment of 27 September 1995, Series A no. 324.

7. _____, *Makaratzis v. Greece*, no. 50385/99, 20 December 2004.

8. See in this regard: ECHR, *McKerr v. United Kingdom*, no. 28883/95, 4 May 2001; ECHR, *Kelly and others v. United Kingdom*, no. 30054/96, 4 May 2011; ECHR, *Kakoulli v. Turkey*, no. 38595/97, 22 November 2005; *Isayeva and others v. Russia*, nos. 57947/00, 57948/00 and 57949/00, 24 February 2005; ECHR, *Erdogan and others v. Turkey*, no. 19807/92, 25 April 2006.

Abella et al. v. Argentina (1997),[9/] the case of *Finca la Exacta v. Guatemala* (2002),[10/] and the report on *Citizen Security and Human Rights* (2009).[11/]

The Inter-American Court of Human Rights (hereinafter the "Court") has also had occasion to develop case law pertaining to the use of force in situations of internal violence and the protection of the individual in these situations. The Court's judgments in the cases of *Neira Alegría et al. v. Peru* (1995),[12/] *Durand and Ugarte v. Peru* (2000),[13/] *Montero Aranguren et al. (Detention Center of Catia) v. Venezuela* (2006)[14/] and *Zambrano Vélez et al. v. Ecuador* (2007)[15/] are some of the most representative judgments on this subject.

In 2005 and again in 2008, the ICRC hosted a meeting in Lima, Peru titled *Sub-Regional Meeting of Government Experts on Regulating the Use of Force and Protection of Persons during Internal Disturbances and other Situations of Internal Violence*, where the emphasis was on the need to strengthen the States' mechanisms for regulating this matter.

The Inter-American Juridical Committee's decision to revisit this issue takes on particular relevance given the situations of violence in our Hemisphere today. This is the first report that the Committee will examine on the subject.

II. SITUATIONS OF INTERNAL VIOLENCE THAT DO NOT QUALIFY AS ARMED CONFLICT

Situations of violence within a State can be classified according to the level of violence, ranging anywhere from a non-international armed conflict to an internal disturbance or internal tension.

Non-international armed conflicts are regulated by international humanitarian law, particularly Common Article 3 of the Geneva Conventions of August 12, 1949, in which the scope of the definition of a non-international armed conflict is broad, and Protocol Additional II to those Conventions (June 8, 1977) relating to the protection of victims of non-international armed conflicts and in which the scope of the definition of an non-international armed conflict is narrower.

Using the broader definition given in Common Article 3, the case law of the International Criminal Tribunal for the former Yugoslavia holds that *"an armed conflict exists whenever there is [...] protracted armed violence between governmental authorities and organized armed groups or between such groups within a State."*[16/]

In this connection, the IACHR has written that non-international armed conflicts:

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9. Inter-American Commission on Human Rights, *Abella et al. v. Argentina*, Case 11.137, Report 55/97, OEA/Ser/L/V/II.97, 18 November 1997.
10. _____. *Report 57/02 Case 11.382*. Merits. *Finca "La exacta" Guatemala*, October 21, 2002.
11. _____. *Report on Citizen Security and Human Rights*, OEA/Ser.L/V/II.Doc.57, December 31, 2009.
12. Inter-American Court of Human Rights, *Case of Neira Alegría et al. v. Peru*. Merits. Judgment of January 19, 1995.
13. ——. *Case of Durand and Ugarte v. Peru. Merits*. Judgment of August 16, 2000. Series C No. 68.
14. _____. *Case of Montero Aranguren et al. (Detention Center of Catia) v. Venezuela*. Judgment of July 5, 2006.
15. _____. *Case of Zambrano Vélez et al. v. Ecuador*. Merits, Reparations and Costs. Judgment of July 4, 2007.
16. International Criminal Tribunal for the former Yugoslavia, *Prosecutor v. Dusko Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, October 2, 1995, IT-94-1-A, paragraph 70.

> *[…] typically involve armed strife between governmental armed forces and organized armed insurgents. It also governs situations where two or more armed factions confront one another without the intervention of governmental forces where, for example, the established government has dissolved or is too weak to intervene.*[17/]

In its case law, the International Criminal Tribunal for the Former Yugoslavia has added that:

> *The determination of the existence of an armed conflict is based solely on two criteria: the intensity of the conflict and organization of the parties, the purpose of the armed forces to engage in acts of violence or also achieve some further objective is, therefore, irrelevant.*[18/]

Still, there is no consensus in the literature as to what role the motives of armed groups play in classifying a situation as an armed conflict. Some legal scholars agree with the International Criminal Court that the motives or purpose of armed groups are irrelevant, while others maintain that in order for a situation to be classified as a non-international armed conflict, the armed group must be pursuing political objectives.

The Peace Research Institute Oslo (PRIO) and the Uppsala Conflict Data Program (UCDP), whose criteria were recently adopted by UNESCO, are of the view that a non-international armed conflict "*has to entail 'contested incompatibility' over government and/or territory where the use of armed force is involved, and where one of the parties to the conflict is the state*." [19/] Other authors like Bruderlein,[20/] Gasser[21/] and Wallensteen also share this view. As they see it, this is a useful criterion by which to distinguish a non-international armed conflict, which involves organized violence that is political in origin, from the different situation involving widespread violence associated with criminal activities on a massive scale. This Rapporteur shares Wallensteen's view that:

> [*S]ometimes actors are not fighting there for political power, but for criminal gain of various sorts. We would not call this an armed conflict, as the actors do not want to*

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17. Inter-American Court of Human Rights. *Abella et al. v. Argentina*, Case 11.137, Report 55/97, OEA/Ser/L/V/II.97, November 18, 1997, paragraph 152.

18. International Criminal Court for the Former Yugoslavia, *Prosecutor v. Limaj et al.*, Case No. IT-03-66-T, Judgment of Trial Chamber II of November 30, 2005, paragraph 170.

19. UNESCO, Education for All Global Monitoring Report 2011, "*The Hidden Crisis: Armed Conflict and Education"*, p.138, available at:

http://unesdoc.unesco.org/images/0019/001907/190743e.pdf . The Uppsala Conflict Data Program of *Uppsala Universitet* in Sweden, whose data sets used established criteria for identifying conflicted-areas, is available at http://www.pcr.uu.se/research/ucdp/database/. The research done by the Peace Research Institute Oslo (PRIO) is available at: http://www.prio.no/Research-and-Publications/Programmes/Conflict-Resolution-and-Peacebuilding/ .

20. BRUDERLEIN, V.C., "*The Role of Non-State Actors in Building Human Security: The Case of Armed Groups in Intra- State Wars"*, Centre for Humanitarian Dialogue, Geneva, May 2000, cited in Vité, Sylvain, "*Typology of armed conflicts in international humanitarian law: legal concepts and actual situations,"* in *International Review of the Red Cross*, vol. 91, No. 873, March 2009, footnote 34.

21. GASSER, H.P. *International Humanitarian Law: an Introduction*, in: *Humanity for All: the International Red Cross and Red Crescent Movement*, H. Haug (ed.), Paul Haupt Publishers, Berne, 1993, p. 555, cited in ICRC Opinion Paper (March 2008) titled "How is the term "Armed Conflict" defined in international humanitarian law?", footnote 18.

exert political power. We would separate political conflict from criminal activities – we don't want to have pure criminal activity in the category of armed conflict.[22]

As for the other situations of internal violence, i.e., those do not qualify as a non-international armed conflict, the ICRC observes that the:

Concept of internal disturbances and tensions may be illustrated by giving a list of examples of such situations without any attempt to be exhaustive: riots, such as demonstrations without a concerted plan from the outset; isolated and sporadic acts of violence, as opposed to military operations carried out by armed forces or armed groups; other acts of a similar nature, including, in particular, large scale arrests of people for their activities or opinions.[23]

These examples are cited by the IACHR.[24] Situations of internal disturbances and situations involving internal tensions are both governed by international human rights law and the provisions of domestic law.

The principal feature that distinguishes serious tensions from internal disturbances is the level of violence involved.

The ICRC has described internal disturbances as follows:

This involves situations in which there is no non-international armed conflict as such, but there exists a confrontation within the country, which is characterized by a certain seriousness or duration and which involves acts of violence. These latter can assume various forms, all the way from the spontaneous generation of acts of revolt to the struggle between more or less organized groups and the authorities in power. In these situations, which do not necessarily degenerate into open struggle, the authorities in power call upon extensive police forces, or even armed forces, to restore internal order. The high number of victims has made necessary the application of a minimum of humanitarian rules.[25]

The ICRC describes internal tensions as follows:

Situations of serious tension (political, religious, racial, social, economic, etc.), but also the sequels of armed conflict or of internal disturbances. Such situations have one or more of the following characteristics, if not all at the same time: large scale arrests; a large number of "political" prisoners; the probable existence of ill-treatment or inhumane conditions of detention; the suspension of fundamental judicial guarantees, either as part of the promulgation of a state of emergency or simply as a matter of fact; allegations of disappearances.[26]

Summarizing, and as the ICRC wrote, "*[i]n short, as stated above, there are internal disturbances, without being an armed conflict, when the State uses armed force*

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22. WALLENSTEEN, Peter, cited in "Interview with Peter Wallensteen", *International Review of the Red Cross*, No. 873, March 2009, p. 10.

23. International Committee of the Red Cross. *Commentary on the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, 8 June 1977, paragraph. 4474.

24. IACHR, *Abella et al. v. Argentina*, Case 11.137, Report 55/97, OEA/Ser/L/V/II.97 (Nov. 18, 1997), paragraph 149.

25. ICRC, Commentary on the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, paragraph 4475.

26. ——. Commentary on the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, paragraph 4476.

to maintain order; there are internal tensions, without being internal disturbances, when force is used as a preventive measure to maintain respect for law and order."[27/]

It is particularly important that a situation of internal violence be properly classified because this determines what the source of the applicable law will be. As was mentioned, non-international armed conflicts are governed by international humanitarian law, which is the *lex specialis* that applies to armed conflicts; in cases of non-international armed conflicts, international human rights law applies as a complementary body of law. In the other situations of internal violence –namely, internal disturbances or tensions– the applicable law is international human rights law and the provisions of domestic law.[28/]

One of the most tangible practical consequences of this distinction is the question of whether certain rights can be suspended. While the international humanitarian law that applies to non-international armed conflicts does not allow suspension or derogation of any of its provisions, international human rights law that applies in other situations of international violence–whether they be internal disturbances or tensions–allows some human rights to be suspended under certain circumstances, the kinds of circumstances that often attend a situation of internal violence.

Here, Article 27 of the American Convention authorizes a States Party to take measures derogating from its obligations under the Convention *"[i]n time of war, public danger, or other emergency that threatens the independence or security of a State Party."*

The European Court of Human Rights has written that a public emergency threatening the life of the nation refers "to an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organized life of the community of which the State is composed."[29/]

The measures that the States adopt in the circumstances described above must meet certain requirements. Under Article 27 of the American Convention, these measures:

i. Must be adopted to the extent and for the period of time strictly required by the exigencies of the situation;

ii. Shall not be inconsistent with the State's other obligations under international law;

iii. Shall not involve discrimination on the ground of race, color, sex, language, religion, or social origin; and

iv. A State Party availing itself of the right of suspension shall immediately inform the other States Parties of the provisions the application of which it has suspended, the reasons that gave rise to the suspension, and the date set for the termination of such suspension.

In any event, any suspension of guarantees must not exceed the limits of what is strictly necessary to deal with the situation; as the Inter-American Court has held, "*any action on the part*

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27. _____. Commentary on the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, paragraph 4477.

28. See IACHR, *Abella et al. v. Argentina*, Case 11.137, Report 55/97, OEA/Ser/L/V/II.97 (Nov. 18, 1997), paragraphs. 148 and 151, in which the Inter-American Commission on Human Rights observed that "*[t]he legal rules governing an internal armed conflict vary significantly from those governing situations of internal disturbances or tensions"; hence, "a proper characterization of the events (...). is necessary to determine the sources of applicable law. [...]* (paragraph 148), and that "*[s]ituations of internal disturbances and tensions are expressly excluded from the scope of international humanitarian law as not being armed conflicts. Instead, they are governed by domestic law and relevant rules of international human rights law."* (paragraph 151).

29. European Court of Human Rights, *Lawless v. Ireland (no. 3)*, judgment of 1 July 1961, Series A no. 3, p. 14, paragraph 28.

of the public authorities that goes beyond those limits, which must be specified with precision in the decree promulgating the state of emergency, would also be unlawful notwithstanding the existence of the emergency situation."[30/]

While suspension of certain human rights is authorized in the circumstances described above, international law also recognizes that there are certain core rights that, given their importance, are nonderogable and cannot be suspended under any circumstances. Article 27 of the American Convention lists these core, nonderogable rights as follows: the right to juridical personality, the right to life, the right to humane treatment, freedom from slavery, freedom from *ex post facto* laws, freedom of conscience and religion, rights of the family, rights of the child, the right to participate in government, the right to a name and the right to nationality, and the judicial guarantees essential for the protection of those rights. The Court has held that these guarantees include "*writs of habeas corpus and of "amparo*," which also serve to "*preserve legality in a democratic society."*[31/]

III. THE USE OF FORCE IN SITUATIONS OF INTERNAL VIOLENCE

Under the Inter-American Democratic Charter (2001), democracy is indispensable for the effective exercise of fundamental freedoms and human rights. The main purpose served by regulating the use of force is to protect the nonderogable right to life. In a representative democracy, the State has sole claim on the legitimate use of force; it is the State, acting through its institutions, that uses this monopoly on the legitimate use of force to maintain order, the rule of law, liberty and the public peace necessary for social coexistence.[32/] Max Weber also uses this concept, as he defines the State as "*the form of human community that (successfully) lays claim to the monopoly of legitimate physical violence within a particular territory."*[33/]

The State has the right and the obligation to provide protection when the lives, personal integrity and security of persons living within its territory are threatened by situations of violence. In concrete situations, this may include the use of lethal means, as both the IACHR[34/] and the Court[35/] have recognized. As the Court wrote, "*the right of the State to use force, even if this implies depriving people of their lives, to maintain law and order […] is not under discussion."*[36/]

The use of physical force has been defined as "*the function with which certain members of the group appear to be endowed, to act on the community's behalf to prevent and repress violation*

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30. Inter-American Court of Human Rights, *Habeas Corpus in Emergency Situations*, Advisory Opinion OC-8/87 of January 30, 1987. Series A No. 8, paragraph 38.
31. _____. *Habeas Corpus in Emergency Situations*, Advisory Opinion OC-8/87 of January 30, 1987. Series A No. 8, paragraph 42.
32. Supreme Court of Justice of the Nation, Mexico, *Dictamen que valora la Investigación constitucional realizada por la Comisión designada en el Expediente 3/2006*, public version, pp. 447 and 448.
33. WEBER, Max. "Politics as Vocation," in *The Vocation Lectures*, edited by David Owen and Tracy B. Strong, translated by Rodney Livingstone. Indianapolis, IN: Hackett Publishing Company, 2004.
34. Inter-American Commission on Human Rights, *Report on citizen security and human rights*, OEA/Ser.L/V/II, doc. 57, December 31, 2009, paragraph 113; *Report on terrorism and human rights*, OEA/Ser.L/V/II.116, doc. 5, October 22, 2002, paragraph 87.
35. Inter-American Court of Human Rights, *Case of Neira Alegría et al. v. Peru*. Judgment of January 19, 1995 (merits), paragraphs 74 and 75; *Case of Velásquez Rodríguez*, Judgment of July 29, 1988. Series C No. 4, paragraph 154; *Case of Godínez Cruz*, Judgment of January 20, 2989, Series C No. 5, paragraph 162.
36. _____. *Case of Neira Alegría et al. v. Peru*. Judgment of January 19, 1995 (merits), paragraph 74.

of certain rules by which the group is governed, if need be through coercive intervention that may involve the use of force."[37/]

In a democratic State, this function is reserved exclusively for law enforcement officials. Under the Code of Conduct, those officials include all officers of the law, whether appointed or elected, who exercise police powers, especially the powers of arrest or detention. These include military authorities, whether uniformed or not, and State security forces in those countries where they exercise police powers.[38/] The exception are the cases in which, because concrete circumstances make it impossible for the State to protect individuals, the latter are permitted to use force in legitimate defense.

The practice of resorting to the military authorities to help a State's security forces restore order has happened on a number of occasions in the history of our Hemisphere when violent situations occurred. It is a lawful measure to which States resort when their police or security forces do not have the wherewithal necessary to deal with a certain situation. In the opinion of this Rapporteur, its legitimacy notwithstanding, this measure must always be exceptional in nature, used only when the police or security forces do not have the means necessary to cope with a situation. It must be a temporary default measure until the police and security forces shore up their own capacities or the deadly threat posed by the criminal organizations is weakened. Whatever the case, the armed forces should be acting in support of and under the orders of the elected civilian authorities. The Court has underscored "*the extreme care which States must observe when they decide to use their Armed Forces as a mean for controlling social protests, domestic disturbances, internal violence, public emergencies and common crime,"*[39] and observed that "*States must restrict to the maximum extent the use of armed forces to control domestic disturbances, since they are trained to fight against enemies and not to protect and control civilians, a task that is typical of police forces."*[40/]

However, this legitimate and exclusive authority of the State to use force through its law enforcement officials is not an unlimited authority. As the Court has observed:

> *Regardless of the seriousness of certain actions and the culpability of the perpetrators of certain crimes, the power of the State is not unlimited, nor may the State resort to any means to attain its ends. The State is subject to law and morality. Disrespect for human dignity cannot serve as the basis for any State action*.[41/]

International human rights instruments and the Court's case law hold that for the use of force by the State–including the use of firearms–to be legitimate, the principles of legality, necessity, and proportionality must be observed.

