

ORGANIZATION OF AMERICAN STATES

INTER-AMERICAN JURIDICAL COMMITTEE



OAS

More rights for more people

CJI

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

2020

GENERAL SECRETARIAT
ORGANIZATION OF AMERICAN STATES
WASHINGTON, D.C.
www.oas.org/cji

ANNUAL REPORT OF THE INTER-AMERICAN JURIDICAL COMMITTEE TO THE GENERAL ASSEMBLY • 2020



CIJ

More rights for more people

CHARTER OF THE ORGANIZATION OF AMERICAN STATES*

**Chapter XIV
THE INTER-AMERICAN JURIDICAL COMMITTEE**

Article 99

The purpose of the Inter-American Juridical Committee is to serve the Organization as an advisory body on juridical matters; to promote the progressive development and the codification of international law; and to study juridical problems related to the integration of the developing countries of the Hemisphere and, insofar as may appear desirable, the possibility of attaining uniformity in their legislation.

Article 100

The Inter-American Juridical Committee shall undertake the studies and preparatory work assigned to it by the General Assembly, the Meeting of Consultation of Ministers of Foreign Affairs, or the Councils of the Organization. It may also, on its own initiative, undertake such studies and preparatory work as it considers advisable, and suggest the holding of specialized juridical conferences.

Article 101

The Inter-American Juridical Committee shall be composed of eleven jurists, nationals of Member States, elected by the General Assembly for a period of four years from panels of three candidates presented by Member States. In the election, a system shall be used that takes into account partial replacement of membership and, insofar as possible, equitable geographic representation. No two Members of the Committee may be nationals of the same State.

Vacancies that occur for reasons other than normal expiration of the terms of office of the Members of the Committee shall be filled by the Permanent Council of the Organization in accordance with the criteria set forth in the preceding paragraph.

Article 102

The Inter-American Juridical Committee represents all of the Member States of the Organization, and has the broadest possible technical autonomy.

Article 103

The Inter-American Juridical Committee shall establish cooperative relations with universities, institutes, and other teaching centers, as well as with national and international committees and entities devoted to study, research, teaching, or dissemination of information on juridical matters of international interest.

Article 104

The Inter-American Juridical Committee shall draft its statutes, which shall be submitted to the General Assembly for approval.

The Committee shall adopt its own rules of procedure.

Article 105

The seat of the Inter-American Juridical Committee shall be the city of Rio de Janeiro, but in special cases the Committee may meet at any other place that may be designated, after consultation with the Member State concerned.

* Amended by the "Protocol of Buenos Aires" in 1967, by the "Protocol of Cartagena de Indias" in 1985, by the "Protocol of Washington" in 1992, and by the "Protocol of Managua" in 1993.

The Organization of American States (OAS) is the world's oldest regional organization, dating back to the First International Conference of American States, held in Washington, D.C., from October 1889 to April 1890. At that meeting the establishment of the International Union of American Republics was approved. The Charter of the OAS was signed in Bogotá in 1948 and entered into force in December 1951. The Charter was subsequently amended by the Protocol of Buenos Aires, signed in 1967, which entered into force in February 1970; by the Protocol of Cartagena de Indias, signed in 1985, which entered into force in November 1988; by the Protocol of Managua, signed in 1993, which entered into force on January 29, 1996; and by the Protocol of Washington, signed in 1992, which entered into force on September 25, 1997. The OAS currently has 35 member states. In addition, the Organization has granted permanent observer status to 72 states, as well as to the European Union.

The essential purposes of the OAS are: to strengthen peace and security in the Hemisphere; to promote and consolidate representative democracy, with due respect for the principle of nonintervention; to prevent possible causes of difficulties and to ensure peaceful settlement of disputes that may arise among the member states; to provide for common action on the part of those states in the event of aggression; to seek the solution of political, juridical, and economic problems that may arise among them; to promote, by cooperative action, their economic, social, and cultural development; and to achieve an effective limitation of conventional weapons that will make it possible to devote the largest amount of resources to the economic and social development of the member states.

The Organization of American States accomplishes its purposes by means of: the General Assembly; the Meeting of Consultation of Ministers of Foreign Affairs; the Councils (the Permanent Council and the Inter-American Council for Integral Development); the Inter-American Juridical Committee; the Inter-American Commission on Human Rights; the General Secretariat; the specialized conferences; the specialized organizations; and other entities established by the General Assembly.

The General Assembly holds a regular session once a year. Under special circumstances it meets in special session. The Meeting of Consultation is convened to consider urgent matters of common interest and to serve as Organ of Consultation under the Inter-American Treaty of Reciprocal Assistance (Rio Treaty), the main instrument for joint action in the event of aggression. The Permanent Council takes cognizance of such matters as are entrusted to it by the General Assembly or the Meeting of Consultation and implements the decisions of both organs when their implementation has not been assigned to any other body; it monitors the maintenance of friendly relations among the member states and the observance of the standards governing General Secretariat operations; and it also acts provisionally as Organ of Consultation under the Rio Treaty. The General Secretariat is the central and permanent organ of the OAS. The headquarters of both the Permanent Council and the General Secretariat are in Washington, D.C.

MEMBER STATES: Antigua and Barbuda, Argentina, The Bahamas (Commonwealth of), Barbados, Belize, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, Cuba, Dominica (Commonwealth of), Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Guyana, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Suriname, Trinidad and Tobago, United States, Uruguay, and Venezuela

ORGANIZATION OF AMERICAN STATES
INTER-AMERICAN JURIDICAL COMMITTEE

CJI



97th REGULAR SESSION
August 3 to 7, 2020
Virtual session

OEA/Ser. Q
CJI/doc. 625/20
August 7, 2020
Original: Spanish

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

2020

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).

TABLE OF CONTENTS

	Page
EXPLANATORY NOTE	3
TABLE OF CONTENTS	5
RESOLUTIONS ADOPTED BY THE INTER-AMERICAN JURIDICAL COMMITTEE	7
DOCUMENTS INCLUDED IN THE ANNUAL REPORT	8
INTRODUCTION	9
CHAPTER I	13
1. THE INTER-AMERICAN JURIDICAL COMMITTEE: ITS ORIGIN, LEGAL BASES, STRUCTURE AND PURPOSES	15
2. PERIOD COVERED BY THE ANNUAL REPORT OF THE INTER-AMERICAN JURIDICAL COMMITTEE	16
A. NINETY-SIXTH REGULAR SESSION	16
B. NINETY-SEVENTH REGULAR SESSION	18
CHAPTER II	25
TOPICS DISCUSSED BY THE INTER-AMERICAN JURIDICAL COMMITTEE AT THE REGULAR SESSIONS HELD IN 2020	27
THEMES UNDER CONSIDERATION	27
1. GUIDE FOR THE APPLICATION OF THE PRINCIPLE OF CONVENTIONALITY	27
2. VALIDITY OF FOREIGN JUDICIAL DECISIONS IN LIGHT OF THE INTER-AMERICAN CONVENTION ON EXTRATERRITORIAL VALIDITY OF FOREIGN JUDGMENTS AND ARBITRAL AWARDS	51
3. PROTECTION OF PERSONAL DATA	73
4. ELECTRONIC WAREHOUSE RECEIPTS FOR AGRICULTURAL PRODUCTS	108
5. CYBER-SECURITY	112
6. FOREIGN INTERFERENCE IN A STATE'S ELECTORAL PROCESS: A THREAT TO DEMOCRACY AND SOVEREIGNTY OF STATES, RESPONSE UNDER INTERNATIONAL LAW	171
7. GUIDELINES FOR THE SUBSEQUENT NORMATIVE DEVELOPMENT OF DIPLOMATIC ASYLUM	173
8. INTERNATIONAL CUSTOMARY LAW IN THE CONTEXT OF THE AMERICAN CONTINENT	175
9. ELECTORAL FRAUD AS AN INTERNATIONAL CRIME IN THE INTER-AMERICAN SYSTEM	177
10. MODEL LAW ON THE USE OF FIREWORKS, FOR EITHER PERSONAL USE OR IN MASS FIREWORK DISPLAYS	180
11. LEGAL ASPECTS OF FOREIGN DEBT	183
12. GUIDE ON THE LAW APPLICABLE TO FOREIGN INVESTMENTS	183
13. INCORPORATION OF THE UNITED NATIONS GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS	183
THEMES CONCLUDED	184
1. BINDING AND NON-BINDING AGREEMENTS	184
2. ACCESS TO PUBLIC INFORMATION	323
CHAPTER III	427
ACTIVITIES CARRIED OUT BY THE INTER-AMERICAN JURIDICAL COMMITTEE DURING 2020	429
A. PARTICIPATION OF THE PRESIDENTS OF THE INTER-AMERICAN JURIDICAL COMMITTEE	429
B. INTERNATIONAL LAW COURSE	438
C. RELATIONS AND COOPERATION WITH OTHER INTER-AMERICAN BODIES AND WITH REGIONAL AND GLOBAL ORGANIZATIONS	438
INDEXES	439
ONOMASTIC INDEX	441
SUBJECT INDEX	442

RESOLUTIONS ADOPTED BY THE INTER-AMERICAN JURIDICAL COMMITTEE

	Page
CJI/RES. 253 (XCV-O/19)	16
AGENDA FOR THE NINETY-SIXTH REGULAR SESSION OF THE INTER-AMERICAN JURIDICAL COMMITTEE (RIO DE JANEIRO, BRAZIL, 2 – 6 MARCH, 2020)	
CJI/RES. 251 (XCV-O/19)	17
DATES AND VENUE OF THE NINETY-SIXTH AND NINETY-SEVENTH REGULAR SESSIONS OF THE INTER-AMERICAN JURIDICAL COMMITTEE	
CJI/RES. 254 (XCVI-O/20)	18
TRIBUTE TO MARIA LÚCIA IECKER VIEIRA	
CJI/RES. 256 (XCVI-O/20)	19
AGENDA FOR THE NINETY-SEVEN REGULAR SESSION OF THE INTER- AMERICAN JURIDICAL COMMITTEE (RIO DE JANEIRO, BRAZIL, JULY 29 TO 7 AUGUST, 2020)	
CJI/RES. 261 (XCVII-O/20)	20
TRIBUTE TO DOCTOR DUNCAN B. HOLLIS	
CJI/RES. 262 (XCVII-O/20)	21
TRIBUTE TO DOCTOR ALIX RICHARD	21
CJI/RES. 263 (XCVII-O/20)	21
TRIBUTE TO DOCTOR IÑIGO SALVADOR CRESPO	
CJI/RES. 264 (XCVII-O/20)	22
CONGRATULATIONS TO RUTH STELLA CORREA PALACIO	
CJI/RES. 260 (XCVII-O/20)	170
INTERNATIONAL LAW AND STATE CYBER OPERATIONS	
CJI/RES. 259 (XCVII-O/20)	260
GUIDELINES OF THE INTER-AMERICAN JURIDICAL COMMITTEE ON BINDING AND NON-BINDING AGREEMENTS	
CJI/RES. 255 (XCVI-O/20)	326
PROPOSAL ON AN INTER-AMERICAN MODEL LAW 2.0 ON ACCESS TO PUBLIC INFORMATION	

* * *

DOCUMENTS INCLUDED IN THE ANNUAL REPORT

	Page
CJI/DOC. 604/20	41
GUIDE FOR THE APPLICATION OF THE PRINCIPLE OF CONVENTIONALITY (PRESENTED BY DR. RUTH STELLA CORREA PALACIO)	
CJI/DOC. 611/20	59
DOMESTIC PROCEDURES FOR THE RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS: RECOMMENDATIONS (PRESENTED BY DR. RUTH STELLA CORREA PALACIO)	59
CJI/DOC.606/20 CORR.1	79
UPDATING THE PRINCIPLES ON PRIVACY AND PROTECTION OF PERSONAL DATA (PRESENTED BY DOCTOR MARIANA SALAZAR ALBORNOZ)	
CJI/DOC. 616/20 REV.1 CORR.1	84
DRAFT UPDATES TO THE “PRINCIPLES ON PRIVACY AND PERSONAL DATA PROTECTION WITH ANNOTATIONS” ADOPTED BY THE CJI IN 2015	
CJI/DOC.603/20 REV.1 CORR.1	120
IMPROVING TRANSPARENCY. INTERNATIONAL LAW AND STATE CYBER OPERATIONS: FOURTH REPORT (PRESENTED BY PROFESSOR DUNCAN B. HOLLIS)	
CJI/DOC. 615/20 REV.1	141
IMPROVING TRANSPARENCY. INTERNATIONAL LAW AND STATE CYBER OPERATIONS: FIFTH REPORT (PRESENTED BY PROFESSOR DUNCAN B. HOLLIS)	
CJI/DOC. 600/20	199
BINDING AND NON-BINDING AGREEMENTS: SIXTH REPORT (PRESENTED BY PROFESSOR DUNCAN B. HOLLIS)	
CJI/DOC. 614/20 REV.1 CORR.1	263
BINDING AND NON-BINDING AGREEMENTS: FINAL REPORT (PRESENTED BY PROFESSOR DUNCAN B. HOLLIS)	
CJI/DOC. 607/20	328
PROPOSAL ON AN INTER-AMERICAN MODEL LAW 2.0 ON ACCESS TO PUBLIC INFORMATION	
CJI/DOC. 612/20	430
REPORT BY DR. RUTH STELLA CORREA PALACIO, CHAIR OF THE INTER- AMERICAN JURIDICAL COMMITTEE TO THE COMMITTEE ON JURIDICAL AND POLITICAL AFFAIRS (CAJP) (MAY 14, 2020)	
CP/CAJP/INF. 774/20	432
PRESENTATION OF THE ANNUAL REPORT OF THE INTER-AMERICAN JURIDICAL COMMITTEE BY ITS CHAIR, DR. RUTH CORREA PALACIO, TO THE POLITICAL AND JURIDICAL COMMITTEE (DOCUMENT PREPARED BY THE DEPARTMENT OF INTERNATIONAL LAW)	
CJI/DOC. 626/20	436
ANNUAL REPORT OF THE CHAIR OF THE INTER-AMERICAN JURIDICAL COMMITTEE TO THE GENERAL ASSEMBLY - (VIRTUAL SESSION, OCTOBER 21, 2020) (PRESENTED BY DR. LUIS GARCÍA-CORROCHANO MOYANO)	

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 2020, in accordance with the terms of Articles 91 f) of the Charter of the Organization of American States and 13 of its Statute, and with the instructions of the General Assembly resolutions dealing with the preparation of annual reports by the organs, agencies, and entities of the Organization, such as resolutions AG/RES. 2886 (XLVI-O/16), AG/RES. 2909 (XLVII-O/17), AG/RES. 2926 (XLVIII-O/18), AG/RES. 2930 (XLIX-O/19), and AG/RES. 2959 (L-O/20), adopted in recent years.