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37. LOUBET DEL BAYLE, Jean Louis, *La Police. Approche socio-politique.* Paris, Montchrestien, 1992, p. 19, cited [in Spanish] by GONZÁLEZ CALLEJA, Eduardo, *Sobre el Concepto de represión,* Hispania Nova- Revista de Historia Contemporánea, No. 6, 2006, p. 17 and by MARTÍNEZ MERCADO, Fernando, *Documento de Trabajo No. 4. Uso de la Fuerza, Notas y experiencias para la reforma policial en México*, Center of Studies in Citizen Security, University of Chile, available [in Spanish] at:
http://www.cesc.uchile.cl/serie_documentos_06.htm. [English translation ours.]

38. *Code of Conduct for Law Enforcement Officials,* adopted by the United Nations General Assembly in resolution 34/169 of December 17, 1979, Article 1.

39. I/A Court H.R. Case of *Zambrano Velez et al. v. Ecuador.* Judgment of July 4, 2007 (Merits, Reparations and Costs). Paragraph 51.

40. _____. Case of *Montero Aranguren et al. (Detention Center of Catia).* Judgment of July 5, 2006. Series C No. 150, paragraph 78.

41. _____. *Case of Neira Alegría et al.*, Judgment of January 19, 1995, Series C No. 20, paragraph 75; *Case of Velásquez Rodríguez*, Judgment of July 29, 1988, Series C No. 4, paragraph 154; *Case of Godínez Cruz*, Judgment of January 20, 1989, Series C No. 5, paragraph 162.

(i) Legality – Existence of a legal framework regulating the use of force

States must have adequate laws and clear guidelines echoing the principles and standards by which law enforcement officials may use force. The purpose of these laws and guidelines must be to ensure that law enforcement officials respect the right to life of persons under their jurisdiction, and to ensure independent control of the legality of the use of force.[42/]

The Basic Principles[43/] provide that the rules and regulations on the use of firearms by law enforcement officials should include guidelines that:

a. Specify the circumstances under which law enforcement officials are authorized to carry firearms and prescribe the types of firearms and ammunition permitted;

b. Ensure that firearms are used only in appropriate circumstances and in a manner likely to decrease the risk of unnecessary harm;

c. Prohibit the use of those firearms and ammunition that cause unwarranted injury or present an unwarranted risk;

d. Regulate the control, storage and issuing of firearms, including procedures for ensuring that law enforcement officials are accountable for the firearms and ammunition issued to them;

e. Provide for warnings to be given, if appropriate, when firearms are to be discharged;

f. Provide for a system of reporting whenever law enforcement officials use firearms in the performance of their duty.

Law enforcement officials may only use force when it is intended to achieve a legitimate objective, as established in the respective law. Thus, no operation may be targeted at killing an individual, which would be an illegitimate objective; instead, the objective of any operation must be to arrest or detain offenders. In operations of this type, a prompt arrest will avert an escalation in the use of force.

(ii) Necessity

Under the principle of necessity, law enforcement officials may use force "*only when strictly necessary and to the extent required for the performance of their duty.*"[44/] Accordingly, the only defensive or offensive security measures used should be those strictly necessary to carry out the lawful orders of a competent authority in the event of acts of violence or crime that imperil the right to life or the right to personal security of any person.[45/]

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42. See Inter-American Court of Human Rights, *Case of Montero Aranguren et al. (Detention Center of Catia) v. Venezuela*, Judgment of July 5, 2006, paragraphs 66 and 75; Inter-American Court of Human Rights, *Case of Zambrano Velez et al. v. Ecuador*. Judgment of July 4, 2007 (Merits, Reparations and Costs). Paragraph 86.

43. *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*, approved by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in Havana, August 27 to September 7, 1990, Principle 11.

44. *Code of Conduct for Law Enforcement Officials*, adopted by the United Nations General Assembly in resolution 34/169 of December 17, 1979, Article 3.

45. Inter-American Commission on Human Rights, *Report on Citizen Security and Human Rights*, OEA/Ser.L/V/II, doc. 57, December 31, 2009, paragraph 116; see also Inter-American Court of Human Rights, *Case of Zambrano Velez et al. v. Ecuador*. Judgment of July 4, 2007 (Merits, Reparations and Costs). Paragraph 85.

Observance of the principle of necessity implies unwavering acknowledgement of the exceptional nature of the use of force. Here, the Court has written that "force or coercive means can only be used once all other methods of control have been exhausted and have failed."[46/]

With specific reference to the use of lethal force and inasmuch as it is an extreme measure, the Court has added that:

> *The use of lethal force and firearms against individuals by law enforcement officials – which must be forbidden as a general rule – is only justified in even more extraordinary cases. The exceptional circumstances under which firearms and lethal force may be used shall be determined by the law and restrictively construed, so that they are used to the minimum extent possible in all circumstances and never exceed the use which is "absolutely necessary" in relation to the force or threat to be repelled.*[47/]

(iii)Proportionality

Under the principle of proportionality, law enforcement officials must exercise restraint and act in proportion to the seriousness of the offense and the legitimate objective to be achieved.[48/]

To that end, the Basic Principles provide that whenever possible, law enforcement officials must use non-violent means before resorting to the use of force and firearms. Their weapons and ammunition should include "*non-lethal incapacitating weapons for use in appropriate situations, with a view to increasingly restraining the application of means capable of causing death or injury to persons."*[49/]

Force and firearms should only be used when other means are ineffective or are no guarantee that the planned outcome will be achieved. Law enforcement officials, therefore, should be equipped with various types of weapons and ammunition that allow for a differentiated use of force and firearms.[50/]

The Code of Conduct states that the use of firearms is considered an extreme measure.[51/] Under the Basic Principles,[52/] which the IACHR has cited,[53/] law enforcement officials shall not

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46. I/A Court H.R., *Case of Zambrano Vélez et al. v. Ecuador*. Merits, Reparations and Costs. Judgment of July 4, 2007, paragraph 83; *Case of Montero Aranguren et al. (Detention Center of Catia) v. Venezuela*, Judgment of July 5, 2006, paragraph 67.

47. I/A Court H.R., *Case of Zambrano Vélez et al. v. Ecuador*. Merits, Reparations and Costs. Judgment of July 4, 2007, paragraph 84; *Case of Montero Aranguren et al. (Detention Center of Catia) v. Venezuela*, Judgment of July 5, 2006, paragraph 68.

48. *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*, approved by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in Havana, August 27 to September 7, 1990, Principle 5 a).

49. *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*, approved by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in Havana, August 27 to September 7, 1990, Principles 2 and 4.

50. *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*, approved by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in Havana, August 27 to September 7, 1990, Principles 2 and 4.

51. *Code of Conduct for Law Enforcement Officials,* adopted by the United Nations General Assembly in resolution 34/169 of December 17, 1979, paragraph c) of the commentary on Article 3.

52. *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*, approved by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in Havana, August 27 to September 7, 1990, Principle 9.

53. Inter-American Commission on Human Rights, *Report on Citizen Security and Human Rights*, OEA/Ser.L/V/II, doc. 57, December 31, 2009, paragraph 113; *Report on Terrorism and Human Rights*, OEA/Ser.L/V/II.116, doc. 5, October 22, 2002, paragraph 87.

use firearms against persons (i) except in self-defense or defense of others; (ii) against the imminent threat of death or serious injury; (iii) to prevent the perpetration of a particularly serious crime involving grave threat to life; (iv) to arrest a person presenting such a danger and resisting their authority, or to prevent his or her escape, and then only when less extreme means are insufficient to achieve these objectives. The Basic Principles also provide the following: "*In any event, intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life.*"

In such situations, law enforcement officials must identify themselves as such and give a clear warning of their intention to use firearms. The warning must be given sufficiently in advance to be considered, except when such a warning would unduly endanger the law enforcement officials, create the risk of death or serious injury to other persons, or is obviously inadequate or useless given the circumstances. Whenever a firearm is discharged, the competent authorities must be informed immediately.

Compliance with the aforementioned principles requires that States properly plan any use of force.

This includes the States' duty to provide law enforcement officials with adequate training in the use of force, consistent with the principles described above. As the Court has held:

> *[a]n adequate legislation would not fulfill its goal if, inter alia, the States do not educate and train the members of their armed forces and security agencies pursuant to the principles and provisions on protection of human rights and the limits to which the use of weapons by law enforcement officials is subject, even under a state of emergency.*[54/]

The Basic Principles provide that law enforcement agencies shall ensure that all law enforcement officials are selected by proper screening procedures, have appropriate moral, psychological and physical qualities for the effective exercise of their functions and receive continuous and thorough professional training. The Principles add that all law enforcement officials should receive training and be tested in accordance with appropriate proficiency standards in the use of force. The purpose is to ensure that those law enforcement officials who are required to carry firearms should be authorized to do so only upon completion of special training in the use of firearms. In that training, special attention should be given to "*issues of police ethics and human rights, […] to alternatives to the use of force and firearms, […] the understanding of crowd behavior, and the methods of persuasion, negotiation and mediation, as well as to technical means, with a view to limiting the use of force and firearms.*"[55/]

States also have a duty to develop a range of means as broad as possible and equip law enforcement officials with various types of weapons and ammunition that would allow for a differentiated use of force and firearms, endeavoring always to preserve the life and physical integrity of all persons. Accordingly, these should include the development of non-lethal incapacitating weapons as mentioned earlier. The Principles also provide that the development and deployment of non-lethal incapacitating weapons should be carefully evaluated in order to minimize the risk of endangering uninvolved persons, and the use of such weapons should be carefully controlled.[56/]

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54. I/A Court H.R., *Case of Montero Aranguren et al.(Detention Center of Catia) v. Venezuela*, Judgment of July 5, 2006, paragraph 77.

55. *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*, approved by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in Havana, August 27 to September 7, 1990, Principles 18 to 21.

56. *Ibid*, principles 2 and 3.

The Principles also state that law enforcement officials should be equipped with self-defensive equipment such as shields, helmets, bullet-proof vests and bullet-proof means of transportation, in order to decrease the need to use weapons of any kind.[57/]

In addition to the above, the State has a duty to adequately control and review the legality of the use of force, especially when this is used by those acting by mandate of the State. As previously noted, whenever a firearm is discharged, the law enforcement official must immediately inform the competent authorities.

Upon learning that firearms have been used by members of its security forces and that such use had lethal consequences, "*the State has the obligation to initiate, ex officio and without delay, a serious, independent, impartial and effective investigation.*"[58/] This is a basic and necessary condition to ensure that the right to life was not violated when that lethal force was employed. As the Inter-American Court has written, *the general rule that prohibits state agents from arbitrarily taking life would be ineffective were there no procedures by which to verify the legality of the lethal force employed by agents of the State*.[59/]

Here, the law must: (i) ensure that arbitrary or abusive use of force and firearms by law enforcement officials is punished as a criminal offence; (ii) ensure that superior officers are held responsible if they know, or should have known, that law enforcement officials under their command are resorting, or have resorted, to the unlawful use of force and firearms, and they did not take all measures in their power to prevent, suppress or report such use; (iii) ensure that superiors who order the unlawful use of force or firearms are held accountable, and (iv) reflect the principle that obedience to superior orders shall be no defense if law enforcement officials knew that an order to use force and firearms resulting in the death or serious injury of a person was manifestly unlawful and had a reasonable opportunity to refuse to follow that order.[60/]

Under the Basic Principles, persons affected by the use of force and firearms or their legal representatives or heirs, shall have access to an independent process, including a judicial process.[61/]

When not done in accordance with the applicable principles and standards, a law enforcement official's use of lethal force may even constitute arbitrary deprivation of life, in violation of the right to life recognized in Article I of the American Declaration and Article 4 of the American Convention.[62/] The Court has held that "*[w]hen excessive force is used, any resulting deprivation of life is arbitrary*."[63/]

The criteria described above apply to any situation of internal violence. The following are some of the specific standards and criteria that, in addition to those already described, must apply to the use of force in the face of two specific recurring forms of internal violence in our

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57. *Ibid*, Principle 2.

58. Inter-American Court of Human Rights. *Case of Zambrano Vélez et al. v. Ecuador*. Judgment of July 4, 2007 (Merits, Reparations and Costs), paragraph 88.

59. _____. *Case of Montero Aranguren et al. (Detention Center of Catia) v. Venezuela*, Judgment of July 5, 2006, paragraphs 79-83.

60. Basic Principles, principles 7, 24 and 26.

61. *Basic Principles*, principles 1, 2, 7, 19, 23 and 26.

62. See Inter-American Commission on Human Rights, *Report on Terrorism and Human Rights*, OEA/Ser.L/V/II.116, doc. 5, October 22, 2002, paragraphs 89 and 90; *Report on Citizen Security and Human Rights*, OEA/Ser.L/V/II, doc. 57, December 31, 2009, paragraph 114; Inter-American Court of Human Rights, *Case of Neira Alegría et al.*, Judgment of January 19, 1995, Series C No. 20, paragraph 76.

63. Inter-American Court of Human Rights, *Case of Zambrano Vélez et al. v. Ecuador*. Judgment of July 4, 2007 (Merits, Reparations and Costs), paragraph 84; *Case of Montero Aranguren et al.* (*Detention Center of Catia*), paragraph 68.

Hemisphere: the violence engendered by unlawful or violent gatherings, and the violence engendered by organized crime.

A. The use of force to disperse unlawful or violent gatherings

As recognized in Articles XXI and XXII of the American Declaration and Articles 15 and 16 of the American Convention, every person has the right to assemble peaceably with others, without arms, in a formal public meeting or an informal gathering, and the right to associate freely for ideological, religious, political, economic, labor, social, cultural, sports or other purposes.

These rights create the State's corollary obligation to protect the lawful and peaceful exercise of the rights of assembly and association. The IACHR has written that:

> *[i]mplicit in protection of the right of assembly is not just the State's obligation to refrain from interfering in the exercise of that right, but also its obligation to adopt, in certain circumstances, positive measures to guarantee it: for example, protecting demonstrators from physical violence by persons who may hold the opposite opinion.*[64/]

This corollary obligation of the State includes the obligation to design operating plans and procedures that will facilitate the exercise of the right of assembly. According to the IACHR, this involves everything from rerouting pedestrian and vehicular traffic in a certain area, to escorting those who are participating in the mass gathering or demonstration in order to guarantee their safety and make it possible for the activities involved to take place. The State must also establish rules of conduct and provide the police forces with professional training, equipment, communication devices, vehicles, means of personal defense and non-lethal deterrence so that they are prepared for situations involving mass gatherings, and thus create the conditions for these events to take place within the framework of the established standards and without adversely affecting the exercise of other human rights.[65/]

As the IACHR has recognized the State can impose reasonable restrictions on demonstrations to ensure that they are peaceful.[66/] Under the American Convention, the only restrictions that may be placed on the exercise of the right of assembly are those stipulated by law and those necessary to preserve national security, public safety or public order, or to protect public health or morals or the rights or freedoms of others.

The IACHR has observed, for example, that "*states may regulate the use of public space, for example by establishing requirements of prior notice, but such regulations may not impose excessive demands that invalidate the exercise of the right.*"[67/] In effect, the IACHR's position has been that some of the restrictions imposed by states, such as arresting peaceful demonstrators[68/] or criminalizing demonstrations on public thoroughfares when they are carried out in exercise of the rights to freedom of expression and to freedom of assembly[69/] (the so-called "criminalization of social protest") are contrary to the right to freedom of assembly as they go beyond what the American Convention deems to be permissible restrictions on the right to freedom of assembly. If, despite the measures taken, the right to freedom of assembly is abused or unlawfully exercised, the IACHR has acknowledged that the State may "*impose reasonable restrictions on demonstrations*

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64. Inter-American Commission on Human Rights, *Annual Report 2007*, Chapter IV, paragraph 259.

65. _____. *Report on Citizen Security and Human Rights*, OEA/Ser.L/V/II, doc. 57, December 31, 2009, paragraph 193.

66. _____. _____. OEA/Ser.L/V/II, doc. 57, December 31, 2009, paragraph 194.

67. Inter-American Commission on Human Rights, *Report on the situation of human rights defenders in the Americas*, OEA/Ser.L/V/II.124, Doc. 5 rev.1, March 7, 2006, paragraph 56.

68. _____ _____. OEA/Ser.L/V/II.124, Doc. 5 rev.1, March 7, 2006, paragraph 56.

69. _____. *Annual Report 2007*, Chapter IV, paragraph 266; Inter-American Court of Human Rights, *Case of Ricardo Canese v. Paraguay*, Judgment of August 31, 2004, Series C No. 111, paragraphs 96 to 98.

[...] to disperse those demonstrations that turn violent or obstructive, provided that those restrictions are informed by the principles of legality, necessity and proportionality."[70/] Nevertheless, the actions of law enforcement officers should protect, rather than discourage, the right to assembly and therefore, the rationale for dispersing the demonstration must be the duty to protect people.[71/]

The use of force by law enforcement officers in these situations must be proportionate to the level of violence of the demonstration. The Basic Principles provide that when dispersing assemblies that are unlawful but non-violent, law enforcement officials shall avoid the use of force or, where that is not practicable, shall restrict such force to the minimum extent necessary. When dispersing violent assemblies, law enforcement officials may use firearms only when less dangerous means are not practicable and only to the minimum extent necessary.[72/] Indeed, law enforcement officials shall not use firearms against persons except when strictly necessary to protect life, either in self-defense or in defense of others against the imminent threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest a person presenting such a danger and resisting their authority, or to prevent his or her escape.[73/]

To ensure that the use of force in public demonstrations is the exception, used only in those circumstances that are strictly necessary, the IACHR has recommended that the States adopt administrative controls and special measures for planning, prevention, and for the investigation of possible abuses of the use of force. These measures include the following:[74/]

a. implementation of mechanisms to prohibit, in an effective manner, the use of lethal force as a recourse in public demonstrations;
b. implementation of an ammunition registration and control system;
c. implementation of a communications records system to monitor operational orders, those responsible for them, and those carrying them out;
d. promotion of visible means of personal identification for police agents participating in public law enforcement operations;
e. promotion of opportunities for communication and dialogue prior to demonstrations and of the activities of liaison officers to coordinate with demonstrators concerning demonstration and protest activities and law enforcement operations, in order to avoid conflict situations;
f. the identification of political officials responsible for law enforcement operations during marches, particularly in the case of scheduled marches or prolonged social conflicts or circumstances in which potential risks to the rights of the demonstrators or others are anticipated, so that such officials are tasked with supervising the field operation and ensuring strict compliance with norms governing the use of force and police conduct;

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70. _____. *Annual Report 2007*, Chapter IV, paragraph 260.
71. _____. *Report on the situation of human rights defenders in the Americas*, OEA/Ser.L/V/II.124, Doc. 5 rev.1, March 7, 2006, paragraph 63.
72. *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*, approved by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in Havana, August 27 to September 7, 1990, Principles 13 and 14.
73. *Basic Principles*, Principle 9.
74. Inter-American Commission on Human Rights. *Report on the situation of human rights defenders in the Americas*, OEA/Ser.L/V/II.124, Doc. 5 rev.1, March 7, 2006, paragraph 68; *Report on citizen security and human rights*, OEA/Ser.L/V/II, doc. 57, December 31, 2009, paragraph 201.

g. the establishment of an administrative sanctions regime for the law enforcement personnel involving independent investigators and the participation of victims of abuses or acts of violence; and

h. the adoption of measures to ensure that police or judicial officials (judges or prosecutors) directly involved in operations are not responsible for investigating irregularities or abuses committed during the course of those operations.