In 2020, the Inter-American Juridical Committee held one working session at its headquarters in Rio de Janeiro and another virtually, due to the COVID-19 pandemic. The first session corresponded to its 96th Regular Session, held March 2-6, 2020, and the second, to its 97th Regular Session, held August 3-7, 2020.

In the period covered by this report, the Committee adopted the Draft Model Inter-American Law 2.0 on Access to Public Information, which updates the document prepared by the IAJC in 2010 and expects to offer the citizens of the Hemisphere greater guarantees, based on the good practices of the States. Its preparation benefited from the opinion of oversight bodies, legislators, civil society, and academics and support from the Network for Transparency and Access to Information (RTA) and the EuroSOCIAL+ program. In addition, the IAJC adopted the Guidelines on Binding and Non-binding Agreements, which offer a concrete and detailed series of definitions, points of common understanding, and optimal practices that States can consider employing in the negotiation, adoption, or enforcement of different types of international agreements and their interaction with the responsible actors (States, government entities, and territorial units). The two documents have been submitted to the OAS General Assembly for its due knowledge and consideration.

In the domain of cybersecurity, the Committee recommended to the OAS General Assembly that it support the applicability of international law to state cyber operations through a declaration inserted in the text of a resolution presented in the fifth and final report of Dr. Duncan Hollis on the topic, titled “International Law and State Cyber Operations.” This report underscores, *inter alia*, the need to give the OAS member states clear parameters on the application of international law to cyberspace and a better understanding of the applicable norms. In the domain of cybersecurity, the Committee recommended to the OAS General Assembly that it support the applicability of international law to state cyber operations through a declaration inserted in the text of a resolution presented in the fifth and final report of Dr. Duncan Hollis on the topic, titled “International Law and State Cyber Operations.” This report underscores, *inter alia*, the need to give the OAS member states clear parameters on the application of international law to cyberspace and a better understanding of the applicable norms. The Committee also furthered the discussion of its different agenda items, among them: “Validity of foreign judicial decisions in light of the Inter-American Convention on extraterritorial validity of foreign judgments and arbitral awards;” “Electronic warehouse receipts for agricultural products;” “Guide for the application of the principle of conventionality;” “Protection of personal data;” “Model Law on the use of Fireworks for either personal use or in mass fireworks displays;” and, “International customary law in the context of the American Hemisphere.” It should be noted that the decision was made to keep the item on cybersecurity on the agenda, but with a broader scope.

Two new items were added to the agenda at its own initiative: “Guide on the law applicable to foreign investments” and “Incorporation of the United Nations guiding principles on business and human rights.” At the conclusion of its August 2020 session, the Committee’s agenda consisted of 13 items.

This Annual Report contains the studies on the aforementioned topics and has three chapters. The first explains the origins, legal grounds, and structure of the Inter-American Juridical

Committee and provides information on the sessions held during the year. The second describes the items discussed by the Juridical Committee and includes the text of the resolutions adopted and specific documents. Finally, the third chapter discusses the activities of the Committee and its members over the past year. As is customary, the Report provides a detailed list of the resolutions adopted and documents approved.

The text of the Annual Report 2020 has been approved by Dr. Luis García-Corrochano Moyano as Chair of the Inter-American Juridical Committee.

This information can be found on the Inter-American Juridical Committee's website at: <http://www.oas.org/es/sla/cji/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, it may meet elsewhere after consulting the member state concerned. This advisory body of the Organization on legal affairs consists of eleven jurists who are nationals of the member states of the Organization. Together, those jurists represent all the States and enjoy as much technical autonomy as possible.

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

A. Ninety-sixth regular session

The 96th Regular Session of the Inter-American Juridical Committee took place March 2-6, 2020 at the Committee headquarters 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":

- José Antonio Moreno Rodríguez (Paraguay)
- Luis García-Corrochano Moyano (Peru)
- Ruth Stella Correa Palacio (Colombia)
- Duncan B. Hollis (United States)
- Milenko Bertrand-Galindo Arriagada (Chile)
- Miguel Angel Espeche-Gil (Argentina)
- George Rodrigo Bandeira Galindo (Brazil)
- Mariana Salazar Albornoz (Mexico)
- Eric P. Rudge (Surinam)

The following members did not attend the meeting: Alix Richard and Iñigo Salvador Crespo. The Chair, Dr. Ruth Stella Correa Palacio, welcomed the presence of Dr. Eric P. Rudge from Suriname who is at his first meeting, having been elected by the General Assembly in June 2019, at the sametime of the relectio of Dr. José Antonio Moreno Rodríguez from Paraguay.

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 and Luis Toro Utrillano, Senior Legal Officer at the Department of International Law; and Maria Lúcia Iecker Vieira as well as Maria C. de Souza Gomes from the Secretariat of the Inter-American Juridical Committee.

The Inter-American Juridical Committee had before it the following agenda, adopted by means of resolution CJI/RES. 253 (XCV-O/19), "Agenda for the ninety-sixth regular session of the Inter-American Juridical Committee":

CJI/RES. 253 (XCV-O/19)

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

(Rio de Janeiro, Brazil, 2 – 6 March, 2020)

Current topics:

1. Guide for the application of the principle of conventionality
Rapporteur: Dr. Ruth Stella Correa Palacio
2. Binding and non-binding agreements
Rapporteur: Dr. Duncan B. Hollis
3. Validity of foreign judicial decisions in light of the Inter-American Convention on extraterritorial validity of foreign judgments and arbitral awards
Rapporteur: Dr. Ruth Stella Correa Palacio

4. Protection of personal data
Rapporteurs: Drs. Carlos Mata Prates, Mariana Salazar Albornoz and Milenko Bertrand-Galindo Arriagada
5. Access to public information
Rapporteur: Dr. Luis García-Corrochano
6. Electronic warehouse receipts for agricultural products
Rapporteur: Dr. José Antonio Moreno Rodríguez
7. Cyber-security
Rapporteur: Dr. Duncan B. Hollis
8. Foreign interference in a state's electoral process: a threat to democracy and sovereignty of states, response under international law
Rapporteur: Dr. Alix Richard
9. Legal aspects of foreign debt
Rapporteur: Dr. Miguel A. Espeche-Gil
10. International customary law in the context of the American Continent
Rapporteur: Dr. George Rodrigo Bandeira Galindo
11. Guidelines for a subsequent normative development of diplomatic asylum.
Rapporteur: Dr. Íñigo Salvador Crespo
12. Electoral fraud as an international crime in the Inter-American system
Rapporteur: Dr. Miguel A. Espeche-Gil
13. Model Law on the use of Fireworks, for either personal use or in mass firework displays.
Rapporteur: Dr. Milenko Bertrand-Galindo Arriagada

This resolution was unanimously approved in the regular session held on August 8, 2019, by the following members: Doctors Luis García-Corrochano Moyano, José Antonio Moreno Rodríguez, Ruth Stella Correa Palacio, Carlos Alberto Mata Prates, Duncan B. Hollis, Mariana Salazar Albornoz, Alix Richard, George Rodrigo Bandeira Galindo, and Miguel A. Espeche-Gil.

It must be noted that the decision of the date and venue of both the ninety-sixth and ninety-seventh Regular Sessions of the Inter-American Juridical Committee was made on August 6, 2019, under resolution CJI/RES. 251 (XCV-O/19).

* * *

CJI/RES. 251 (XCV-O/19)

**DATES AND VENUE OF THE
NINETY-SIXTH AND NINETY-SEVENTH REGULAR SESSIONS
OF THE INTER-AMERICAN JURIDICAL COMMITTEE**

THE INTER-AMERICAN JURIDICAL COMMITTEE,

CONSIDERING that Article 15 of its Statute provides for two annual regular sessions;

BEARING IN MIND that Article 14 of its Statute states that the Inter-American Juridical Committee has its headquarters in the city of Rio de Janeiro, Brazil;

RESOLVES to hold its 96th regular session from 2 to 6 March, 2020, in the city of Rio de Janeiro, and the 97th regular session from 29 July to 7 August, 2020, also in the same venue.

This resolution was unanimously approved at the regular session held on August 6, 2019, by the following members: Drs. Luis García-Corrochano Moyano, José Antonio Moreno Rodríguez, Ruth Stella Correa Palacio, Íñigo Salvador Crespo, Carlos Alberto Mata Prates, Duncan B. Hollis, Mariana Salazar Albornoz, Alix Richard, George Rodrigo Bandeira Galindo, Milenko Bertrand-Galindo Arriagada and Miguel A. Espeche-Gil.

At the end of the session, the Committee adopted a resolution that recognizes the work of Maria Lúcia Iecker Vieira, an official of the Committee's Secretariat based at its headquarters in Rio de Janeiro, who is retiring from the OAS after 24 years of dedicated services, CJI/RES. 254 (XCVI-O/20).

CJI/RES. 254 (XCVI-O/20)

TRIBUTE TO MARIA LÚCIA IECKER VIEIRA

THE INTER-AMERICAN JURIDICAL COMMITTEE,

CONSIDERING that this year Ms. Maria Lúcia Vieira is retiring from the OAS after 24 years of dedicated service in the Secretariat of the Juridical Committee;

RECALLING that Ms. Maria Lúcia Vieira has assisted the Committee in various capacities, in particular in the administrative affairs of its secretariat;

MINDFUL of the valuable contribution made by Ms. Maria Lúcia Vieira to both the Inter-American Juridical Committee and its members; and

HIGHLIGHTING the various personal and professional qualities of Ms. Maria Lúcia Vieira,

RESOLVES:

1. To express its deep appreciation to Ms. Maria Lúcia Vieira for her dedication and invaluable contribution to the work of the Inter-American Juridical Committee.
2. To wish her every success in her future endeavors, in the hope that she will remain in contact with the Inter-American Juridical Committee.
3. To present this resolution to her in the presence of the full membership of the Juridical Committee.

This resolution was unanimously adopted at the meeting held on March 5, 2020, by the following members: Doctors José Antonio Moreno Rodríguez, Luis Garcia-Corrochano Moyano, Ruth Stella Correa Palacio, Duncan B. Hollis, Milenko Bertrand-Galindo Arriagada, Miguel A. Espeche-Gil, George Rodrigo Bandeira Galindo, Mariana Salazar Albornoz and Eric P. Rudge.

* * *

B. Ninety-seventh regular session

The 97th Regular Session of the Inter-American Juridical Committee took place on August 3-7, 2020 virtually due to the COVID-19 virus pandemic. All members participated from their countries to the session transmitted via internet .

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 was the following:

- Luis García-Corrochano Moyano (Peru)
- Alix Richard (Haiti)
- Mariana Salazar Albornoz (Mexico)
- José Antonio Moreno Rodríguez (Paraguay)
- Milenko Bertrand-Galindo Arriagada (Chile)
- Duncan B. Hollis (United States)
- Eric P. Rudge (Surinam)

- George Rodrigo Bandeira Galindo (Brazil)
- Miguel Angel Espeche-Gil (Argentina)
- Iñigo Salvador Crespo (Ecuador)
- Ruth Stella Correa Palacio (Colombia)

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, Senior Legal Officer, Jaime Moreno and Eduardo Parada, Legal Officers at the Department of International Law; and Maria C. de Souza Gomes from the Secretariat of the Inter-American Juridical Committee.

At the beginning of the sessions, the Chair of the Committee, Dr. Ruth Correa, announced the results of the election of the two members by the General Assembly (held in Medellin, Colombia, in June of 2019), having elected for a period of four year: Doctors José Antonio Moreno Rodríguez from Paraguay and Eric P. Rudge from Surinam (both of their mandates will start in January 2020).

The Inter-American Juridical Committee has adopted the following “Agenda for the ninety-seventh Regular Session of the Inter-American Juridical Committee”, resolution CJI/RES. 256 (XCVI-O/20).

CJI/RES. 256 (XCVI-O/20)

AGENDA FOR THE NINETY-SEVEN REGULAR SESSION OF THE INTER-AMERICAN JURIDICAL COMMITTEE

(Rio de Janeiro, Brazil, July 29 to 7 August, 2020)

Current topics:

1. Guide for the application of the principle of conventionality
Rapporteur: Dr. Ruth Stella Correa Palacio
2. Binding and non-binding agreements
Rapporteur: Dr. Duncan B. Hollis
3. Validity of foreign judicial decisions in light of the Inter-American Convention on extraterritorial validity of foreign judgments and arbitral awards
Rapporteur: Dr. Ruth Stella Correa Palacio
4. Protection of personal data
Rapporteurs: Drs. Mariana Salazar Albornoz and Milenko Bertrand-Galindo Arriagada
5. Electronic warehouse receipts for agricultural products
Rapporteur: Dr. José Antonio Moreno Rodríguez
6. Cyber-security
Rapporteur: Dr. Duncan B. Hollis
7. Foreign interference in a state’s electoral process: a threat to democracy and sovereignty of states, response under international law
Rapporteur: Dr. Alix Richard
8. Legal aspects of foreign debt
Rapporteur: Dr. Miguel A. Espeche-Gil
9. International customary law in the context of the American Continent
Rapporteur: Dr. George Rodrigo Bandeira Galindo
10. Guidelines for a subsequent normative development of diplomatic asylum.
Rapporteur: Dr. Iñigo Salvador Crespo

11. Electoral fraud as an international crime in the Inter-American system
Rapporteur: Dr. Miguel A. Espeche-Gil
12. Model Law on the use of Fireworks, for either personal use or in mass firework displays.
Rapporteur: Dr. Milenko Bertrand-Galindo Arriagada

This resolution was unanimously approved in the regular session held on March 6, 2020, by the following members: Doctors José Antonio Moreno Rodríguez, Luis García-Corrochano Moyano, Ruth Stella Correa Palacio, Milenko Bertrand-Galindo Arriagada, Miguel A. Espeche-Gil, George Rodrigo Bandeira Galindo, Mariana Salazar Albornoz and Eric P. Rudge.