As observed, disproportionate use of force by law enforcement officials in suppressing public demonstrations or riots may constitute an arbitrary deprivation of life, as the reports of the IACHR[75/] and the case law of the Court[76/] have established.

B. The use of force in response to the violence engendered by organized crime

The countries of the region now have some of the highest crime rates in the world. The age group most affected, both as victims and perpetrators, are youth. The IACHR acknowledged as much when it wrote that for the first time in decades, crime has replaced unemployment as the public's chief concern and that in these countries, "*[t]he judicial branch, public prosecutor's offices, the police and the prison system have failed to develop the capability to respond effectively through lawful measures to prevent and suppress crime and violence.*"[77/] It observed that in some cases, private enterprise, social organizations and other actors have tried to replace the State with very precarious results and that in some countries of the region, corruption and impunity have enabled criminal organizations to grow and establish parallel power structures.[78/]

Under the definition given in the United Nations Convention against Transnational Organized Crime (hereinafter the "Palermo Convention"),[79/] an "organized criminal group" is "*a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit.*"

As previously noted, the State has an obligation to guarantee the rule of law and citizen security. The IACHR has defined citizen security as "*a situation in which persons are able to live free of the threats caused by violence and crime, and the State has the necessary means to guarantee and protect the human rights directly threatened by violence and crime*" […] in other words, it is "*a condition in which individuals live free from the violence practiced by State and non-state actors.*"[80/]

Organized criminal groups use force unlawfully, and organized crime is a manifestation of violence that poses a challenge to democratic coexistence and jeopardizes citizen security. The State, therefore, has an obligation to establish laws, institutions and steadfast policies whose purpose is to prevent and punish the activities of organized criminal groups, so as to protect the human rights of persons within their jurisdiction. As the IACHR has observed:

> *In the rule of law, the use of force and other legitimate means of coercion are reserved exclusively for the public authorities, who must exercise them in accordance with the*

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75. See Inter-American Commission on Human Rights, *Report on the Situation of Human Rights in Chile*, OEA/Ser.L/V/11.66, doc. 17, September 27, 1985, Chapter III, paragraph 101.

76. Inter-American Court of Human Rights, *Case of Durand and Ugarte v. Peru.* Judgment of August 16, 2000 (Merits), paragraph 118.

77. Inter-American Commission on Human Rights, *Report on Citizen Security and Human Rights*, OEA/Ser.L/V/II, doc. 57, December 31, 2009, paragraph 3.

78. _____. *Report on Citizen Security and Human Rights*, OEA/Ser.L/V/II, doc. 57, December 31, 2009, paragraph 33.

79. Adopted by the United Nations General Assembly on November 15, 2000, through resolution A/Res/55/25, Article 2 a).

80. Inter-American Commission on Human Rights, *Report on Citizen Security and Human Rights*, OEA/Ser.L/V/II, doc. 57, December 31, 2009, paragraph 221.

> *standards discussed earlier […] States are not fulfilling their duties to protect and ensure human rights when they allow, encourage or tolerate private groups that usurp the essential functions of the institutions within the system for the administration of justice or the police force. The recent history of the Hemisphere has seen practices of this type, which have caused extensive and systematic violations of human rights. Therefore, it is the duty of a democratic state to exercise strong control over such groups, to prevent them from operating and, where necessary, to apply the appropriate penalties under its criminal laws.*[81/]

Under the Palermo Convention, States Parties have an obligation to adopt such legislative and other measures as may be necessary to establish the intentional commission of the following as criminal offences: participation in an organized criminal group; organizing, directing, aiding, abetting, facilitating or counseling the commission of serious crime involving an organized criminal group; and laundering proceeds of crime and corruption. They are also to adopt measures, *inter alia*, to enable confiscation of proceeds of crime and the property, equipment or other instrumentalities used in or destined for use in the offences covered by the Palermo Convention.[82/] Under the Hemispheric Plan of Action against Transnational Organized Crime, the States are to adopt legislative measures and national strategies to prevent and combat transnational organized crime; to pursue, prosecute, and appropriately punish perpetrators of transnational organized crime; and adopt and use special investigative techniques to combat this crime.[83/]

This Rapporteur also concurs with the IACHR on how important it is that the State design and put into practice comprehensive public policies on citizen security, under which specific measures and strategic plans at the operational, normative, and preventive levels are carried out simultaneously. These policies must be sustainable and be subjected to periodic evaluation and accountability mechanisms involving broad citizen participation.[84/]

The State must also bolster its institutional capacities to deal with these situations. Police and prosecution institutions play a vital role here. The IACHR has written that in democratic systems of government, they are *"an irreplaceable cog in the machinery that guarantees the human rights threatened by violence and crime."* The police and the prosecution have an important role to play not just in preventing, deterring, and controlling crime and violence, but also in ensuring that the administration of justice functions properly. Police are responsible for conducting criminal investigations, identifying assailants, victims and witnesses, gathering and analyzing material evidence, and preparing reports for prosecutors and judges. The State has an obligation to strengthen the legitimacy and efficacy of these institutions so that they are better able to combat organized crime. It must provide law enforcement personnel and prosecutors with the training, infrastructure, and equipment needed to perform their functions properly. It must also ensure that the police force receives support and cooperation from the actors in the criminal justice system, government organizations, civil society organizations and private enterprise.[85/] The police must be endowed with the constitutional authorities necessary to investigate and pursue members of these criminal organizations. To that end, it must be taken as a given that these organizations always operate clandestinely and the dynamics and relationships among their members are

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81. _____. _____. OEA/Ser.L/V/II, doc. 57, December 31, 2009, paragraph 209.

82. Palermo Convention, adopted by the United Nations General Assembly on November 15, 2000, through resolution A/Res/55/25, articles 5, 6, 8 and 12.

83. Hemispheric Plan of Action against Transnational Organized Crime, Doc. CP/RES. 908 (1567/06), adopted by the OAS Permanent Council at the meeting held on October 25, 2006.

84. Inter-American Commission on Human Rights, *Report on Citizen Security and Human Rights*, OEA/Ser.L/V/II, doc. 57, December 31, 2009, paragraph 232(A), subparagraph 1.

85. Inter-American Commission on Human Rights, *Report on Citizen Security and Human Rights*, OEA/Ser.L/V/II, doc. 57, December 31, 2009, paragraphs 222 to 224.

complex. The police should be equipped with the appropriate technological tools to investigate and pursue this criminal phenomenon.

As in other circumstances, the State's use of force to preserve the rule of law and keep it safe from the violence perpetrated by organized crime must be exercised with the utmost respect for human rights. Here, the Court has written that while the criminal threat "*can certainly constitute a legitimate reason to use state security forces in specific cases […] States' fight against criminality must take place within the limits and in accordance with the proceedings which allow for the preservation of both public security and the full respect of human rights of the individuals under their jurisdiction.*"[86/]

Despite this obligation, the IACHR has observed that the citizen security policies historically pursued in numerous states of the Americas have, in general terms, diverged from international standards in the area of human rights. In many cases, the authorities have resorted to the illegal and arbitrary use of force in the name of crime prevention and control.[87/] The IACHR has underscored the fact that "*t]he use of force beyond the boundaries established by law and by international standards, compounded by the inability of the institutions responsible for ensuring citizen security to develop effective measures to deal with crime and violence, only increases the public's insecurity*."[88/]

Addressing this situation in its case law, the Court has held that no matter how difficult its circumstances, they do not relieve a State Party to the American Convention of its obligations under the Convention; these obligations remain intact, especially in those difficult circumstances. In this regard, it has underscored that "*no matter the circumstances in any State, there exist an absolute prohibition of torture, forced disappearances of individuals and summary and extrajudicial executions; and that such prohibition constitutes a mandatory rule of International Law not subject to derogation*."[89/]

IV. PROTECTION OF PEOPLE IN SITUATIONS OF INTERNAL VIOLENCE

Situations of internal violence are, generally speaking, accompanied by numerous human rights violations. While not claiming to be an exhaustive list, Harrof-Tavel has enumerated the following violations:

- *physical damage: injury, illness, disability or death;*
- *torture and ill-treatment;*
- *disappearances: these may be the result of a deliberate State policy, or the doing of paramilitary groups or opposition movements. Those who disappear may be held captive at secret locations; more often than not, however, they are killed, either to terrorize the population or to avoid the stigma of national or international disapproval resulting from the arrest and detention of certain opposition figures;*
- *deprivation of freedom: the classic form of detention is incarceration in a closed place designed for the purpose (prisons, camps, or-in some countries-psychiatric hospitals, etc.), but there are others, such as assignment to residence or confinement in another region of the country, often far away, isolated and insalubrious;*

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86. Inter-American Court of Human Rights, *Case of Zambrano Vélez et al. v. Ecuador*. Judgment of July 4, 2007 (Merits, Reparations and Costs), paragraph 96; *Cf. Case of Castillo Petruzzi et al.* Judgment of May 30, 1999. Series C. No. 52, paragraph 207.

87. Inter-American Commission on Human Rights, *Report on Citizen Security and Human Rights*, OEA/Ser.L/V/II, doc. 57, December 31, 2009, paragraph 32.

88. _____. _____. OEA/Ser.L/V/II, doc. 57, December 31, 2009, paragraph 34.

89. Inter-American Court of Human Rights, *Case of Zambrano Vélez et al. v. Ecuador*. Judgment of July 4, 2007 (Merits, Reparations and Costs), paragraph 96.

- *a person's inability to satisfy his vital needs (security, material survival, psychological needs), when he has lost his means of subsistence, has been displaced within the country or has had to seek refuge abroad;*
- *separation of families, whose members are without news of their relatives on account of the hostilities or unrest;*
- *the suffering of individuals or communities indirectly affected by the strife, such as families with no means of support, communities whose precarious economic situation is threatened by the additional burden represented by refugees or displaced populations, and persons who are suspect on account of their kinship with someone involved in the violence.*[90/]

The human rights violations and suffering engendered during situations of internal violence are cause for serious humanitarian concerns. It is imperative that the States provide and facilitate humanitarian assistance to persons affected by these situations. As the Turku Declaration states, *"[i]n situations of internal violence, [...] humanitarian organizations shall be granted all the facilities necessary to enable them to carry out their humanitarian activities."*[91/]

The duty to provide humanitarian organizations with the necessary facilities includes the obligation not to obstruct their work and to respect and protect the humanitarian aid personnel, their installations and means of transportation in situations of violence. As the Turku Declaration recognizes, *"[m]edical and religious personnel shall be respected and protected and shall be granted all available help for the performance of their duties. They shall not be compelled to carry out tasks which are not compatible with their humanitarian missions."*[92/]

Here, particular mention should be made of the work that humanitarian organizations like the ICRC are performing in a number of countries of this Hemisphere. They engage in preventive work like training and dissemination of the humanitarian principles and standards on the use of force, and in the actual delivery of humanitarian assistance and aid to persons affected by violence, whether by offering their services to the States and acting with their consent, or by supporting the assistance that the local Red Cross organizations in each country provide. States must be particularly attentive to their international obligations to respect and protect the emblem of the Red Cross and the Red Crescent, both in the case of the work performed by the ICRC itself and that performed by the local Red Cross organizations.

The above serves as a reason for this Committee to most emphatically urge the States of our continent to allow these humanitarian organizations to intervene in the situations of internal violence referred to in this study, taking into account that past actions have shown these organizations to be an effective remedy to mitigate the suffering that such situations cause in our communities.

The following are certain aspects of some of the human rights most frequently affected in situations of internal violence:

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90. Harrof-Tavel, Marion**, "***Action taken by the International Committee of the Red Cross in situations of internal violence."* International Review of the Red Cross No. 117, May-June 1993. Available at: http://www.icrc.org/eng/resources/documents/misc/57jmhy.htm.

91. *Declaration of Minimum Humanitarian Standards (Turku Declaration)*, adopted by an expert meeting convened by the Institute for Human Rights, Åbo Akademi University in Turku/ Åbo (Finland), November 30 to December 2, 1990, and subsequently revised at a meeting at the Norwegian Institute of Human Rights held in Oslo (Norway) on September 29-30, 1994, Article 15.

92. *Ibid*, Articles 14 and 15.

(i) *Right to life*

In situations of internal violence, one of the most imperiled rights is the right to life. The right to life, recognized in Article I of the American Declaration and in Article 4 of the American Convention, is the supreme right and one of that nucleus of rights that cannot be suspended, no matter what the circumstances.

The Court has written that the right to life protected under the American Convention carries corollary obligations, among them that the State shall deprive no one of his or her life arbitrarily (negative obligation) and, given its duty to ensure the free and full exercise of human rights, that the State shall adopt all appropriate measures to protect and preserve the right to life (positive obligation) of those persons under its jurisdiction.[93] The United Nations Human Rights Committee has written that "*States have the supreme duty to prevent […] acts of mass violence causing arbitrary loss of life.*"[94]

Moreover, States must take all measures necessary to, *inter alia*, establish a framework of laws that deters any possible threat to the right to life and establish an effective legal system to investigate, punish, and redress deprivation of life by State officials or private individuals. The Court underscores that States must especially ensure "*that their security forces, which are entitled to use legitimate force, respect the right to life of the individuals under their jurisdiction.*"[95]

Protection of the right to life is the paramount purpose of the principles and standards governing the use of force by law enforcement officials. Under the Basic Principles, whenever the lawful use of force and firearms is necessary, law enforcement officials shall "*respect and preserve human life;*"[96] and, *[i]n any event, intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life.*"[97]

On occasion, situations of violence often lead to the regrettable disappearance of persons involved in or affected by those situations. In this regard, the Human Rights Committee has written that the right to life includes the duty of States to "*take specific and effective measures to prevent the disappearance of individuals"* and to "*establish effective facilities and procedures to investigate thoroughly cases of missing and disappeared persons in circumstances which may involve a violation of the right to life.*"[98]

(ii) *The right to humane treatment*

The right to humane treatment is protected under Article I of the American Declaration and Article 5 of the American Convention. It, too, is one of that core body of rights that cannot be suspended or derogated under any circumstance.

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93. Inter-American Court of Human Rights, *Case of Zambrano Vélez et al. v. Ecuador*. Judgment of July 4, 2007 (Merits, Reparations and Costs), paragraph 80; *Cf. Case of the "Street Children" (Villagrán Morales et al.).* Judgment of November 19, 1999. Series C No. 63, paragraph 144; *Case of the Miguel Castro-Castro Prison*. Judgment of November 25, 2006. Series C No. 160, paragraph 237; *Case of Vargas Areco*. Judgment of September 26, 2006. Series C No. 155, paragraph 14.

94. Human Rights Committee, *General Comment No. 6*, Article 6-Right to Life, 16th session, UN Doc. HRI/GEN/1/Rev.7 (1982).

95. Inter-American Court of Human Rights, *Case of Zambrano Vélez et al. v. Ecuador*. Judgment of July 4, 2007 (Merits, Reparations and Costs), paragraph 81.

96. *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*, approved by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in Havana, August 27 to September 7, 1990, Principle 5(a).

97. *Ibid*, Principle 9.

98. Human Rights Committee, General Comment No. 6, paragraph 4.

As the American Convention has established, the right to humane treatment includes every person's right to have his or her physical, mental and moral integrity respected. For their part, the Basic Principles provide that whenever the use of firearms is unavoidable, law enforcement officials are to *"[m]inimize damage and injury."*[99/]

The right to humane treatment is closely related to the right of the sick and injured in situations of violence to receive medical attention. Here, the Basic Principles provide that law enforcement officials shall ensure *"that assistance and medical aid are rendered to any injured or affected persons at the earliest possible moment."*[100/] The Court has framed the relationship between the lack of medical attention as a component of the right to health and the nonderogable right to personal integrity as follows:

> *Lack of adequate medical assistance could be considered per se a violation of Articles 5(1) and 5(2) of the Convention depending on the specific circumstances of the person, the type of disease or ailment, the time spent without medical attention and its cumulative effects.*[101/]

Another aspect of the right to humane treatment protected under the American Convention is the right not to be subjected to torture or to other cruel, inhuman or degrading treatment or punishment. The Code of Conduct expressly provides that:

> *[n]o law enforcement official may inflict, instigate or tolerate any act of torture or other cruel, inhuman or degrading treatment or punishment, nor may any law enforcement official invoke superior orders or exceptional circumstances such as a state of war or a threat of war, a threat to national security, internal political instability or any other public emergency as a justification of torture or other cruel, inhuman or degrading treatment or punishment.*[102/]

The rights of persons deprived of liberty to be treated with respect for the dignity inherent in the human person, and to decent conditions of detention are also protected under the nonderogable right to humane treatment recognized in the American Convention. In situations of internal violence, particular care must be taken to ensure that the circumstances attending the violence do not lead to inadequate and improper detention conditions. As the Court has written, the State has a special duty as guarantor of the rights of those deprived of their liberty, given the

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99. *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*, approved by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in Havana, August 27 to September 7, 1990, Principles 5 (b) and (c). See also *Declaration of Minimum Humanitarian Standards (Turku Declaration)*, adopted by an expert meeting convened by the Institute for Human Rights, Åbo Akademi University, in Turku/ Åbo (Finland), November 30 to December 2, 1990, and subsequently revised at a meeting at the Norwegian Institute of Human Rights held in Oslo (Norway) on September 29-30, 1994, articles 12 and 13.