* * *

Considering the reduced amount of time during the virtual session, two hours daily, the Committee concentrated its efforts mainly on those issues expected to be concluded during the session with a final report or proposal, and left the others pending for next year.

* * *

Due to the completion of their mandates on the 31st December of this year, the CJI took the opportunity to pay tribute to three of its members and extend their appreciation for their contributions, Doctors Duncan Hollis (United States), Alix Richard (Haiti) and Íñigo Salvador Crespo (Ecuador). The CJI also thanked Dr. Ruth Correa Palacio (Colombia) by adopting a resolution for her having acted as Chair for the past two years.

Finally, on August 7, 2020, the CJI elected its new authorities, being chosen as President Dr. Luis García-Corrochano Moyano (Peru) and as Vice President Dr. José Antonio Moreno Rodríguez (Paraguay).

CJI/RES. 261 (XCVII-O/20)

TRIBUTE TO DOCTOR DUNCAN B. HOLLIS

THE INTER-AMERICAN JURIDICAL COMMITTEE,

CONSIDERING that on December 31, 2020 Dr. Duncan B. Hollis' mandate comes to an end;

RECALLING that Dr. Duncan B. Hollis has been a member of the Committee since January 2017;

AWARE of the invaluable contribution made by doctor Hollis throughout his mandate to the work of the Committee, and that his reports represented an invaluable support to the development and codification of international legislation and the Inter-American System, especially those related to "International law and state cyber operations" and "binding and non-binding agreements;"

AWARE AS WELL that his interventions constituted an inestimable subsidy to the development and codification of international law and to the inter-American system;

UNDERLINING Dr. Hollis' professionalism, his various personal qualities, among which his legal and academic culture, his constructive support to the other members of the Committee, as well as his pleasant manner and leadership, that distinguishes him among the members of the Committee,

RESOLVES:

1. To express its heartfelt thanks to Dr. Duncan B. Hollis for his dedication and invaluable contribution to the work of the Inter-American Juridical Committee.

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

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

This resolution was approved by acclamation, during the 97th Regular Session of the Committee on the 7th of August 2020, by the following Members: Drs. Luis García-Corrochano Moyano, Eric P. Rudge, Mariana Salazar Albornoz, José Antonio Moreno Rodríguez, Milenko Bertrand-Galindo Arriagada, Alix Richard, George Rodrigo Bandeira Galindo, Miguel A. Espeche-Gil, Íñigo Salvador Crespo and Ruth Correa Palacio.

* * *

CJI/RES. 262 (XCVII-O/20)

TRIBUTE TO DOCTOR ALIX RICHARD

THE INTER-AMERICAN JURIDICAL COMMITTEE,

CONSIDERING that on December 31, 2020 Dr. Alix Richard's mandate comes to an end;

RECALLING that Dr. Alix Richard has been a member of the Committee since January 2017;

AWARE of the valuable contribution made by Dr. Richard throughout the course of his mandate to the work carried out by the Committee, in particular his proposal on "Foreign interference in a state's electoral process: a threat to democracy and sovereignty of states, response under international law," and that his interventions constituted an inestimable subsidy to the development and codification of international law and to the inter-American system;

UNDERLINING Dr. Richard's professionalism, and his various personal qualities, among which his legal and academic culture, as well as his pleasant manner and leadership, that distinguishes him among the members of the Committee,

RESOLVES:

1. To express its heartfelt thanks to Dr. Alix Richard for his dedication and invaluable contribution to the work of the Inter-American Juridical Committee.

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

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

This resolution was approved by acclamation, during the 97th Regular Session of the Committee on the 7th of August 2020, by the following Members: Drs. Luis García-Corrochano Moyano, Eric P. Rudge, Mariana Salazar Albornoz, José Antonio Moreno Rodríguez, Milenko Bertrand-Galindo Arriagada, Duncan B. Hollis, George Rodrigo Bandeira Galindo, Miguel A. Espeche-Gil, Íñigo Salvador Crespo and Ruth Correa Palacio.

* * *

CJI/RES. 263 (XCVII-O/20)

TRIBUTE TO DOCTOR IÑIGO SALVADOR CRESPO

THE INTER-AMERICAN JURIDICAL COMMITTEE,

CONSIDERING that on December 31, 2020 Dr. Íñigo Salvador Crespo's mandate comes to an end;

RECALLING that Dr. Íñigo Salvador Crespo has been a member of the Committee since May 20018;

AWARE of the valuable contribution made by Dr. Salvador Crespo throughout the course of his mandate to the work carried out by the Committee, in particular his proposal on “Guidelines for a subsequent normative development of diplomatic asylum,” and that his interventions constituted an inestimable subsidy to the development and codification of international law and to the inter-American system;

UNDERLINING Dr. Salvador Crespo’s professionalism, and his various personal qualities, among which his legal and academic culture, as well as his pleasant manner and leadership, that distinguishes him among the members of the Committee,

RESOLVES:

1. To express its heartfelt thanks to Dr. Iñigo Salvador Crespo for his dedication and invaluable contribution to the work of the Inter-American Juridical Committee.

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

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

This resolution was approved by acclamation during the 97th Regular Session of the Committee on the 7th of August 2020, by the following Members: Drs. Luis García-Corrochano Moyano, Eric P. Rudge, Mariana Salazar Albornoz, José Antonio Moreno Rodríguez, Milenko Bertrand-Galindo Arriagada, Duncan B. Hollis, Alix Richard, George Rodrigo Bandeira Galindo, Miguel A. Espeche-Gil and Ruth Correa Palacio.

* * *

CJI/RES. 264 (XCVII-O/20)

CONGRATULATIONS TO RUTH STELLA CORREA PALACIO

THE INTER-AMERICAN JURIDICAL COMMITTEE,

CONSIDERING that on August 7, 2020 Dr. Ruth Stella Correa Palacio’s mandate as Chairperson of the Inter-American Juridical Committee came to an end.

RECALLING that Dr. Ruth Stella Correa Palacio exercised the position of Chairperson since August 10, 2018, being the first woman to hold the Presidency of the Committee since its creation in 1906;

AWARE of the invaluable contribution made by Dr. Correa Palacio as Chair of the Committee, a position in which she demonstrated her qualities of management and leadership, leading and guiding the work of this organ towards the conclusion of important reports and proposals that will contribute to the codification and progressive development of international law in the region;

BEARING IN MIND the extensive professional and academic experience with which she contributed to the development of important issues under her rapporteurships and ensured that the Committee was duly represented at the highest legal level at the various international forums in which the work of this organ was disseminated;

UNDERLINING Dr. Correa Palacio’s many personal qualities, including her capacity for listening and engaging in transparent and open dialogue that allowed the Juridical Committee to reach important consensus in the treatment of its agenda, and especially the kindness and tact with which she conducted the inter-personal relationships of the Committee members, thereby creating an environment conducive to work and collaboration,

RESOLVES:

1. To express its heartfelt thanks and special appreciation to Dr. Ruth Stella Correa Palacio for her dedication and invaluable contribution to the work of the Inter-American Juridical Committee in her capacity as Chair; and

2. To send this resolution to the various organs of the Organization.

The following Members approved by acclamation this resolution on the 7th of August 2020, during the 97th Regular Session of the Committee: Drs. Luis García-Corrochano Moyano, Eric P. Rudge, Mariana Salazar Albornoz, José Antonio Moreno Rodríguez, Milenko Bertrand-Galindo Arriagada, Duncan B. Hollis, Alix Richard, George Rodrigo Bandeira Galindo, Miguel A. Espeche-Gil and Íñigo Salvador Crespo.

* * *

CHAPTER II

**TOPICS DISCUSSED BY THE INTER-AMERICAN JURIDICAL COMMITTEE
AT THE REGULAR SESSIONS HELD IN 2020**

THEMES UNDER CONSIDERATION

Following is a presentation of the topics addressed by the Committee during the year 2020, along with, where applicable, documents prepared and approved by the Inter-American Juridical Committee.

* * *

1. Guide for the Application of the Principle of Conventionality

Document

CJI/doc. 604/20 Guidelines for applying the conventionality principle
(presented by Dr. Ruth Stella Correa Palacio)

* * *

At the 87th Regular Session of the Inter-American Juridical Committee held in Rio de Janeiro in August 2015, Dr. Ruth Stella Correa Palacio introduced the document “Guide for the Application of the Principle of Conventionality (Preliminary Presentation)” (CJI/doc. 492/15) with a view to its inclusion as a new item on the Committee’s agenda.

From the methodological standpoint, she suggested the following steps: send the States a questionnaire to gain insight on the status of the issue from states’ point of view; and review decisions adopted by the Inter-American Court of Human Rights and domestic courts.

Dr. Baena Soares expressed concern over the recurring problem of states’ lack of response to the Committee’s questionnaires, while Dr. Salinas commented on the enforcement of human rights treaties, whose nature precludes their automatic enforcement; he said that there were considerations involving respect for national sovereignty, for example, that have to be taken into account. He noted for the record the fundamental value of that doctrine and recalled the issue of the Protocol of San Salvador and the necessary distinction with respect to its enforcement, given the principle of conventionality. Lastly, he suggested shortening the questionnaire.

Dr. Moreno Guerra congratulated the rapporteur for starting from the premise that the constitution cannot be above treaties. He acknowledged the relevance of the proposed questions, including the references to the conventions on torture and forced disappearance.

Dr. Stewart mentioned that in the common law system, international treaties are not directly enforceable but require laws or a written rule to enable their implementation.

Dr. Collot suggested that the comparative law methodology be used in Dr. Correa’s study.

Dr. Mata Prates said that the first issue to be discussed concerned the principle of conventionality, which entails considering the significance of provisions contained in international treaties, as well as the implementation of the decisions of the Inter-American Court of Human Rights. The latter, necessitates a determination as to whether the *considerando* clauses (preambular paragraphs stating grounds) of a decision impose additional obligations.

Dr. Correa noted that there is nothing ideological about this study; its aim is to examine the status of the matter; moreover, the questions are not designed to analyze the scope of domestic obligations. She also stressed that her study does not cover social and economic rights because their incorporation in her country would require mechanisms other than human rights instruments, owing to their different nature.

Acting as Chair, Dr. Mata Prates noted for the record the agreement of the members and moved to approve the item's inclusion on the agenda of the Inter-American Juridical Committee and designate Dr. Correa as its rapporteur.

On October 2, 2015, the Secretariat of the Juridical Committee, in accordance with the Committee's request, distributed the questionnaire (document CJI/doc. 492/15 rev.1) to the member states of the Organization.

At the 88th Regular Session (Washington, D.C., April 2016), the rapporteur presented (document CJI/doc. 500/16) "Guide for the Application of the Principle of Conventionality" and reviewed the background on the subject.

She explained that the report was divided into two main parts: the first deals with the concept of conventionality control, while the second sets out her conclusions based on the responses of the five countries that had answered the questionnaire distributed by the Committee Secretariat (Chile, Colombia, Jamaica, Mexico, Peru and Guatemala), clarifying that the latter's response was not included because it had arrived after she submitted her written report.

With regard to the first part, she highlighted the scope ascribed to the principle by the Inter-American Court of Human Rights based on the following assumptions: either human rights conventions are incorporated into a country's legal system, or convention provisions are observed by the country's judges. She also pointed out that there is a distinction between enforcing convention provisions and the effect that may be accorded to the principle of conventionality.

She noted that conventionality control occurs when a domestic legal provision is rendered ineffective by a treaty-based provision.

She said that conventionality control is usually identified with constitutionality control, since most countries in the Americas incorporate treaty-based provisions on human rights into their domestic system of laws at the constitutional level, falling in step with the conventional block. In that context, such rights also enjoy constitutional rank and can be used to interpret, amend or remove lesser legal provisions, or make them unenforceable. She stressed that such issues have to do with the way in which states express their sovereignty and, therefore, should be taken into account in preparing the guide.

Among the responses received thus far, she noted that all of the States that had replied were parties to the American Convention, which was not necessarily to say that they had accepted the jurisdiction of the Court. She further noted that, as a rule, in the countries reviewed lawmakers were not taking steps to incorporate the treaties into their domestic legal systems by or assigning them the rank of law, or that of constitutional provision in the case of countries that adopt the constitutional block. In this regard, she emphasized that constitutionality control systems have not been an obstacle to conventionality control, regardless of whether the country has adopted consolidated or diffuse constitutionality control. She also indicated that she had found that the enforcement of international standards serves as justification for domestic judgments, and that there was a perceptible intention on the part of states to apply international standards at the domestic level based on criteria established by the Inter-American Court.

By way of a general conclusion, she observed that it is important to have more information with which to prepare the guide. In that connection, she thanked the Committee Secretariat for its efforts to encourage responses from states on the subject and she asked that another reminder be sent out.

Dr. Salinas urged the rapporteur to address two issues in her report: (1) the effectiveness of human rights laws and their implementation in the domestic system of law; and (2) the interpretation of constitutional provisions in the light of convention norms, and whether or not the interpretation of the Inter-American Court of Human Rights should be enforced, taking precedence over constitutional norms. He said that the guide should clarify the issue of conventionality control,

not so much from the point of view of compliance with the provisions of treaties, but rather with regard to the interpretation of domestic laws in the light of conventions and the interpretations of the Inter-American Court of Human Rights.

Dr. Pichardo referred to the positive contribution that a guide would make in terms of facilitating the efforts of countries to meet their international obligations.