100. *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*, approved by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in Havana, August 27 to September 7, 1990, Principle 5(b) and (c). See also *Declaration of Minimum Humanitarian Standards (Turku Declaration)*, adopted by an expert meeting convened by the Institute for Human Rights, Åbo Akademi University, in Turku/ Åbo (Finland), November 30 to December 2, 1990, and subsequently revised at a meeting at the Norwegian Institute of Human Rights held in Oslo (Norway) on September 29-30, 1994, articles 12 and 13.

101. Inter-American Court of Human Rights. *Case of Montero Aranguren et al. (Detention Center of Catia) v. Venezuela*, Judgment of July 5, 2006, paragraph 103.

102. *Code of Conduct for Law Enforcement Officials*, adopted by the United Nations General Assembly in resolution 34/169 of December 17, 1979, Article 5.

control or authority that prison officials have over those in their custody and inasmuch as the particular circumstances that attend incarceration make it impossible for those deprived of their liberty to satisfy, by their own means, a number of the most basic needs essential for one to live a decent life.[103] The Court has held that the unavoidable consequence of any deprivation of liberty is the impairment of other human rights; hence, such impairment must be strictly minimized and *the State must ensure that the manner and method used to carry out the measure do not subject the detainee to more suffering and hardship than detention inevitably involves and that, the practical demands of imprisonment notwithstanding, his or her health and wellbeing are properly attended.*[104]

To protect the right to humane treatment in the case of persons deprived of liberty, the Basic Principles provide that in their relations with persons in custody or detention, law enforcement officials (i) shall not use force except when strictly necessary to maintain security and order within the institution or when personal safety is threatened, and (ii) shall not use firearms, except when strictly necessary to protect life, either in self-defense or in the defense of others against the immediate threat of death or serious injury, or when strictly necessary to prevent the escape of a person in custody or detention who poses the danger of perpetrating a particularly serious crime involving a grave threat to life.[105]

For its part, the Code of Conduct requires that law enforcement officials shall ensure the full protection of the health of persons in their custody and, in particular, shall take immediate action to secure medical attention whenever required.[106] Here, the Court has held that:

> *Lack of adequate medical assistance does not satisfy the minimum material requisites of a treatment consistent with the human condition as stipulated in Article 5 of the American Convention. The State has the duty to provide detainees with regular medical check-ups and care and adequate treatment whenever necessary.*[107]

A number of instruments and a body of case law have been developed on the subject of the rights of persons deprived of liberty. The Standard Minimum Rules for the Treatment of Prisoners,[108] the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment,[109] the Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas[110] and other instruments establish detailed standards to provide States with guidance on what constitutes humane treatment and the proper detention conditions for persons deprived of liberty. These instruments prescribe that a register shall be kept of persons deprived of liberty; that separate categories of prisoners must be established; that

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103. Inter-American Court of Human Rights. *Case of Neira Alegría et al.*, Judgment of January 19, 1995, Series C No. 20, paragraph 60; *Case of Montero Aranguren et al.(Detention Center of Catia) v. Venezuela*, Judgment of July 5, 2006, paragraph 87.

104. ——. *Case of Montero Aranguren et al.(Detention Center of Catia) v. Venezuela*, Judgment of July 5, 2006, paragraph 86.

105. *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*, approved by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in Havana, August 27 to September 7, 1990, Principles 15 and 16.

106. *Code of Conduct for Law Enforcement Officials*, adopted by the United Nations General Assembly in resolution 34/169 of December 17, 1979, Article 6.

107. Inter-American Court of Human Rights, *Case of Montero Aranguren et al.(Detention Center of Catia) v. Venezuela*, Judgment of July 5, 2006, paragraph 102.

108. Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in Geneva in 1955, and approved by the United Nations Economic and Social Council in its resolutions 66 C (XXIV) of July 31, 1957 and 2076 (LXII) of May 13, 1977.

109. Adopted by the United Nations General Assembly in its resolution 43/173 of December 9, 1988.

110. Approved by the IACHR at its 131st regular session, held March 3 to 14, 2008.

persons deprived of their liberty are to be provided with the means for their personal hygiene as well as food, physical exercise and medical services; they must be accommodated in spaces that are well ventilated and have adequate lighting; next of kin are to be notified in the event of an inmate's death, illness or transfer, and inmates are not to be subjected to torture or cruel, inhuman or degrading treatment or punishment. The Court has written that overcrowding in prisons constitutes cruel, inhuman and degrading treatment and therefore a violation of the right to humane treatment[111/] and that

> *poor physical and sanitary conditions in detention centers, and inadequate lighting and ventilation can be violations of Article 5 of the American Convention, depending on their intensity, the length of the detention and the personal health of the person who must endure those conditions, since the suffering they may cause can exceed the hardship and suffering that incarceration will inevitably cause and leave those so incarcerated with a sense of humiliation and inferiority.*[112/]

(iii)*Right to personal liberty*

Situations of internal violence occasionally result in large-scale detentions.

Article 7 of the American Convention protects every person's right to personal liberty and security. It provides that no one shall be deprived of his physical liberty except for the reasons and under the conditions established beforehand by the constitution of the State Party concerned or by a law established pursuant thereto, and no one shall be subject to arbitrary arrest or imprisonment. The Court's interpretation of that article is as follows:

> *This provision contains specific guarantees against illegal or arbitrary detentions or arrests, as described in clauses 2 and 3, respectively. Pursuant to the first of these provisions, no person may be deprived of his or her personal freedom except for reasons, cases or circumstances expressly defined by law (material aspect) and, furthermore, subject to strict adherence to the procedures objectively set forth in that law (formal aspect). The second provision addresses the issue that no one may be subjected to arrest or imprisonment for reasons and by methods which, although classified as legal, could be deemed to be incompatible with the respect for the fundamental rights of the individual because, among other things, they are unreasonable, unforeseeable or lacking in proportionality.*[113/]

The Human Rights Committee has observed that if so-called preventive detention is used for reasons of public security, it must not be arbitrary and must be based on grounds and procedures established by law.[114/]

It is also worth noting that the Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas state that, in accordance with national legislation and international law, regular visits and inspections of places of deprivation of liberty shall be conducted by national and international institutions and organizations in order to ascertain, at any time and under any circumstance, the conditions of deprivation of liberty and the respect for human rights. The Principles and Best Practices also stipulate that its provisions shall not affect the obligations of States Parties to the four Geneva Conventions of 12 August 1949 and the Additional Protocols thereto of 8 June 1997, nor the opportunity available to any State Party to authorize the

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111. Inter-American Court of Human Rights, *Case of Montero Aranguren et al.(Detention Center of Catia) v. Venezuela*, Judgment of July 5, 2006, paragraph 91.

112. *Ibid*, paragraph 97.

113. Inter-American Court of Human Rights, *Case of Gangaram Panday*. Judgment of January 21, 1994. Series C. No. 16, paragraph 47.

114. Human Rights Committee, General Comment No. 8, Article 9 - *Right to liberty and security of persons (Art. 9),* 16th session (1982).

International Committee of the Red Cross to visit places of detention in situations not covered by international humanitarian law.[115/]

(iv) *Right to privacy and protection of domicile*

Situations of internal violence also occasionally result in intrusions into the domicile or property of the persons involved.

Article 11 of the American Convention prohibits all arbitrary or abusive interference with the private lives of persons, and lists various realms of private life, such as family, home and correspondence. The Court has written that "the sphere of privacy is characterized by being exempt and immune from abusive and arbitrary invasion by third parties or public authorities." The foregoing notwithstanding, the right to privacy is not absolute and is, therefore, subject to state-imposed restrictions provided that any state interference in private life is neither abusive nor arbitrary; therefore, any such restrictions must be provided by the constitutions and laws, pursue a legitimate end and be those necessary to preserve a democratic society.[116/]

(v) *Right to effective judicial protection*

The Inter-American Court has held that the general obligations of States include a positive duty to guarantee the rights of all individuals within their jurisdiction. This includes the duty to take all necessary measures to remove any impediments that would prevent individuals from enjoying the rights the Convention guarantees. Any state that tolerates circumstances or conditions that prevent individuals from having recourse to the legal remedies designed to protect their rights is in violation of Article 1(1) of the Convention. The State also has the general obligation established in Article 2 of the Convention, to adapt its domestic laws to the provisions of the American Convention so as to ensure the rights protected therein. That Article 2 obligation includes the enactment of laws and the development of practices conducive to the effective observance of the rights and freedoms recognized in the Convention, and the adoption of measures to suppress laws and practices of any kind that imply a violation of the guarantees established in the Convention.[117/] This rapporteurship, therefore, is offering a proposal which it believes would be an effective means of avoiding arbitrary conduct in detentions and arrests and in any investigative techniques and practices that may infringe an individual's right to privacy. It is proposing that the States introduce controls to ensure that police and prosecutorial authorities are operating within the law when they authorize arrests or infringements of a person's privacy rights or when, in urgent cases or cases of *flagrante delicto,* they confirm such arrests or infringements after the fact. Such controls should test for the presence of the conditions of necessity that would justify such restrictive measures and, wherever necessary, should be entrusted preferably to judicial authorities rather than the authorities in charge of the investigation. In any event, an effective judicial recourse should always be available to confirm that any arrests or privacy infringements are not arbitrary.

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115 *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas,* (document approved by the Inter-American Commission on Human Rights at its 131st regular session, held March 3 to 14, 2008). Principle XXIV.

116. Inter-American Court of Human Rights. *Case of Escher et al. v. Brazil*, Preliminary Objections, Merits, Reparations and Costs. Judgment of July 6, 2009. Series C. No. 200.

117. ——. *Case of Yvone Neptune v. Haiti*. Merits, Reparations and Costs. Judgment of May 6, 2008. Series C. No. 180. *Case of Albán Cornejo et al. v. Ecuador*. Merits, Reparations and Costs. Judgment of November 22, 2007. Series C. No. 171. *Case of Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago*. Merits, Reparations and Costs. Judgment of June 21, 2002. Series C. No. 94; *Case of Bulacio v. Argentina.* Merits, Reparations and Costs. Judgment of September 18, 2003. Series C. No. 100, and *Case of Myrna Mack Chang v. Guatemala*. Merits, Reparations and Costs. Judgment of November 25, 2003. Series C. No. 101.

V. CONCLUSIONS AND RECOMMENDATIONS

1. Situations of internal violence that do not qualify as armed conflict, namely internal tensions and disturbances, are governed by international human rights law and domestic law.

2. Under the American Convention, only in time of war, public danger, or other emergency that threatens its independence or security may a State party suspend certain rights, and then only as an exception. However, if the suspension is to be valid, it must be done strictly in accordance with the requirements set forth in Article 27 of the American Convention. Otherwise, all human rights remain in force and must be respected.

3. Democracy is indispensable for the effective exercise of fundamental freedoms and human rights. The main purpose served by regulating the use of force is to protect the nonderogable right to life. In a democratic State, the State has sole claim on the legitimate use of force; the State uses this monopoly on the legitimate use of force to maintain the order, rule of law, freedom and public peace necessary for social co-existence.

4. The State has the right and the obligation to provide protection when the security of persons living within its territory is threatened by situations of violence. In practice, this may include the use of lethal means.

5. In a democratic State, the use of force is reserved exclusively for law enforcement officials, which include all officers of the law who exercise police powers, including military authorities and State security forces in those countries where they exercise police powers. This does not preclude acknowledging that in exceptional cases individuals are authorized to use force in legitimate defense. While States may legitimately resort to their military authorities to perform these functions, such a measure must always be exceptional in nature, used only when the police or security forces do not have the means necessary to cope with a situation. It must be a temporary default measure until the police and security forces shore up their own capacities. In such cases, the armed forces should be acting in support of and under the orders of the elected civilian authorities.

6. The legitimate and exclusive authority of the State to use force is not an unlimited authority. States must have adequate laws and clear guidelines to ensure that the use of force by law enforcement officials is done with complete respect for human rights and in compliance with the relevant international instruments. States must ensure that their domestic laws and regulations are compatible with the principles and standards of international human rights law that regulate the use of force in situations of internal violence and, to that end, must promote a review and amendment of the existing body of law and/or the adoption of specific laws and regulations on the subject.

7. When law enforcement officials use force, they must at all times respect the principles of legality, necessity and proportionality. The use of firearms should be considered an extreme measure.

8. States must properly plan their use of force and provide law enforcement officials with the training, equipment and resources they need to use force in a manner that is fully respectful of human rights and the relevant international instruments, and that serves to keep them safe.

9. States must control and review the use of force. When States learn that their security agents have used firearms with lethal consequences, they have an obligation to initiate, *ex officio* and without delay, a serious, independent, impartial and effective investigation. Persons affected by the use of force and firearms or their legal representatives or heirs, must have access to an independent process, including a judicial process through which those responsible for the unlawful use of force are punished.

10. States have an obligation to protect the lawful and peaceful exercise of the right of assembly and freedom of association. This obligation entails positive measures, including the

design of operating plans and procedures, training and equipment for law enforcement personnel, all with a view to ensuring that demonstrations take place peacefully.

11. The only restrictions that States can impose on the right of assembly and freedom of association are those recognized by the relevant international instruments.

12. States have a duty to prevent situations of violence caused when the right of assembly is abused or unlawfully exercised. When dispersing demonstrations that are unlawful but nonviolent, law enforcement officials are to avoid the use of force or, where this is not possible, are to keep the use of force to the absolute minimum necessary. When dispersing violent assemblies, law enforcement officials may use firearms only when less dangerous means are not practicable and only to the minimum extent necessary, as a last resort and when strictly necessary to protect life.

13. As part of the State's obligation to protect and guarantee the human rights of those subject to its jurisdiction, it has an obligation to exert effective control on situations of violence caused by organized crime and to prevent and punish the crimes committed by organized criminal groups.

14. States must design, implement and constantly evaluate public policies on citizen security and ensure that they are comprehensive, sustainable and crafted from a human rights perspective. These policies must feature legislative measures and comprehensive national strategies to prevent and combat organized crime. The States must be able to protect and guarantee human rights amid situations of violence engendered by organized crime. Hence, they must take these situations into particular account when reinforcing the legitimacy and efficacy of their law enforcement personnel by providing them with training, supplying them with infrastructure and equipment, and other measures.

15. The States must ensure that the human rights of persons involved in or affected by situations of internal violence are adequately protected. States must ensure that law enforcement officials respect the right to life of those under their jurisdiction.

16. The States must provide and facilitate humanitarian assistance to persons affected by situations of internal violence. States must grant humanitarian organizations all the facilities necessary to enable them to carry out their humanitarian mission and have access to the population and provide humanitarian aid; States must refrain from obstructing the work of these organizations and respect and protect humanitarian aid workers and their facilities and means of transportation. Accordingly, this Committee urges the member States of our organization to authorize the fullest possible collaboration of humanitarian organizations to mitigate the human suffering caused by such violent situations.

17. States must guarantee protection of the right to life of persons involved in or affected by situations of internal violence. They must take care to ensure that the law enforcement personnel who are authorized to use force are respectful of the right to life of the persons under the States' jurisdiction. States must have a framework of laws and a judicial system that are adequate for these purposes. The States have an obligation to adopt concrete and effective measures and procedures to prevent disappearances and thoroughly investigate cases of persons who went missing or disappeared under circumstances that may suggest a violation of the right to life.

18. The States have an obligation to guarantee the right to humane treatment of persons involved in or affected by situations of internal violence. They have a duty to provide medical attention to persons injured or otherwise affected by these situations. The States may not inflict, instigate or tolerate any act of torture or cruel, inhuman or degrading treatment or punishment. They must also respect the rights that persons deprived of liberty have to be treated with respect for the dignity inherent in the human person and to decent conditions of detention, as required under the applicable international instruments.

19. The States must respect the right to personal liberty of persons involved in or affected by situations of internal violence. A detention done for reasons of public safety must not be arbitrary and must be based on grounds and procedures established by law.

20. The States must respect the privacy rights of individuals, their families, their homes or private correspondence. Any restrictions to this right must be provided for in the constitutions and laws, pursue a legitimate end and be those necessary to preserve a democratic society.

21. The States must make provision for effective judicial remedies that ensure that the measures taken by police and prosecutorial authorities are respectful of the individual rights protected under the Convention. It is therefore recommended that controls be established to ensure that detentions and infringements of privacy rights are done according to law.

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7. International Humanitarian Law: model legislation on protection of cultural property in cases of armed conflict

In 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 (DDI), 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."

During the 72nd regular session of the Inter-American Juridical Committee (Rio de Janeiro, Brazil, March 2008), 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.

In June 2008, the General Assembly 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.

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.

During the 74th regular session of the Inter-American Juridical Committee (Bogota, March 2009), 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.

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.

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

In June 2009, the General Assembly resolutions AG/RES. 2515 (XXIX-O/09) and AG/RES. 2507 (XXIX-O/09) 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."

He also 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.

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.

At the 76th Regular Session of the Inter-American Juridical Committee (Lima, Peru, March 2010), Dr. Jorge Palacios, the rapporteur for the topic, pointed out 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 cleared up, 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. 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. 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.

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.