Dr. Stewart observed that the concept is not very well known in the common law tradition. In that regard he asked the rapporteur if the principle applies only to those countries that have accepted the jurisdiction of the Court and if the principle should be understood as imposing additional obligations; that is, in the sense of making binding the opinions of interpretative international bodies, such as the Committee against Torture. In his opinion, states could take the comments of such international bodies into consideration, but not regard them as binding, despite the fact that some members of such committees regard them as compulsory and binding. As he understood the presentation, the doctrine of conventionality control was apparently even stronger and entailed a treaty-based obligation to give enforce the interpretations of the Inter-American Court of Human Rights.

Dr. Correa said that Dr. Stewart's questions went to the heart of the matter under consideration and were precisely what she sought to verify in her research. In fact, she stated that she had observed in the Inter-American Court's jurisprudence statements that attribute to the "authorized judicial interpreter" — which in the case of the American Convention on Human Rights would be the Court itself — authority to enforce its decisions and interpretations in all states parties to the Convention, whose standards afford the minimum of protection that is needed. She also mentioned certain pronouncements by the Inter-American Court that would appear to establish an enforcement obligation for all OAS member states, even ones that are not parties to the American Convention, in cases that concern interpretations in relation to the limits and legal effects of *jus cogens*, bearing in mind the *erga omnes* nature of the rights enshrined by this principle.

Dr. Salinas suggested that these obligations be compared with principle of the margin of appreciation that derives from state sovereignty.

At the 89th Regular Session (Rio de Janeiro, October 2016), the rapporteur referred to a study carried out by the Inter-American Institute of Human Rights on the subject of conventionality control (Self-training Manual for Justice Operators on Enforcement of Conventionality Control), which has many merits since it explains how the concept evolved in the Inter-American Court of Human Rights.

She noted that the Committee had only received 10 replies to date, and explained that the purpose of the study is to draft a guide to assess the scope of the issue and states' concept of it.

The Chair mentioned that he was advising on a doctoral thesis precisely on the subject of conventionality control, the conclusions of which found that there are three different postures that states adopt: (1) compliant; (2) opposed – the Court lacks the authority; and (3) undecided. Therefore, he found it unlikely to obtain uniformity with regard to what the Court imposes.

He urged the rapporteur to continue her work despite not having received more responses from States, and suggested that her report at the next meeting cover the reactions of states to the judgments enforced by the Court.

Dr. Hernández García noted there is a directive from the Supreme Court of Mexico that was mandatory for the country's courts and indicated that all courts must judge based on the *pro homine* principle. He said that the challenge for the rapporteur is to determine the scope of international human rights law. The directive is very broad as it implies the principle of *ex officio* application in addition to the need to rely on the standards underpinning all the court's jurisprudence, which seems excessive. Although the State is bound and the judiciary is part of the State, the Mexican State

should not take part in the development of standards in which it has not played a role. He said that a collegial discussion of the topic could allow the Juridical Committee to adopt conclusions.

Dr. Mata Prates acknowledged the complexity of the issue and agreed with the opinion of the other members in favor of developing a guide, given its usefulness. He mentioned having attended a seminar on the subject in Uruguay, but from the perspective of constitutional law. In that context, a multitude of opinions were put forward on the subject. For that reason, he said that it was well-nigh impossible to set out a single position on the part of States, since the response was closely bound up with the jurisprudence of each country. Hence, the vital importance of Dr. Correa's work for explaining the various interpretations of the concept of conventionality control.

Dr. Villalta mentioned that protection standards should be sought, not only in the American Convention, but also in other human rights treaties.

Dr. Correa emphasized that the Court had decided that the rationale for its decisions should be used to interpret treaty provisions in justifying decisions at the domestic level. She said that the states that had replied were Argentina, Chile, Colombia, Ecuador, Guatemala, Jamaica, Mexico, Panama, Paraguay and Peru. In the case of Jamaica, she said that the response noted that the country did not accept the jurisdiction of the Court, despite being a party to the American Convention. She explained that, in part, the study serves to verify all the elements of the principle's scope. The Court, for example, makes the principle of conventionality control binding upon all states simply by virtue of having signed the American Convention. She expressed concern in that regard, given that the judges' background is in domestic law, not treaty law. She said that it is important to have the opinion of non-signatories of the American Convention; or of countries, such as Jamaica, that are signatories but are not subject to the jurisdiction of the Court. She agreed with working with the information that had been made available but said that it was very important to have the responses of the other States so that a single standard could be advanced, given that this was a self-imposed mandate of the Committee.

Dr. Salinas reiterated that a conceptual definition should be the starting point of the study. Naturally that involved implementing the Court's interpretation; the enforceability of international treaties is a separate matter, however. It is important to know the concept because if we restrict it to the Court's interpretation, then states parties, particularly those subject to the jurisdiction of the Court, will be taken into account, but we would not get a complete overview.

Dr. Hernández García explained that it was important to have a practical, accessible, and readable document on which they could then offer considerations, which should cover three levels:

1. Link to the jurisdiction of the Court;
2. Link to the regulatory contents of the American Convention; and,
3. Unenforceability of the domestic provision *vis-à-vis* the international rule.

The Chair consulted the rapporteur on ways to avoid the final report being regarded as an extension of powers that do not belong to the Inter-American Juridical Committee, but to the Inter-American Court, to which Dr. Correa replied that, as the document was developed, it would be necessary to take the precautions to avoid any clash of competencies. However, she said that the objective is to harmonize criteria for applying principles.

During the 90th Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, March 2017), the rapporteur on the subject, Dr. Ruth Stella Correa Palacio, presented her proposal "Guide for the Application of the Principle of Conventionality," (document CJI/doc. 526/17).

Dr. Mata Prates first noted a limitation in that only 15 States have accepted the jurisdiction of the Court and therefore this guide would not be applicable in the States that have not ratified the Convention. Secondly, the response rate to the questionnaire was not very good and of those States that did respond, only 7 have ratified and acknowledged the jurisdiction of the Court. Likewise, he

pointed out that as regards the principle of conventionality, it would be necessary to choose one of the interpretations to validate. He said that if we were to begin from a perspective of hierarchy, we must determine how the Convention would be framed in domestic law and the rank that would be conferred onto it by a domestic judge. For some, the interpretation of the Convention by the Court should be treated as binding legal precedent; however, he said that Uruguay does not keep to that tradition.

He asked whether the intention was to include only decisions or also interpretations and, secondly, whether the intention was to extend this provision only to the parties to the Convention or to all States. He was in agreement with item 5 until the second comma and suggested that the clause thereafter be revised to read something like "... and that judges take into account the decisions of the Court." Dr. Mata continued onto item 7 and expressed his agreement only with the middle section, but voiced concern over the way judges would be called upon to interpret law and the reference addressing domestic matters unique to each State. He suggested rewording the part of item 11 relating to supervision of the application of the decisions of the Court, in particular, its follow-up through meetings with the State and the parties.