During the 78th regular session of the Inter-American Juridical Committee (Rio de Janeiro, Brazil, March 2011), the Chairman Fernández de Soto clarified that the mandate consisted in "preparing and proposing model laws to support the efforts undertaken by member states to implement obligations arising from treaties in the area of international humanitarian law." In this regard, the Committee requested member states to draw up a list of priority topics. The following six countries have responded: Bolivia, Ecuador, El Salvador, Mexico, Suriname, and Paraguay.

As regards the follow-up on this mandate, some members proposed that it be considered as concluded. At the same time, there were members who requested that the General Assembly be informed about the absence of responses by member states and the lack of interest in continuing this topic. In addition, the Chairman Fernández de Soto was requested to pay a courtesy visit to the Permanent Representative of Mexico to the OAS while he was present at headquarters in April 2011, for information on the mandate that said mission would be presenting to the General Assembly.

Since Dr. Jorge Palacios was the rapporteur for this topic, Dr. Negro suggested that a rapporteur be appointed for the continuation of the mandate. Dr. Elizabeth Villalta expressed an interest in serving as rapporteur for this topic.

After discussion, it was decided that the item would remain on the agenda and a decision on dealing with this topic would be made at the August session, in light of the new mandate to be granted by the General Assembly.

During the forty-first regular session of the OAS General Assembly (El Salvador, June 2011), the Inter-American Juridical Committee was requested to "propose model laws to support the efforts made by member states to fulfill obligations under international humanitarian law treaties, with an emphasis on protection of cultural property in the event of armed conflict, and to report on the progress made to the General Assembly at its forty-second and forty-third regular sessions, respectively", (AG/RES. 2650 (XLI-O/11).

During the 79th regular session of the Inter-American Juridical Committee (Rio de Janeiro, Brazil, August 2011), Dr. Dante Negro encouraged the Committee to appoint a rapporteur to replace Dr. Jorge Palacios, and presented a document prepared by the Department that could serve as a basis for initial research ("Protection of Cultural Property in Armed Conflict: Considerations for the National Implementation of IHL Rules," document DDI/doc.10 of July 26, 2011). In response to Dr. Hubert's question regarding the history of model laws in the Committee, Dr. Negro referred to the work done on the subject of Transnational Bribery and Illicit Enrichment, in addition to the cases where the Committee prepared guidelines.

The Chairman Fernández de Soto requested Dr. Freddy Castillo to draft an explanatory report on the mandate, with the support of the Secretariat, to clarify and specify the work of the Committee on the subject. He agreed, and noted the highly advanced work of UNESCO. Dr. Freddy Castillo confirmed the relevance of studying this topic given the current situation. He indicated that he had found legal instruments that protect both the cultural and natural patrimony and property in times of armed conflict. He cited the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflicts that appeared as a response to the destruction of two world wars. He also referred to adoption of Protocol II to the Convention, which updates the instrument. He mentioned a fund of financial resources to protect said cultural property in the event of armed conflict. At the same time, he voiced his concern regarding countries that do not have property declared as the patrimony of humanity and that appear to be unprotected. Finally, he recommended that the work of preparing the model laws is meaningful to other areas of law. In response to a question by Dr. Hubert on the status of preservation of cultural property in the case of internal clashes that are not part of cross-border conflicts, the Committee agreed to work on mechanisms to implement and develop in cases of internal conflicts.

Dr. Villalta referred to the interest of the ICRC in protection of property in the event of both international and internal armed conflicts. In addition, she explained her position on the need to deal separately with the topics of cultural diversity and international humanitarian law.

Dr. Mauricio Herdocia made two suggestions to the rapporteur on this subject: first, to incorporate the work done by the ICRC with the national committees on international humanitarian law; and, second, to include developments related to appropriation of cultural property in cases of both international and internal armed conflicts, and to cover matters related to war crimes in this context.

Dr. Gómez Mont Urueta requested that a relationship be established between cultural events as a value added by man and the natural environment.

At the end of the discussion on the General Assembly mandate, the Chairman Fernández de Soto asked Dr. Castillo to serve as rapporteur on this topic to which he assented.

During the 80th regular session of the Inter-American Juridical Committee (Mexico City, March 2012) the joint rapporteur for the issue, Dr. Elizabeth Villalta, explained her report, "Model Legislation on Protection of Cultural Property in the Event of Armed Conflict", document CJI/doc.403/12, dated February 28, 2012. In reading the document, the rapporteur made specific reference to the mandate and identified the relevant instruments that will serve in preparing a model legislation to protect cultural property in armed conflict situations.

Dr. Luis Moreno observed that security in the Americas was now a priority issue, because groups such as gangs, guerrillas, terrorists, drug traffickers, and assassins, which have no respect for cultural property, had developed, and in that connection he urged the rapporteur to identify such groups and the sanctions that should be applied to them.

Dr. Carlos Mata Prates, meanwhile, quoting the reference to the Rome Statute on the competence of the International Criminal Court, suggested that specific reference be made to the situation of cultural property. With respect to measures that would involve instruments that are not part of the inter-American system, he proposed urging OAS member states to take the steps that they have been prescribed. Finally, he proposed a change in form with respect to general protection.

Chairman Novak expressed appreciation for the presentation of the document and for the precision with which the rapporteur dealt with the mandate. He agreed as well that it was important to discuss international humanitarian law and that the applicable international instruments should be included. He took the opportunity to make the following suggestions: Include OAS states that are signatories to the aforementioned instruments; make reference to the norms considered as part of general international law based on custom; and divide the text into four parts with their respective subtitles.

Dr. David Stewart, following the observation made by Dr. Novak, proposed including those states that are not signatories to the instruments under reference. He asked the rapporteur about her position on the importance of making reference to protection of cultural property in peace time, and to anticipate situations.

Freddy Castillo noted that the rapporteurship for this topic was in the hands of two members of this Committee – Dr. Villalta's and his. He revealed that Dr. Villalta had done a weighting of international instruments on this subject, and he hoped to collaborate on the final drafting of the report. The rapporteurs intended to submit a proposal by August.

Co-rapporteur Dr. Elizabeth Villalta expressed appreciation for all the reports, and stated her intention to include them in her report. Following Dr. Luis Moreno's proposal, the co-rapporteur asked about the appropriateness of referring to new types of conflicts. This was supported by the Dr. Jean-Paul Hubert, who, concerned over the destruction of cemeteries in Libya, requested that mention of threats by fundamentalist religious organizations be included. Chairman Novak asked the rapporteurs for their opinion on the developments outlined in the co-rapporteur's document on

situations of internal violence that qualify as non-international armed conflicts. Both rapporteurs confirmed that they would involve two scenarios, that is, cases of armed conflicts at the international level as well as domestic level. An analysis of cases of internal disturbances and internal tensions would be left for later on.

Chairman Novak concluded by noting that the co-rapporteurs would submit a revised report with the corrections suggested along with a preliminary version of the model legislation for the next session of the Inter-American Juridical Committee, in August.

At the forty-second regular session of the OAS General Assembly (Cochabamba, June 2012) the Inter-American Juridical Committee was requested to "report on progress made in developing model legislation to support efforts undertaken by the member states to implement their obligations under treaties on the subject of international humanitarian law, with emphasis on protecting cultural property in the event of armed conflict" AG/RES. 2722 (XLII-O/12).

At the 81st regular session of the Inter-American Juridical Committee (Rio de Janeiro, Brazil, August 2012) one of the rapporteurs for the topic, Dr. Elizabeth Villalta, presented a report, document CJI/doc.403/12 rev.1, which includes the suggestions mentioned at the previous session held in Mexico City. The report includes as background information relevant legal instruments on the subject matter, a list of ratifications by member states of the OAS, and an explanation of the scope of the general protection for cultural property in the Hemisphere. Dr. Villalta underscored the importance of taking preventive steps in peace time, such as preparation of inventories, planning emergency measures, transfer of cultural property, designation of authorities, and publicity on said measures. She also proposed that issues related to identification and inventories be developed, marking, identification cards, international registry, promotion, and criminal sanctions.

The members of the Committee thanked Dr. Villalta for her presentation. Dr. Freddy Castillo Castellanos confirmed that this document would reinforce the Committee's work in the area of international humanitarian law and protection of cultural property. Dr. Fernando Gómez Mont Urueta noted the complexity involved in dealing with this subject matter and, in light of aggressions that follow regime changes or historical revisionism, expressed his concern with about leaving protection of cultural property exclusively in the hands of the state. Accordingly, he requested that the document identify elements for a registry to be recognized independently of changes that may occur as a result of political circumstances. Vice Chairman Novak presented specific observations to contribute to the work carried out rapporteur Villalta, and requested that national liberation movements be included in the definition of international armed conflict and, in the section on ratifications, naming the states. As regards the draft model law, he proposed eliminating the numbering from the preamble and, in the fifth paragraph of the preamble, making mention of the civil authorities. He further suggested including articles 2, 4, and 5 under one provision and, finally, expressed doubts about the reference to national legislation in article 15.

Dr. David Stewart thanked rapporteur Elizabeth Villalta for the document and inquired as to why the use of language that departed from the typical model law in terms of indicating how states should address safeguard measures. Regarding article 8, he expressed concern about focusing only on criminalization, and thus proposed rewording it. In article 9, he proposed urging the states to designate a central coordinating authority in each country, given the issues that would arise with having an international authority. Rapporteur Villalta explained that penal measures were included in the light of the developments in the criminal codes of several countries but that she would leave the final decision to the plenary. Regarding article 9, she proposed making it a joint effort between the inter-American system and the principles of the Hague Convention.

Dr. José Luis Moreno suggested including international organizations in armed conflicts. Regarding Dr. Gomez Mont's concern about changes in the lists, he suggested wording that provides protection to prevent revisionism for political or religious reasons. Finally, proposed to simplify some provisions by eliminating duplication or multiplication of verbs.

Dr. Carlos Mata Prates proposed deleting the word "only" from the third paragraph and amending article 15, which refers to the rules, since it is very general. Regarding Dr. Gomez Mont's concern, he suggested an alternative formulation to the absolute nature of the registry of property that must be respected regardless of the regime in power. Finally, in relation to the preparation of the draft, he requested that a peremptory norm be included, instead of a reference to the commitment by states.

Dr. Jean-Paul Hubert underscored the difficulties in enforcing international obligations. Dr. Villalta's document contains a list that reminds states of obligations that they must fulfill under the instruments they have ratified, and in this sense, it is extremely useful. Accordingly, her preference was for changing the document format to draw it up as a guide rather than a model law. Dr. Villalta recalled the principles guides drafted by Dr. Herdocia and Dr. Aparicio on a variety of subjects, but felt that this methodology could not satisfy the needs of the ICRC in this subject area.

Dr. Gomez Mont also proposed drafting a set of principles to guide the action of states, since insisting on drawing up a model law would involve a complete re-drafting. To address the concern he expressed before, concerning the registry being absolute, he proposed that in the absence of a list or where existing lists are incomplete, the criterion should be "to take into account the identification of the goods at any time."

Dr. Fabián Novak, although noting that the mandate called for "model laws" to be drafted, did agree with the observation by Dr. Stewart and Dr. Hubert concerning the way the document was written. In that connection, he acknowledged that although drawing up a model law may involve more effort, the mandate must be respected and states facilitated in terms of how to proceed and to identify the measures that were being proposed.

Dr. Carlos Mata Prates emphasized that the reference to "industrial center" in article 3 could diminish the protection being sought. He therefore proposed rewording article 15 if working on a model law is the aim.

Dr. Villalta expressed concern about the rewording the document, which would involve additional work time and would consequently delay the submission of the document to the General Assembly. For his part, Dr. Castillo Castellanos suggested presenting this preliminary product to the General Assembly as "principles to guide" with a view to a different document to subsequently reflect a model law, a suggestion supported by Dr. Fabián Novak. Chairman Baena Soares felt that present principles to guide should not be incompatible as long as this is explained.

Dr. Jean-Michel Arrighi shed light on progress made in terms of the drafting of legal instruments within the OAS. He said that in the case at hand there was no gap in the rules or the general principles agreed upon, but rather in the modalities of implementation at the domestic level. He cited the case of model laws drawn up by the Committee in relation to the Inter-American Convention against Corruption, and felt it was necessary to seek uniform solutions in implementing international obligations at the domestic level.

Dr. David Stewart asked Dr. Elizabeth Villalta whether there were examples of states that had implemented these instruments. If so, those cases should be used as a reference and, if not, the course of action proposed by Dr. Castillo Castellanos should be followed. Dr. Villalta cited her country as an

example in the area of markings, but requested more time to check the situation in other countries and aspects.

Dr. Hyacinth Lindsay revealed that although Jamaica had laws governing the subject matter, cases of cultural property being stolen were still being properly and duly reported, and presumably protected.

Announcing the document presented could be reviewed at the session in March, Chairman Baena Soares asked the plenary for its position with regard to the presentation of a model law or a set of guiding principles. The members decided in the end that a model law should be drafted.

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8. Sexual orientation, gender identity and expression

During the forty-first regular session of the OAS General Assembly (El Salvador, June 2011), the IACHR and the Inter-American Juridical Committee were requested to do separate studies on the legal implications and conceptual and terminological developments related to sexual orientation, gender identity, and gender expression, and the Committee on Juridical and Political Affairs was instructed to include on its agenda consideration of the results of these studies, with the participation of interested civil society organizations, prior to the forty-second regular session of the General Assembly, AG/RES. 2653 (XLI-O/11).

At the 80th regular session of the Inter-American Juridical Committee (Mexico City, March 2012) the rapporteurs for the topic, Dr. Freddy Castillo Castellanos and Dr. Elizabeth Villalta announced their intention to present a document to the next session of the Committee, in August.

For his part, Dr. Freddy Castillo Castellanos submitted the elements that will be included in the report. Besides reiterating how complex the issue was, particularly with respect to the terminology of the contents, he expressed an interest in confining things to the legal dimension of the issue, sticking to existing laws and the recommendations of United Nations-related institutions involved in the field. He referred to the expression LGBTT, which encompassed the concepts of "lesbians, gays, bisexuals, transsexuals, and transgender people." He further requested the Secretariat to forward any information on cases that have been settled by the Inter-Commission on Human Rights (IACHR) and the Inter-American Court of Human Rights in this area. The rapporteur also expressed an interest in establishing a definition of the concepts and in determining the specific type of protection that should be applied in each case.

Chairman Novak stressed the importance of issue and the need to address the mandate in a clear manner in the report to be submitted in August and to point to protection measures that states should have in place so as to protect these groups, taking into account the characteristics of each.

Dr. Ana Elizabeth Villalta explained efforts being made in her country’s public service, noting as well the discrimination faced by people in terms of access to employment.

Dr. Luis Moreno Guerra, meanwhile, cited studies relating to the process of separation of the sexes, noting that 30% of all living species were homosexual. He said this was therefore not a matter of choice. He said that the studies showed that there were elements that altered genes differently for each case. Finally, he noted that most sexual-orientation-based intolerance was religious in nature as a matter of reality.

Dr. David Stewart agreed that the rapporteurs had adopted a valid point in taking a legal approach, and suggested that they not limit the categories as they are evolving elements. Certain elements may be hard to define, and he therefore proposed that something be drawn up to identify the principles and categories that are recognized today.

Rapporteur Dr. Freddy Castillo Castellanos thanked Dr. Luis Moreno Guerra and Dr. David Stewart for their proposals, noting the intention to produce a report that was legal in nature and based on the issues under purview of the Committee.

Dr. Fernando Gomez Mont acknowledged that the rapporteurs’ work could be easier if effort were made to define the freedoms and determine conflicts, where applicable. He suggested that, for all of the cases, the obligations of states should be spelled out along with the limits on those freedoms with respect to third parties. Dr. Castillo Castellanos expressed appreciation for all of this.

The forty-second regular session of the OAS General Assembly (Cochabamba, June 2012) requested the Inter-American Juridical Committee "to report on progress made on the study of the legal implications and conceptual and terminological developments related to sexual orientation, gender identity, and gender expression" AG/RES. 2722 (XLII-O/12).

At the 81st regular session of the Inter-American Juridical Committee (Rio de Janeiro, Brazil, August, 2012) each of the rapporteurs presented a separate written document pursuant to the General Assembly mandate. Dr. Villalta's report on this topic, document CJI/doc.417/12, contains a definition of the concepts used in this area. It also makes some recommendations that are part of the case law developed by the Inter-American Court of Human Rights and the report prepared by the Inter-American Commission on Human Rights, such as the drafting of an American convention on the subject matter or training for public officials. Dr. Freddy Castillo Castellanos' report, document CJI/doc.421/12, meanwhile, addresses elements that should be included in the study highlighting, among others, the inclusion of principles of non-discrimination and respect for human beings.

Dr. Fabián Novak Talavera called for a review of the General Assembly mandate and for the Committee's work to focus on preparation of a study on the legal implications and conceptual developments on which doctrinal and jurisprudential work on the subject is predicated. The result of this study could be sent to the states and could serve as material for training courses conducted in the inter-American system.

Dr. Jean-Paul Hubert asked the Secretariat about the draft Convention on racism, discrimination, and intolerance, recalling that the Committee had an opportunity to comment on the matters related to how this subject is handled, in "The Struggle Against Discrimination and Intolerance in the Americas " (CJI/RES. 124 (LXX-O/07).

Dr. Dante Negro clarified the situation regarding the treatment of the Draft Convention that Dr. Hubert mentioned, asserting that said issue is now divided into two drafts – one on racial discrimination and the other on all forms of discrimination and intolerance.

Dr. Carlos Mata Prates referred to training being conducted at the Foreign Ministry of Uruguay and to administrative and judicial developments that have taken place in his country, with respect to marriages between persons of the same sex or the granting of child custody to same-sex couples. Following Dr. Novak's suggestion, he urged the rapporteurs to do an objective job.

Dr. Hyacinth Evadne Lindsay said she was interested in sending a copy of this report to her government to facilitate the drafting of a bill on the subject that will be the focus of discussions.

At the end of the discussion the rapporteurs were requested to present at the next session a document incorporating the suggestions made.

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9. Topics on Private International Law: Inter-American Specialized Conference on Private International Law

In 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.

On that occasion, the Committee was asked to collaborate on preparations for the upcoming CIDIP-VII, resolution AG/RES. 2069 (XXXV-O/05) "Observations and Recommendations on the Annual Report of the Inter-American Juridical Committee".

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," in which it requested the rapporteurs of the theme to participate in the consultation mechanisms regarding the themes proposed for CIDIP-VII, and principally at the meeting of experts convened for that purpose.

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 rapporteur 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 rapporteur use mentioned the three proposals submitted: one from Brazil regarding an Inter-American Convention on the Law Applicable to certain Contracts and Consumer Relations; one from the United States on a Model Law on Monetary Restitution regarding the availability of dispute resolution and redress measures for consumers, along with three Model Law appendices: one on Claims for Minor Amounts, one on Electronic Arbitration for Cross-border Claims, and one on Governmental Restitution; and one from Canada regarding a convention on jurisdiction or model legislation on jurisdiction and uniformly applicable legal provisions in consumer contracts.

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. This proposal was also divided into three components: 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-rapporteur, and reiterated the request to participate in consultation mechanisms, and to keep the Committee informed of progress in discussions on these topics.

In 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), it 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.

At the 70th regular session of the Inter-American Juridical Committee (San Salvador, February-March 2007), 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 instruments to facilitate, enforce, and guarantee consumer protection, especially at the aforesaid First Meeting of Experts.

At the 72nd regular session of the Inter-American Juridical Committee (Rio de Janeiro, March 2008), 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".

At the 73rd regular session of the Inter-American Juridical Committee (Rio de Janeiro, August 2008), Dr. Ana Elizabeth Villalta Vizcarra, rapporteur 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.

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. At the same time, he pointed out that with the assistance of *Fondo España*, 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.

The rapporteur on the subject, Dr. Ana Elizabeth Villalta, referred to the history of this issue, and underlined the current impasse involving the 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.

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.

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 OAS 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."

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.

In June 2010, the OAS General Assembly 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), the topic was not discussed.

During the 78th regular session of the Inter-American Juridical Committee held in Rio de Janeiro in March 2011), Dr. Dante Negro explained that because of difficulties encountered at the General Assembly in Lima in June 2010 between the delegations of Brazil and the United States, the topic was sent back to the Committee on Juridical and Political Affairs via the Permanent Council.

Dr. Negro also used the opportunity to urge the Committee to present new topics or proposals that might be of interest for future contributions.

Dr. Villalta reported on the meeting of the ASADIP (American Association of Private International Law) to be held on Friday 25 March in Rio de Janeiro, and invited Professor Cláudia Lima Marques to make a presentation on the themes that this instance is working on. In addition, she proposed addressing as a new theme commercial arbitration in investments as a dispute settlement mechanism.

The Chairman Guillermo Fernández de Soto proposed analyzing the Panama and New York Conventions. Dr. Luis Toro Utillano revealed the recent signing of a cooperation Agreement between the OAS and the Permanent Court of Arbitration, an instrument that could serve as a reference, considering the interest and availability that the Court has shown to work with the Organization. The Chairman described the multiple international bodies working on the theme, emphasizing in particular the role of the Chambers of Commerce in Latin America, the *CCI* in Paris and the AAA in the United States of America.

Dr. Stewart agreed on the broad nature of arbitration and invited the Committee to make a selection of a practical topic. He expressed interest in following up on the theme of protection of data, also noting that there is a mandate from the General Assembly and that this is a field where there are no initiatives based in Latin America. He committed himself to drafting a document for the session in August.

The Chairman Férnandez de Soto, after underscoring Dr. Stewart's observation on the importance of dispute settlement mechanisms, personally committed himself and asked Drs. Stewart and Villalta to contribute to the presentation of a list of six topics for the upcoming sessions of the

Committee in order to help the Committee's reflections. Dr. Jean-Paul Hubert suggested using care in selecting the themes.

As to the follow-up on this topic, Dr. Stewart proposed keeping it on the agenda and working on certain considerations regarding the present CIDIP, as well as analyzing new themes for a future CIDIP (protection of data, simplified companies, international law in domestic courts). Dr. Herdocia supported Dr. Stewart's proposals. The Chairman also proposed including the subject of alternative methods of settling disputes, in particular as related to International Arbitration.

During the 79th regular session of the Inter-American Juridical Committee (Rio de Janeiro, Brazil, August 2011), Dr. Stewart reported on the lack of significant progress in the CIDIP process, and expressed his interest in working on the topic of protection of personal data and corporations. At the end of the discussion, the Chairman Fernández de Soto, suggested that talks on this subject be taken up again later.

During the 80th regular session of the Inter-American Juridical Committee (Mexico City, March 2012), Dr. Elizabeth Villalta raised concerns about follow-up on this issue and the need for the Inter-American Juridical Committee to be involved in regional forums engaged on this issue, and suggested that the Committee work on the issue of consumer protection.

Dr. Jean-Paul Hubert felt that the Committee should not be concerned with follow-up on consumer protection but should instead select new options from among the existing range of interesting issues.

Chairman Novak requested Dr. David Stewart to present, by the August session, a couple of issues for the Juridical Committee to work on, specifically with a presentation on their importance. He agreed that the Committee needed to contribute to these issues without falling prey to the paralysis of the last CIDIP, and agreed with Dr. Jean-Paul Hubert in this regard. The plenary approved the proposal presented.

At the 81st regular session of the Inter-American Juridical Committee (Rio de Janeiro, Brazil, August 2012), Dr. David Stewart reported that there had been no new developments on CIDIP. He then announced two new proposals for the Committee to take up.

The first was a proposed uniform law on electronic customs receipts relating to the transportation of agricultural products. He said many countries had very outdated procedures for receipts in the transportation of the products concerned, at the various stages of the production chain. Dr. Jean-Michel Arrighi proposed that Dr. David Stewart verify the scope of the Inter-American Convention on contracts for the international carriage of goods by land.

The second proposed topic relates to the adoption of an instrument on the immunity of states in transnational lawsuits. He said the Committee to prepare a draft convention on the immunity of states in 1986 but that effort was not fruitful, and he added that the states did not have proper laws in place. In his explanation, Dr. David Stewart noted the implications that an instrument of this sort could have for the area of trade and the immunity of government officials.

Dr. Carlos Mata Prates expressed appreciation for both proposals and, with respect to immunity from jurisdiction, felt that the Committee could contribute to the scope of that immunity in order to clarify the status of individuals and of the state.

Dr. Elizabeth Villalta suggested that the family issues that were presented in Mexico by the Association of Private International Law be considered, along with the proposal for a network of judges referred to the day before by Professor Adriana Dreyzin de Klor. Presented with these two options, the plenary decided to work on the latter.

Dr. Fernando Gomez Mont proposed that the plenary Urueta appoint Dr. David Stewart as rapporteur for the topic of electronic customs receipts in the transportation of agricultural products; and, for as rapporteur for immunity from jurisdiction, Dr. Carlos Mata Prates, who would also work on the issue of the network of judges.

This proposal was accepted by all members, and the Chairman Baena Soares instructed each rapporteur to present a study at the next session of the Committee.

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10. General guidelines for border integration

During the 80th regular session of the Inter-American Juridical Committee (Mexico City, March 2012), Dr. Luis Moreno Guerra proposed including a new topic on the agenda, entitled "General guidelines for border integration," and establishing national jurisdictions to facilitate said integration. The Plenary supported the proposal and appointed Dr. Moreno Guerra as the rapporteur for this subject. He undertook to submit a proposal at the next session.

During the 81st regular session of the Inter-American Juridical Committee (Rio de Janeiro, Brazil, August, 2012), the rapporteur on the subject, Dr. Luis Moreno Guerra, presented the first report, document "Border Integration" (CJI/doc.415/12).

The rapporteur warned that this document should not be considered a template to be executed automatically in each integration process, but rather as a working tool. In the rapporteur's opinion, integration should be regarded as an expeditious mechanism for countries' economic growth and the social development of their peoples, within a framework of equity and inclusion.

Dr. Fabián Novak Talavera provided some examples of how border integration processes are forged. In that context, he asked the rapporteur to describe, in as detailed a manner as possible, those processes that were proving to be successful and to point out the depressed zones on the geographical sidelines. The rapporteur welcomed Dr. Novak's comments and added that the ultimate purpose of his mandate was to propose a legal model or framework to facilitate bilateral integration. Finally, Dr. Novak asked the rapporteur to cite Articles 99 and 100 of the OAS Charter in the section relating to the mandate.

Dr. Fernando Gómez Mont Urueta described the integration dynamics on the Mexican border and suggested that the rapporteur analyze the advantages of integration in light of the pressures exerted by globalization. In addition, he suggested making guiding principles available to States to enable them to pool their efforts in favor of integration. Those principles should acknowledge the problems involved as well as possible remedies for addressing asymmetries and tensions.

Dr. Carlos Mata Prates described some experiences with integration between Uruguay and Brazil and Uruguay and Argentina and invited the rapporteur to produce an initial report focusing on a bilateral framework, and then to move on to more advanced forms of integration.

Dr. Elizabeth Villalta mentioned the efforts of El Salvador and Honduras to facilitate access to property, possession and even nationality of the citizens of both countries, based on their "Convention on Nationality and Acquired Rights."

Dr. Miguel Pichardo noted the usefulness of the rapporteur's document, which could lend support to integration efforts on the border between the Dominican Republic and Haiti, and he asked the rapporteur how deep the integration process went. The rapporteur said that the limits to the process were set by the citizens themselves, who generally called for greater progress.

Dr. David Stewart urged the rapporteur first to conduct an empirical survey of structures already in place, so as to arrive at conclusions regarding them.

The Chair, Dr. Baena Soares, thanked the Committee members for their suggestions and proposals for enriching the rapporteur's work and continuing to address the issue. He thanked the rapporteur and asked him to submit a new version, incorporating existing integration efforts, at the next session.

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CHAPTER III

OTHER ACTIVITIES

ACTIVITIES CARRIED OUT BY THE INTER-AMERICAN JURIDICAL COMMITTEE DURING 2012

A. Presentation of the Annual Report of the Inter-American Juridical Committee

Documents	
CJI/doc.416/12	Statement of Dr. David P. Stewart as Representative of the Inter-American Juridical Committee before the International Law Commission of the United Nations (Geneva, July 25, 2012)
CJI/doc.424/12	Presentation of the Annual Report of the Inter-American Juridical Committee to the OAS General Assembly (Forty-second regular session, Cochabamba, Bolivia, June 3-5, 2012) (presented by Dr. Fabián Novak Talavera)

During the 81st regular session of the Inter-American Juridical Committee (Rio de Janeiro, Brazil, August 2012), Dr. David Stewart presented the Annual Report to the Committee on Juridical and Political Affairs and participated in a meeting of the United Nations International Law Commission. He said he had been warmly welcomed by both institutions and mentioned the topics he had raised with each body.

His presentation to the Committee on Juridical and Political Affairs took place on Tuesday, April 3, 2012. There, Dr. Stewart referred to the two regular sessions of the CJI in 2011, the first in March and the second in August, at its headquarters in Rio de Janeiro, Brazil. In those two sessions, the Inter-American Juridical Committee had adopted resolutions on: "Participatory Democracy and Citizen Participation"; "Peace, Security and Cooperation"; "Relations between asylum and refuge"; and "Freedom of Thought and Expression", all of which form part of the Annual Report. As for sessions held outside Committee Headquarters, Dr. Stewart thanked the Mexican Government for having taken steps to enable a successful working session to take place in March of this year and he urged States to follow that example. He expressed the Committee's concern at the increase in the number and complexity of mandates in areas of great interest and importance while at the same time the Committee's financial and human resources were being cut back. In that connection, he pointed out that holding sessions away from headquarters could be one way to ease the burden on the Committee's budget, since the host country defrays some of the costs. For their part, the delegates of the permanent missions who were present noted the valid nature of the Committee's budgetary concerns and expressed their appreciation of the Committee's efforts to comply with the mandates imposed on it by the General Assembly. The delegate of Mexico thanked the Committee and said his country had been very satisfied with the Committee session held in March in Mexico City, which had, moreover, facilitated encounters with the various State bodies responsible for implementing international law, and he invited the other delegates to offer to host future sessions of the Committee in their respective capitals. The Permanent Representative of Panama to the OAS said he was interested in making arrangements with his Government for a session of the Inter-American Juridical Committee in Panama.

As regards the presentation to the International Law Commission of the United Nations, on June 22, 2012, Dr. Stewart had discerned great interest on the part of the Commission in getting to know the work of the Committee, particularly with respect to direct participation; freedom of expression and opinion; cultural diversity; gender identity; the strengthening of the human rights mechanism; and refugees. He also detected a desire to establish more direct ties of cooperation

between the two entities in several areas within their spheres of competence. Dr. Stewart concluded his verbal report with a suggestion that the Committee be more pro-active with regard to the agenda of the International Law Commission, focusing on issues that could pertain to the same field. In addition, he asked the Secretariat for a list of international organizations similar in nature to the Committee. Dr. David P. Stewart's report to the International Law Commission of the United Nations is contained in document CJI/doc.416/12, attached hereto.

CJI/doc. 416/12

STATEMENT OF DR. DAVID P. STEWART AS REPRESENTATIVE OF THE INTER-AMERICAN JURIDICAL COMMITTEE BEFORE THE INTERNATIONAL LAW COMMISSION OF THE UNITED NATIONS
(Geneva, July 25, 2012)

Chairman Caflisch, Distinguished Members of the International Law Commission, and Members of the Secretariat:

It is a pleasure to be here this morning to report to you on the recent activities of the Inter-American Juridical Committee. Both bodies – your Commission and our Committee – are engaged in the progressive development and codification of international law, yours from a global perspective and ours from a regional perspective.

Our methods of work and our agendas share some common features as well as some distinct differences, but there can be no doubt about the wisdom and utility of consultations of the kind we will engage in this morning. In that spirit, my purpose is to offer you an overview of the Committee's work over the past year. We have already provided the Commission with the very detailed "Annual Report of the Inter-American Juridical Committee for 2011", so I will limit my remarks to a few of the most important issues. Of course I will be pleased to respond to any questions the members of this Commission may have.

Some of you are already familiar with the origins and structure of the Inter-American Juridical Committee. Indeed, Dr. Stephen Vasciannie is himself a former member of the Committee. But for those who have not yet had the opportunity, allow me spend just a few minutes describing the Committee.

I. The structure and purpose of the Inter-American Juridical Committee

The Inter-American Juridical Committee is an integral part of the Organization of American States and serves as the Organization's principal advisory body on international juridical matters. This role is set forth in the 1948 OAS Charter itself (Arts. 99-105), to which all 35 member states of the OAS are party. The origins of the Committee, however, extend back into the beginning of the 20th century, to the Permanent Commission of Jurisconsultes created in 1906. Some of your members may recall that the International Law Commission helped to celebrate the centenary of our Juridical Committee in 2006.

We are eleven members elected by the OAS General Assembly as independent experts for four year terms. Our current Chairman is Ambassador João Clemente Baena Soares, former Secretary General of the OAS. The Committee's headquarters are in Rio de Janeiro, but we frequently meet by invitation in other member states.

The Committee provides advice and undertakes studies and projects both at the request of the OAS General Assembly and on its own initiative. At any given time, the Committee's agenda will include self-generated work as well as mandates given by the General Assembly. We may be providing advice or opinions on specific matters of regional interest or global importance, working on the harmonization of laws among the member states, preparing draft conventions or other instruments, conducting studies of juridical problems related to regional integration, proposing

conferences and meetings on international juridical matters, or conducting cooperative relations with other entities engaged in the development or codification of international law.

Over the years, the Committee has prepared many notable instruments, including for example the American Convention on Human Rights (1969); the Inter-American Convention to Prevent and Punish the Acts of Terrorism taking the Form of Crimes against Persons and related Extortion that are International Significance (1971); and the Inter-American Convention on Extradition (1981). More recently, the Committee helped to prepare the Inter-American Convention on the Law Applicable to International Contracts (1994); the Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities (1999); the Inter-American Convention against Corruption (1996), and the Inter-American Democratic Charter (2001), which reflects a shared commitment to democracy of enormous importance in our hemisphere.

As part of our efforts to promote interest in and awareness of international law, since 1974 the Committee has organized an annual course on international law for young lawyers from OAS member states. The theme of last summer's course was "International Law and Democracy" in commemoration of the 10th anniversary of the Inter-American Democratic Charter. Over 30 students attended (18 were on OAS scholarships) and the faculty included 21 distinguished lecturers from various OAS and European countries. The course has been supported by the Governments of Spain, France and Switzerland, for which we are grateful.

It has been my privilege to participate as a lecturer over the past several years and I can inform this body that it is a highly regarded and timely course, and it unquestionably makes a true contribution to the promotion and development of international law throughout the Americas.

A traditional hallmark of the Committee, and one feature that distinguishes our work from yours, is an emphasis on issues of Private International Law. One of the Committee's predecessors prepared the well-known Bustamante Code of Private International Law in 1928. More recently, this aspect of our work has been centered on specialized conferences on private international law, known by their Spanish acronym "CIDIP." Through the years, these CIDIP conferences have dealt with such varied topics as the choice of law in contractual matters, the enforcement of arbitral awards, proof of foreign law, trans-border child support, extra-contractual civil liability, electronic registries for secured transactions, and international consumer protection.

Overall, the CIDIP process has produced 26 instruments (including 20 Conventions, 3 Protocols, 1 Model Law and 2 Uniform Documents). These instruments help create an effective legal framework for judicial cooperation and add legal certainty to cross-border transactions in civil, family, commercial and procedural dealings of individuals in the Inter-American context.

Before concluding this brief review, I must convey the very sad news that our longtime friend and colleague, *Manoel Tolomei Moletta*, passed a few short weeks ago away after a valiant struggle with cancer. Manoel served as Secretary of the Committee for quite a number of years, and we mourn his loss.

II. The Committee's substantive Agenda

Let me turn now to the recent substantive work of the Committee. As you would expect, our deliberations have covered a wide range of topics, some of which remain under consideration. I will speak only to six (6) which I believe are particularly important and may be of some interest to members of the Commission.

1. Inter-American Human Rights System

As I am certain all of the members of this Commission are aware, the protection and promotion of human rights is one of the core missions of the OAS. At the heart of our regional human rights system are two foundational instruments, the American Declaration on the Rights and Duties of Man and the American Convention on Human Rights.

Our Committee has long played an active role in this critical area. Over the past several years, for example, the Committee has provided advice in connection with the preparation of a regional instrument concerning new forms of racism and racial discrimination.

Last year, the General Assembly asked the Committee to prepare a study of ways to strengthen the regional human rights system. Our report, forwarded to the General Assembly this past spring, provided a number of recommendations regarding the powers and responsibilities of the system's principal organs, the Inter-American Human Rights Commission (headquartered in Washington) and the Inter-American Human Rights Court (which sits in San José). The study contains a number of comments and suggestions relating to the friendly settlement of cases and the issuance of precautionary measures. It also identifies measures that the Court and Commission might usefully take in promoting human rights and mechanisms for effective follow-up and enforcement of judgments. The study considers it vital for the system to achieve universal application by having more states ratify the instruments that are applied in this area, and it includes proposals for financing these bodies and their ongoing operations.

2. Freedom of Thought and Expression

The General Assembly also asked our Committee to prepare a study regarding freedom of thought and expression. More specifically, we were asked to consider "the importance of guaranteeing the right of freedom of thought and expression, 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." A particular focus of the concerns behind this request was the growing importance of information conveyed by the Internet, and the threat of restrictions on the free flow of information through the Internet.

After extensive discussions, our report was adopted and transmitted to the Permanent Council and the General Assembly. It provided an analysis of Article 13 of the American Convention on Human Rights, its relationship to the consolidation of democracy, as well as limitations and penalties for abuse of that right. The report noted that freedom of thought and expression is an essential element of democracy, and that freedom of the press offers one of the best ways to know and to judge the ideas, attitudes and accomplishments of political leaders. As reflected in the American Convention and various decisions of the Inter-American Commission and Court of Human Rights, however, these are not absolute or unlimited rights, and are balanced by other recognized rights such as the right to honor. Yet States must never engage in prior censorship.

The Report proceeded to suggest some "guiding criteria" for the purpose of respecting freedom of expression, including among others that good journalism always has a commitment to the truth, is independent before all public, political and economic powers, and has the "self-critical capacity to recognize its mistakes." In the words of the Report, "the best way to guarantee freedom of expression is the ethical practice of good journalism … [and] freedom of expression applies to the Internet in the same way as to all other media."

3. Participatory Democracy and Citizen Participation

A third topic on which the General Assembly asked for our views concerns the nature of citizen participation in a democratic system. The promotion of democracy has been one of the major contributions of the Inter-American System in the 21st century, and the Inter-American Democratic Charter has become one of the hemisphere's foundational documents. Of course, democracy is not a static condition, and even when it has been achieved it requires careful maintenance. In our hemisphere, as elsewhere around the world, the institutions of democracy are often subject to challenge. In one formulation, it has been argued that the requirements of a democratic system might be met through various forms of citizen participation, including but not limited to different kinds of electoral processes, even if those in power remain without a fixed term of office and with the clear intent of perpetuating their rule.

Not surprisingly, perhaps, the Committee's view is that democracy does not consist simply of electoral processes on the one hand or other forms of citizen participation on the other hand. Citizen participation is of course important, and our report described thirteen distinct mechanisms of direct citizen participation reflected in the various legal systems in our hemisphere. The report pointed to some of the limitations of those mechanisms and offered suggestions regarding legislative developments as well as jurisdictional and procedural controls in the context of respect for constitutional order and the rights of citizens.

Most importantly, it noted that the distinction between "representative democracy" and "participatory democracy" can be entirely misleading. Representative democracy does not imply a divorce from or rejection of citizen participation, but to the contrary invites citizens to be actively present in the democratic decision-making process. To quote from the study, "The mechanisms of direct participation are therefore seen not as substitutes but rather as con-substantial elements of representative institutions, to which they lend strength and vigor. In synthesis, there is just one democracy, based on representation and comprised of mechanisms for direct participation."

4. Peace, Security and Cooperation

In a fourth mandate from the General Assembly, the Committee was asked to undertake a comparative analysis of the principal legal instruments of the Inter-American system related to peace, security and cooperation. Compared to some other regions of the world, ours has been a relatively peaceful hemisphere over the past fifty or sixty years, yet the maintenance of regional peace and security remains one of the principal goals of the OAS. Our system gives special importance to the principle of non-intervention and to the peaceful resolution of disputes.

The Committee's report provided a detailed comparative study of the various regional instruments relating to peace, security and cooperation, beginning with the 1945 Chapultepec Conference and proceeding through the OAS Charter, the Pact of Bogota, and other instruments such as the Conventions against Terrorism and Corruption and, of course, the Democratic Charter. It painted a picture of "multidimensional" security addressing such non-traditional threats as terrorism, transnational organized crime, trafficking in migrants, drugs and small arms, climate change, and cybercrime, among others. It concluded by emphasizing the need to think creatively about these emergent and evolving threats and to adopt new tools and innovative mechanisms that address the "new realities" of our regional security situation.

To quote from the final text, "Democracy, Rule of Law and Human Rights are an inseparable part of this comprehensive effort where peace, security and cooperation are mutually reinforcing at the continental and national level."

5. Privacy and Data Protection

Over the past several years, the Committee has given particular attention to issues related to the right of individuals to gain access to information held by the State, to the right to privacy in the age of digital information, and to related questions of data protection. These issues are of course essential to a healthy democratic system and to respect for human rights, ever more so in the Internet age. For example, the Committee assisted the Secretariat's Department of International Law in drafting a Model Law on Access to Public Information and an accompanying Implementation Guide, which were adopted in 2010.

This past year, the Committee adopted a "Statement of Principles on Privacy and Protection of Personal Data in the Americas." As you well know, substantial work has been done in this rapidly evolving field by other international and regional organizations, including the OECD, APEC, the Council of Europe and the European Union. Among other developments, "globalization" and the revolution in digital information technology pose unique challenges to traditional concepts of privacy. Addressing these issues involves finding the proper balance between contending interests and principles, including the right to privacy as a fundamental human right, the importance of freedom of speech, opinion and expression, the free flow of information

across borders (which has substantial implications for trade, investment and growth), and the need of every government for security.

Taking into account the work of other international organizations, as well as domestic initiatives within our member States, the Committee has crafted a statement of 12 principles for privacy and personal data protection, to guide further work in this area by the member states. The principles include transparency, clarity, consent, confidentiality and most importantly accountability. Parameters are established for access to and correction of information, the handling of sensitive information, the responsibilities of persons or entities in charge of the information, cross-border use, and publicizing exceptions.

We believe these principles provide a sound basis on which all member States can frame their domestic approaches and adopt legislation on obtaining or using personal data and personal information.

6. Simplified Stock Corporations

The final topic I wish to mention falls clearly into the private international law area. It also concerns a matter of considerable importance to economic development in the region.

You may aware that in many countries in the Americas, the formalities of the process of incorporation, to say nothing of the expenses and the length of time involved, have proven to be a significant obstacle to the creation of new business organizations, especially those involving the smallest business ventures. You may also be aware of the emergence over the past decade of new forms of hybrid corporate organizations in various countries around the world. They are known by different names but essentially involve a blending or combination of two business forms – partnerships and corporations. These new business forms have proven to be especially important with respect to micro-business as well as small and medium-sized enterprises.

The Committee took note of the success of an initiative undertaken in 2008 by the Government of Columbia to permit small businesses to use this new hybrid form to incorporate quickly and inexpensively. The basic approach is to provide microbusinesses with the benefits and protections of incorporation (which makes it easier to obtain financing for new business ventures) while eliminating many of the costs and complexities traditionally associated with the formalities of incorporation. In Columbia, this initiative has been very beneficial to the economy.

The Committee also took note of the work of a highly respected Columbian academic and government official, Prof. Francisco Reyes, who developed a proposed model law based on the Columbian experience. The term he uses is the simplified stock corporation (*la Sociedad por Acciones Simplificadas*). Under his model law, shareholders are provided with limited liability (except when using the corporate veil to perpetrate acts of fraud or abuse of the corporate form). Protection for third parties is included, along with effective and inexpensive oversight by external auditors. From a corporate capital standpoint, this type of business organization allows more contractual freedom, affording shareholders the possibility of issuing various categories or series of stocks. Liquidation and dissolution, on the other hand, involve fairly simple rules.

After a careful review of the proposed model law, the Committee endorsed it and forwarded our analysis and recommendation to the General Assembly for consideration by the member states. We believe this is a worthy initiative, one which can promote economic development and is therefore deserving of careful consideration by member states.

Mr. Chairman, this list does not exhaust the topics about which the Committee has deliberated over the past year.

- We also adopted a “guide to principles on access to justice in the Americas,” which sets out innovative ways to ensure justice systems are autonomous and that rights are guaranteed and accessible to all citizens, against the backdrop of increased demand for justice and less capacity to handle it. The document contains proposals on training and selection of judges, modernization and autonomy of the judicial system, respect for effective judicial remedies, guarantees for equal

access to justice in the various spheres of a country's justice system, alternative justice mechanisms, attention to vulnerable groups, and recognition of multiculturalism.

- We adopted a "guide to principles regarding cultural diversity in the development of international law," which discusses ways to facilitate incorporating cultural diversity into domestic systems. It proposes ways of implementing constitutional and legal recognition of cultural diversity and its relationship to democracy and the multicultural make up of our societies. It also calls for the preservation of the linguistic heritage and restoration of areas destroyed by natural disasters; the creation of institutions and mechanisms to protect and preserve cultural heritage and incorporate cultural diversity into regional integration processes. Finally, the respective roles are defined for civil society, nongovernmental organizations, and the private sector in terms of promoting diversity.

- We adopted a resolution on the relationship between asylum and refugee status, which seeks to ensure that individuals are afforded proper access to asylum *status* under domestic law in accordance with relevant principles of international law. It urges states to offer protection to individuals who are victims of persecution through the appropriate procedures without undermining the specificities of both regimes.

III. Future work

The Committee will hold its 81st regular session in just a few weeks in Rio de Janeiro. It may of interest to you to hear, briefly, what is on the agenda. There are five new items.

1) Preparation of a guide for regulating the use of force and protection of people in situations of internal violence that do not qualify as armed conflict. It is well-known that in a number of countries in the hemisphere, safety and security are seriously threatened by criminal organizations as well as politically motivated mass demonstrations. The aim will be to elaborate a practical legal framework for responding to domestic violence in situations that qualify as neither peace nor war. In democratic societies, law enforcement authorities need to maintain public order and protect themselves while respecting human rights.

2) Preparation of an analytic study on human rights, sexual orientation and gender identity. This topic arises at the request of the OAS General Assembly. The Committee's approach will likely be from the stand-point of non-discrimination, in order to identify the legal principles relevant to assuring respect for the rights of individuals in the various groups.

3) Preparation of model legislation on protection of cultural property in the event of armed conflict. At the direction of the OAS General Assembly, the Committee has been working for several years on ways to promote respect for international humanitarian law in our hemisphere. In light of the rich legacy of cultural assets recognized by UNESCO as world heritage, we are working to prepare model legislation to assist states that are party to the relevant international instruments (in particular the 1954 Hague Convention for the Protection of Cultural property in the Event of Armed Conflict and its two protocols) to comply with their obligations, and to assist states that have not ratified those instruments to adopt appropriate protective legislation. For the moment, analysis of situations involving internal disturbances and tensions has been deferred.

4) Preparation of general guidelines for border integration. This effort, which is at its very beginning, concerns the facilitation of cross-border cooperation in different situations in the hemisphere, with an eye towards eventual sub-national and regional integration.

5) New initiatives in the field of private international law. While work will continue on the subjects of access to information and privacy and personal data protection, the Committee will begin considering possibilities for new initiatives, for example in the field of international commercial and investment arbitration, international immunities from the jurisdiction of domestic courts, and issues related to the role of international law in domestic courts.

IV. A perspective on the work of the Committee

Distinguished members of the Commission,

Even this rather brief review of the structure, agenda and recent work of the Inter-American Juridical Committee indicates to you the wide range of our work on the progressive development of international law. Our focus is, necessarily and properly, on issues of special relevance to our hemisphere and in particular on the specific challenges faced by the Member states of the Organization. Above all, we are dedicated to strengthening the juridical order of the Inter-American System, at the international level and through the effective incorporation of international obligations at the domestic level.

You will have noted from my remarks that the Committee is not bound to confine its deliberations to traditional topics of public international law. By practice and tradition we are eager to take on issues of private international law and to examine the new questions and challenges which arise daily in the trans-border context. We are clearly inclined to concentrate on topics that have a direct and practical impact on people, for example in such areas as consumer protection, access to government information, the right to asylum and refugee status, and the struggle against contemporary forms of discrimination.

We all know that the field of international law is no longer confined to issues concerning the relations between states or international organizations. Today, the concept of public order at the international level must be appreciated in a much broader context. It must be concerned with a wide range of international activity, including those undertaken by non-state actors including individuals and groups of individuals, ranging from trade and commerce, cultural and family matters, and even criminal activity, to the protection of the environment, the settlement of private civil and commercial disputes, and the protection of the consumer. Indeed, it is difficult today to think of an aspect of economic, social or cultural activity that is not conducted across national borders or that does not potentially raise some type of international legal issue.

Rapid advances in technology, communication and commerce pose unique challenges for the international legal system at all levels. Threats to international peace and security no longer come only from nation states; they have an increasingly multi-dimensional character that transcends national boundaries and demands extraordinary collective efforts. Properly understood, the process of development and the effort to eradicate poverty involve inter-related aspects of economic, social and cultural rights that must be carefully considered. The protection and promotion of international recognized human rights is an essential part of building a democratic order.

In all of these areas, the traditional distinctions between international and domestic law and between public and private law have been eroding. So in carrying out our mandate under the OAS Charter, our Committee takes a broad view with the aim of addressing the problems and issues of greatest relevance to the Organization where we can make the most significant and positive contributions.

Speaking personally, however, I must admit that on occasion the pace of our work and the breadth of our agenda seem daunting indeed. It would be nice to have more time and more resources and ample opportunity to consider issues in greater depth and detail. As a former practitioner and government lawyer now turned scholar, I have come to value greatly the chance for thoughtful reflection on complicated problems. For our Committee, the constant challenge is to find the proper balance between study and analysis, on the one hand, and providing practical guidance on fast-moving problems on the other.

V. Conclusion

Mr. Chairman:

Permit me to conclude by thanking you for your attention and the opportunity to acquaint the members of the Commission with the work of the Inter-American Juridical Committee. We

give considerable importance to strengthening the dialogue between the ILC and the CJI and we would be delighted to receive a representative of the Commission at our annual session in Rio de Janeiro, as well at the annual course on International Law which takes place at the same time. Perhaps we might discover other ways for us to collaborate. I look forward to your comments and questions.

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Report presented by Dr. Fabián Novak Talavera to the Forty-Second RegularSession of the General Assembly

The Chairman, Dr. João Clemente Baena Soares, explained that for health reasons he could not attend the General Assembly in Cochabamba and the report was therefore delivered by Dr. Fabián Novak Talavera. Vice Chairman Dr. Novak described how it was a complex General Assembly in that there was a great deal of discussion on strengthening the inter-American human rights system, with little time left for presentations by the other organs, including the CJI. He also shared with the Committee members the positive comments made by the Secretary General regarding the large number of reports submitted by the Inter-American Juridical Committee in such a short time. With respect to the report on the inter-American system, Dr. Novak reported that the Committee's document was well-received, which he illustrated by quoting both the Secretary General and the President of Ecuador. Dr. Novak Talavera also spoke about the training in international law and promotional activities carried out in Rio de Janeiro, with the support of the Department of International Law: the XXXVIII Course on International Law as well as the panel discussion on "The Organization of American States and the defense of democracy: origins and evolution," and the official launch of the book "Democracy in the Work of the Inter-American Juridical Committee (1946-2010)." He concluded his presentation with an explanation of the budget situation and a call to assess the situation whereby more mandates were being assigned to the Committee while its funds were being cut back.

The report appears in the document presented by Dr. Fabián Novak Talavera, CJI/doc.424/12, included herein.

CJI/doc.424/12

PRESENTATION OF THE ANNUAL REPORT OF THE INTER-AMERICAN JURIDICAL COMMITTEE TO THE GENERAL ASSEMBLY
(Forty-second regular session of the General Assembly,
Cochabamba, Bolivia, June 3-5, 2012)
(presented by Dr. Fabián Novak Talavera)

Mr. President of the OAS General Assembly:

I would like to report to the distinguished members of this Assembly on the work of the Inter-American Juridical Committee during its last two sessions.

First, I will comment on the studies and reports produced by this Committee over the past year. Then I will report on actions we have taken in that same period to promote international law. Finally, I will point out a number of budgetary issues facing the Committee.

Regarding the Inter-American Juridical Committee's work, I can report to this Assembly that over the past year the Committee has prepared nine reports on topics as important for the

Americas as representative democracy, human rights, security, and economic and social development.

Thus, on the topic of *Representative Democracy*, the Committee has completed two particularly important reports. The first is a "Guide to Principles on Access to Justice in the Americas". It comprises 15 principles proposed by the Committee to guarantee autonomous, modern, and accessible justice in the countries of the Americas. Thus, there are proposals for training and selecting judges, the modernization and autonomy of the judiciary, the observance of effective judicial remedies, guarantees for equal access to the justice system and attention to vulnerable groups, and recognition of other alternative forms of justice.

For its part, the second report, entitled "Mechanisms for Direct Participation in and Strengthening of Representative Democracy" is devoted to analyzing the different legal systems in the Americas and the direct participation mechanisms they provide for. Thus, the report describes up to 13 direct participation mechanisms established in the various legal systems found in the Americas and the limitations they face in practice. The Committee formulates a set of proposals aimed at perfecting and strengthening those mechanisms.

On the issue of *Security*, the Inter-American Juridical Committee completed a study on "Peace, Security, and Cooperation," which analyzes security in the region, the various inter-American instruments dealing with the subject, and the traditional and modern threats facing the region today, and then makes a series of recommendations designed to address such threats.

In the area of *Economic and Social Development*, the Inter-American Juridical Committee, drawing on Colombia's successful experience in this field, prepared a "Draft Model Law on Simplified Stock Corporation" in which it proposes two types of hybrid corporate organization that eliminate costs and reduces the red tape involved in constituting formal sector corporations. The Committee considers that incorporating these simplified stock corporation models into the domestic legislation of the countries of the Americas may help bring enterprises into the formal sector and advance their economic and social development.

As regards *Human Rights*, the Committee's work was especially prolific, yielding five completed reports.

The first, entitled "Freedom of Thought and Expression," analyzes the scope of Article 13 of the American Convention on Human Rights, which establishes the right to freedom of expression. The Inter-American Juridical Committee's study not only determines the content of that right; it also proposes criteria to govern the exercise of it, while pointing to its importance for representative democracy and the need to exercise it ethically and in accordance with law.

The second report on "The relation between Asylum and Refuge" seeks to clarify the similarities and differences between these two classical concepts of protection of human beings, the spheres in which they operate, and, above all, how they complement one another.

The third report is a "Statement of Principles on Privacy and Personal Data Protection" which documents how developments in communications technology and new forms of digital information can violate individuals' privacy. Accordingly, the Committee puts forward a set of principles and measures that could be incorporated into the domestic laws of the countries of the Americas, in order to guarantee respect for the privacy, honor, and dignity of individuals.

The fourth report, entitled "Guide to Principles regarding Cultural Diversity," establishes the part that, in the Inter-American Juridical Committee's opinion, States and a number of other organizations in society should play in promoting and protecting cultural diversity. That includes seeking constitutional and legal recognition of cultural diversity, as well as the establishment of institutions and mechanisms for protecting and preserving it.

Finally, the fifth report addresses one of the most crucial items on the OAS agenda today, which is "Strengthening of the Inter-American System for the Promotion and Protection of Human Rights." This report contains analysis, commentary, and suggestions regarding various matters of

concern to States and to the other users of this system. Thus, changes and amendments are proposed with respect to friendly settlement, precautionary measures, universalization of the system, financing of the system's organs, compliance with resolutions, procedural matters, and other issues, all of them geared to guaranteeing a transparent, reliable, predictable and expeditious human rights protection system.

On this, the Inter-American Juridical Committee notes with satisfaction that a draft resolution on the Committee's annual report to be adopted at this General Assembly session, includes a mandate to the Permanent Council to include on its agenda consideration of the resolutions and reports adopted by the Juridical Committee over the past year.

With respect to activities designed to promote international law in the region, the Inter-American Juridical Committee not only ran a successful 38th Course on International Law, attended by 21 teachers from different countries in the Americas and Europe and 18 participants with OAS Scholarships; it also organized a meeting to celebrate the tenth anniversary of the adoption of the Inter-American Democratic Charter and published a volume containing essays on democracy written by the Committee from 1946 to 2010. All these academic encounters were widely publicized and enriched by the participation of the inter-American academic community.

Finally, Mr. President, I must point out that the Inter-American Juridical Committee is concerned at the real terms reduction in its budget, which runs counter to the increase in the number and complexity of the mandates assigned to it by the OAS General Assembly.

This cut has meant that in the past three sessions, the Committee has had to meet for less than a week (a far cry from the two weeks they normally took). This, in turn, has meant selecting and prioritizing certain mandates and topics due to time constraints. We consider that the competent organs of this Organization should look closely into this.

In short, Mr. President, the Inter-American Juridical Committee can point with satisfaction to the fulfillment of all the mandates and tasks entrusted to it by this Honorable Assembly.

The Inter-American Juridical Committee therefore looks forward to continuing to contribute to the development of international law in the region and, thereby, to the achievement of the noble purposes and goals of this regional organization.

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The Inter-American Juridical Committee annual Reports are available on the Internet at the following link :

http://www.oas.org/cji/informes_cji.htm (en español)

http://www.oas.org/cji/eng/reports_annualreport_iajc.htm (in English)

B. Juridical Committee Session in Mexico City

The CJI being in Mexico City for its 80th regular session allowed its members to hold meetings with various state agencies, including the Supreme Court, the Federal Institute for Access to Information and Data Protection (IFAI), and the Federal Electoral Institute (IFE), as well as local and international organizations (Mexican International Law Society and International Committee of the Red Cross) engaged in international law. These meetings produced a rich exchange on forms of cooperation and proposals for new items to be included on the Committee's agenda. Opportunity was also allowed for dialogue on the application of international treaties and the relationship between domestic law and international law. Details of those meetings are in Section D.

C. Course on International Law

The XXXIX Course on International Law was held in Rio de Janeiro, Brazil, from August 6 to 24, 2012, under the central theme: "Law and Current International Relations.” This course was

intended for reflect on, discuss, and present updates on a variety of issues in the area of public and private international law. The panelists included renowned professors from the hemisphere and Europe, legal advisers from foreign ministries of some member states, and officials from international organizations and the OAS. In attendance were 20 OAS-funded fellowship holders from various countries of the hemisphere and 15 local and foreign participants who financed their own participation in the course.

The course was inaugurated by the Chairman of the Juridical Committee, Dr. João Clemente Baena Soares, and the OAS Secretary for Legal Affairs, Dr. Jean-Michel Arrighi. Meanwhile, the traditional tribute was delivered by Inter-American Juridical Committee member Dr. Elizabeth Villalta Vizcarra, who dedicated it to the memory of the late Salvadoran jurist Dr. Reynaldo Galindo Pohl.

The Course Program was as follows:

PROGRAM
XXXIX Course on International Law

"Law and Current International Relations"
Río de Janeiro, Brazil
August 6 – 24, 2012

Organized by the Inter-American Juridical Committee and the Department of International Law of the Secretariat for Legal Affairs of the Organization of American States

First Week

Monday 6

9:30 – 10:00	**REGISTRATION**
10:00 – 12:00	**INAUGURATION** Ambassador João Clemente Baena Soares, Chairman of the Inter-American Juridical Committee *Opening remarks* **Dr. Jean-Michel Arrighi,** OAS Secretary for Legal Affairs *Opening remarks* **Dr. Ana Elizabeth Villalta Vizcarra,** Member of the Inter-American Juridical Committee *Homage to Dr. Reynaldo Galindo Pohl (El Salvador)* *Break* Brief message from the Course Coordination Office
2:30 – 4:30	**Adriana Dreyzin de Klor,** Professor of Private International law and Integration Law, *National University of Córdoba*, Argentina *Private International law and judicial activism*

Tuesday 7

9:00 – 10:50	**Adriana Dreyzin de Klor** *Private International law and judicial activism*
11:10 – 1:00	**Adriana Dreyzin de Klor** *Private International law and judicial activism*
2:30 – 4:30	**João Clemente Baena Soares,** Chairman of the Inter-American Juridical Committee *The Inter-American Juridical Committee*

Wednesday 8

9:00 – 10:50	**Inés Bustillo,** Director of the Economic Commission for Latin America and the Caribbean (ECLAC) Office in Washington D.C. *Development challenges and public policies*

11:10 – 1:00	**Freddy Castillo Castellanos,** Member of the Inter-American Juridical Committee *Cultural diversity in the development of international law*
2:30 – 4:30	**David P. Stewart,** Member of the Inter-American Juridical Committee *Humanitarian Intervention and Responsibility to Protect*
Thursday 9	
9:00 – 10:50	**Inés Bustillo** *Financial crises, debt, and access to capital markets*
11:10 – 1:00	**Clovis Baptista,** Executive Secretary of the Inter-American Telecommunication Commission (CITEL) *Telecommunication policies, legislation, and regulation in a era of hyper-connectivity*
2:30 – 4:30	**Arturo Oropeza García,** Researcher with the Judicial Research Institute, National Autonomous University of Mexico (UNAM) *An overview of China's economic model and its legal system*
Friday 10	
9:00 – 10:50	**Clovis Baptista** *Telecommunication policies, legislation, and regulation in a era of hyper-connectivity*
11:10 – 1:00	**Arturo Oropeza García** *An overview of the BRICS countries: economic development and the rule of law*
2:30 – 4:30	**Gabriel Valladares,** Legal Advisor, International Committee of the Red Cross (ICRC) Regional Delegation for Brazil, Argentina, Chile, Paraguay, and Uruguay **Patrick Zahnd,** Legal Advisor, ICRC Regional Delegation for Mexico, Central America, and Cuba *Introduction to international humanitarian law and its relevance today*
<u>Second week</u>	
Monday 13	
9:00 – 10:50	**Tullio Treves,** Professor of international law at the University of Milan, Italy. Judge on the International Law of the Sea Tribunal (1996-2011) *Dispute settlement under the law of the sea*
11:10 – 1:00	**Pierre Michel Eisemann,** Professor, School of Law, Sorbonne – University of Paris 1 *Adjudication of Territorial Disputes*
2:30 – 4:30	**Jean-Michel Arrighi** *Current aspects of inter-American law*
Tuesday 14	
9:00 – 10:50	**Tullio Treves** *Dispute settlement under the law of the sea*
11:10 – 1:00	**Pierre Michel Eisemann** *Adjudication of Territorial Disputes*
2:30 – 4:30	**Jean-Michel Arrighi** *Current aspects of inter-American law*
Wednesday 15	
9:00 – 10:50	**Tullio Treves** *Dispute settlement under the law of the sea*

11:10 – 1:00	**Pierre Michel Eisemann** *Adjudication of Territorial Disputes*
2:30 – 4:30	**Concepción Escobar Hernández,** Lecturer in Public International Law, National Distance-Education University, Spain. Member of the United National International Law Commission. *Building an international criminal justice system: recent developments*
Thursday 16	
9:00 – 10:50	**Concepción Escobar Hernández** *Building an international criminal justice system: recent developments*
11:10 – 1:00	**Antônio Augusto Cançado Trindade,** Magistrate of the International Court of Justice *Jurisdictional immunity of the state with respect to international crimes*
2:30 – 4:30	**Wagner Menezes,** Professor of International Law, Faculty of Law, University of São Paulo, Brazil *The foundations of international law in the contemporary scenario*
Friday 17	
9:00 – 10:50	**Concepción Escobar** *Building an international criminal justice system: recent developments*
11:10 – 1:00	**Antônio Augusto Cançado Trindade** *Jurisdictional immunity of the state with respect to international crimes*
2:30 – 4:30	**Wagner Menezes** *The foundations of international law in the contemporary scenario*
Third week	
Monday 20	
9:00 – 10:50	**Edward Kwakwa,** Legal Counsel, World Intellectual Property Organization (WIPO) *Institutional Issues Relating to WIPO and WTO*
11:10 – 1:00	**Joel Hernández G.,** Ambassador, Permanent Representative of Mexico to the OAS *Legal aspects of international action against climate change*
2:30 – 4:30	**Alejandro M. Lapadu,** Professor of Procedural Law, Faculty of Law, University of Buenos Aires *Human rights and international relations*
Tuesday 21	
9:00 – 10:50	**Edward Kwakwa** *The Developing Countries and their Participation in the Multilateral Trade and Intellectual Property Systems*
11:10 – 1:00	**Joel Hernández G.** *Legal aspects of international action against climate change*
2:30 – 4:30	**Anne-Marie Leroy,** Senior Vice President and General Counsel of the World Bank Group *Current issues in international development: Some perspectives from the World Bank*
Wednesday 22	
9:00 – 10:50	**Edward Kwakwa** *Current Issues in International Intellectual Property Law*

11:10 – 1:00	**Juan Carlos Murillo,** Regional Legal Adviser, **UNHCR**, Costa Rica *Challenges for the international protection of refugees in Latin America*
2:30 – 4:30	**Anne-Marie Leroy** *Current issues in international development: Some perspectives from the World Bank*
Thursday 23	
9:00 – 10:50	**Juan Carlos Murillo** *Protection for persons of interest to the UNHCR and the inter-American human rights system*
11:10 – 1:00	**Anne-Marie Leroy** *Current issues in international development: Some perspectives from the World Bank*
2:30 – 4:30	**Elizabeth Villalta** *The contributions of the Inter-American Juridical Committee to the promotion of the International Criminal Court and International Humanitarian Law*
Friday 24	
10:00	**CLOSING CEREMONY AND PRESENTATION OF CERTIFICATES**

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D. Relations and Cooperation with other Inter-American bodies and with Similar Regional and Global Organizations

1. Participation of members of the Inter-American Juridical Committee as Observers to or Guests of different organizations and conferences in 2012

Political and Juridical Affairs Committee
Washington, April 3, 2012
Dr. David P. Stewart
General Assembly of the OAS
Cochabamba, June 4, 2012
Dr. Fabián Novak Talavera (CJI/doc.424/12)
United Nations Commission on International Law
Genera, June 22, 2012
Dr David P. Stewart (CJI/doc.416/12)

2. Meetings sponsored by the Inter-American Juridical Committee

The Inter-American Juridical Committee welcomed the following persons as guests and visitors at its sessions during 2012:

- **During the 80th regular session, held in Mexico City, Mexico**

  1) March 5, 2012, visit by Mr. Mario Buil-Merce, representing the United Nations Office of the Special Adviser on the Prevention of Genocide. He explained the background to the establishment of that Office and its mandates:

     - Collecting information on massive and serious violations of human rights and of international humanitarian law of ethnic and racial origin, that, if not prevented or halted, might lead to genocide;
     - Acting as a mechanism of early warning to the Secretary-General;

- Making recommendations to the Security Council, through the Secretary-General, on actions to prevent or halt genocide; and
- Liaising with the United Nations system on activities for the prevention of genocide.

2) March 5, 2012, visit by a delegation of the International Committee of the Red Cross (ICRC) in Mexico City, headed by Dr. Patrick Zahnd, who underscored the work being done by both Committees in a number of areas of interest. Special emphasis was placed on a series of activities to promote international humanitarian law, such as the Regional Seminar of National Committees for IHL on the Protection of Cultural Property in Times of Armed Conflict in December 2011. Finally, there was a presentation on the use of force and the protection of persons in situations of internal violence that do not qualify as armed conflict.

3) March 6, 2012, visit by members of the Federal Institute for Access to Information and Data Protection (IFAI), represented by Commissioners Jacqueline Peschard, María Elena Pérez Jaen and Ángel Trinidad, as well as members of their Secretariat. The Commissioners described Mexico's experience with the delivery of information and data protection.

4) March 7, 2012, visit to the Supreme Court of Justice, where the Committee was welcomed by its president, Minister Juan N. Silva Meza. During a working lunch, the discussion focused on the international implementation of treaties and issues relating to the relation between domestic law and international law.

5) March 7, 2012, visit by a delegation of the Mexican Academy of Private International and Comparative Law, comprising Dr. Virginia Aguilar, Dr. Carlos Odriozola Mariscal, Dr. Nuria González Martín, Dr. Leonel Péreznieto Castro, Dr. María Elena Mansilla y Mejía, Dr. Jorge Sánchez, Dr. Ligia Claudia González Lozano, Dr. Jaime Roberto Rendón-Graniell, and Dr. Carlos Sánchez-Mejorada y Velasco. The Academy made proposals to the Committee regarding the approach to the new topics. It was also proposed that those topics be presented in the form of "Guidelines" or "Model Laws." Recommended topics included: Rules governing contractual civil liability derived from the provision of services; Uniform Regime governing international treaty obligations; Uniform inter-American rules governing product distribution contracts; Rules governing assistance by transborder authorities for the protection of unaccompanied minors; Rules governing assistance to undocumented (visa-less) parents who stop seeing their children because of an international restitution to reunite the family.

- **During the 81st regular session, held in Rio de Janeiro, Brazil:**

1) August 7, 2012, visit by Adriana Dreyzin de Klor, Head of the Department of Private International Law and Integration Law of the National University of Cordoba, Argentina. In addition to describing the contents of her class in the International Law Course, Professor Dreyzin de Klor suggested a few topics that the Committee might consider addressing in the area of private international law.

2) August 9, 2012, visit by Arturo Oropeza, Senior Lecturer and Researcher of the Institute for Legal Research at the national Autonomous University of Mexico (UNAM). He described his research and efforts to promote knowledge of China, in particular, and of the BRIC countries (Brazil, Russia, India, and China).

Professor Oropeza presented the Committee with a copy of a book on Chinese law that he had written in collaboration with professors from that country. He also presented a volume on the legal and economic aspects of the current situation in Brazil, Russia, India and China.

3) August 9, 2012, visit by Patrick Zahnd, Regional Legal Advisor for Mexico of the International Committee of the Red Cross (ICRC). On this occasion, Dr. Zahnd underscored the high level of political commitment to international humanitarian law shown by most countries in the Hemisphere. He alluded to the recent contributions that the ICRC had been making to the Committee with respect to the regulation guidelines being drawn up by the rapporteur, Gomez Mont Urueta, and to rapporteur Elizabeth Villalta Vizcarra's work on cultural property. He also spoke about an ICRC study on assistance to victims of armed conflicts and about a series of consultations the ICRC will be conducting regarding the following topics: protection of persons deprived of their liberty and the transfer of detainees between authorities of international and state organizations. Finally, he invited the Committee to the hemispheric seminar of National Committees for International Humanitarian Law, to be held in June 2013.

4) August 9, 2012, visit by Inés Bustillo, Director of the Washington Office of the Economic Commission for Latin America and the Caribbean (ECLAC). Dr. Bustillo discussed the topics she addressed in her presentation during the International Law Course regarding regional development and domestic sources of funding in Latin America (and how they have evolved over time). She also discussed the region's response to financial crises and the role of governance in different international – financial and regulatory –organizations.

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