Dr. Hollis requested further explanation from the rapporteur about the scope and wondered whether the catalogue was intended to be applied only to States party that have accepted the jurisdiction of the Court or to all OAS member states. He expressed fear that the guidelines would not align with the domestic laws of some States. By way of example, he explained that, although the United States accepts the principle of *pacta sunt servanda* and the principle that domestic law is no excuse for non-compliance with treaty obligations, the problem arises with "non-self-executing treaties", in which case, the domestic judge is not allowed to apply the treaty provisions directly and must apply domestic law.

He further pondered whether the guidelines were intended for monist States that accept international law as predominant or for dualist States that put domestic law above international law. He asserted that for dualist States, the guidelines would be problematic and referred specifically to item 5, which grants binding nature to interpretations of the courts and he suggested adding an explanation to limit the guidelines to those States that would be able to apply conventionality.

Dr. Hernández noted that even those 15 States would each have a different interpretation of the principle of conventionality and suggested it would be useful to provide a definition. On this issue, he compared the title of the document with the title of the attached Guide and noted that the scope of the guidelines related more to domestic implementation.

He turned to item 5 and said that in some States, such as Mexico, the interpretations used by the Supreme Court are not limited to those cases where Mexico has been a party, but includes application of all jurisprudence. On this score, he said, the proposal to observe the interpretation of the Inter-American Court would not be realistic in a judicial system as complex as Mexico's. Dr. Hernández concluded by pondering whether the purpose of this work should be addressing the intended meaning of the concept of conventionality, in light of the different understandings of the concept.

Dr. Baena Soares posed the question of who would be the target audience of the guide. He assumed it would only be States party to the Convention, but he felt that non-party States could also benefit from a guide.

Dr. Villalta recalled her experiences with courts in El Salvador and noted that in many OAS States, judges were unaware of rulings by the Court or the conventions in force. Regarding item 13 on the creation of an institution, she requested clarification on how it would function, especially given that not all States are parties to the American Convention.

The Chair began his remarks by addressing the lack of a definition of the core concept. He said that one aspect would be less controversial and could be solved by the law of treaties, inasmuch

as all human rights adhere to the principle of *pacta sunt servanda*. Secondly, this becomes more complex and highly controversial if national courts are required to take into account the jurisprudence of the Court. If we exempt those that are not parties, then we also exempt those that have not accepted jurisdiction of the Court; and hence the scope of application would be reduced even further. In his view, the principle of conventionality should be seen as a means towards fulfillment of treaties, not as an end in and of itself, given that most States do not consider the judgments of the Court as mandatory. Lastly, he asked the rapporteur to start by crafting a definition that would serve as the start of a path to follow.

The rapporteur members to recall the discussion with the legal advisors as to the importance and currency of this topic. She reminded the plenary that this was her second report and that the discussions on the definitions were reflected in the first one. She said that this concept did not come from the rapporteurship, but was instead based on precepts previously used by the Court. She thought it was clear that the objective was not simply to apply the Convention, but also to use the interpretations as a basis for rulings. In response to the question of the intended audience, she said it could be split into two groups. The first group is based on the recommendation that all OAS member states should ratify the Convention, i.e. it consists of countries that have not ratified the instrument. The second group consists of countries that have ratified it. Thirdly, she explained that reference to the concept that interpretations be treated as binding was only for those States that had accepted the Court's jurisdiction. The paper is geared toward the second theory, which would not only include parties to the decision but also those that had accepted the Court's jurisdiction. It is obvious that such a differentiation leads to a clear conclusion that the decision is binding only on the parties and those that have accepted jurisdiction. Not only are there binding effects, but the Court is allowed to interpret. That is the conformity principle of interpretation and is intended to be taken into account by States. The rapporteur finished by stating that the purpose was to recommend follow-up for those States that have ratified the Convention and nothing more. She said that in many States -Mexico, Peru, Colombia- judges are talking about conventionality and not only in the higher courts. As to item 10, the intention is that training should be made available to all administrative officials – not only judges – including those in charge of protecting human rights and interpreting the decisions of the Court. She said that this is closely connected to access to justice.

Dr. Villalta suggested, with the support of Dr. Moreno, changing the title to “Recommendations” rather than “Guidelines.”

Dr. Hernández said it was important to clarify the interpretations and the jurisprudential interpretations as a whole.

Regarding the content of the recommendations, he agreed that the first recommendation was clear and valid: the call for ratification. But he clarified that, at the end of the day, it is a sovereign decision, suggesting differentiating between those States party (25) and those that recognize the jurisdiction of the Court (15). This would make the guide much easier to follow.

Dr. Mata Prates endorsed the suggestion to change the first part in order to look at different positions regarding the scope of the principle of conventionality before continuing with the recommendations, such as calling for the ratification of the Convention and recognition of the jurisdiction of the Court. In regard to the jurisprudence of the Court, he requested being cautious because constitutional aspects play an important role in the way each State brings decisions into its domestic law. It is essential for jurisprudence to be known not only by judges, but also by the administration.

Dr. Villalta agreed with the recommendation about training, as there is generally a lack of knowledge about all human rights instruments – not just the Inter-American ones.

The Chair agreed that the Committee could only invite and not recommend acceptance by States of the jurisdiction of the Court.

Secondly, he said in-depth study was important for fine-tuning the principle of conventionality and its application by human rights courts. He proposed including the discussion on compliance with judgments as well as rulings (as precedents) of the European Union Court. He thought it also important to cover the sovereignty of States and to refer, for example, to the empowerment of the state regarding compatibility with domestic laws. Thus, he proposed making additional efforts, due to the complexity and importance of the topic, to secure responses from the States that have not responded.

The Chair suggested the rapporteur prepare a new report for the upcoming session, and closed discussion on the topic.

On March 30, the Technical Secretariat of the Committee sent out a reminder to the States that have not responded to the questionnaire.

During the 91st Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, August 2017), the topic was not considered, but at the 92nd Regular Session (Mexico City, Mexico, February 2018), the rapporteur presented an outline of the study of the topic by the CJI, drawing some conclusions that are included in the Guide for the Application of the Principle of Conformity (document CJI/doc. 557/18).

Dr. Mata congratulated the rapporteur on the quality of the work presented and suggested making a slight modification in the wording so that the document might appear to be more operational and less descriptive. He pointed out that the legislator neither enforces the norms nor is he the first addressee of the international norm, being the one with least entitlement to apply it. He also said that the international law focuses its provisions on the State, and the State, in turn, has to regulate enforcement of the norm in its domestic legislation.

Regarding the consultative opinions of the Inter-American Court of Human Rights, he pointed out that the report presented does not address them adequately, and that in view of the relevance that these opinions have gained recently, it would be advisable to provide details on its obligatory nature, explaining whether enforcement is obligatory for all the States that recognize the jurisdiction of the Court or only for those who so request it, or for none of the States. He also suggested adding a sub-chapter on the legal effects of consultative opinions.

Dr. Hollis thanked the rapporteur for the work and effort displayed in the document presented and suggested altering the proposal of the Guide, which should be directed only to the States that are members of the American Convention on Human Rights.

The Chair congratulated the rapporteur on her valuable contribution to the work of the CJI, and commented that the obligation of the Inter-American Court of Human Rights to communicate its rulings to the States does not necessarily imply that the latter accept the Principle of Conventionality as an obligatory compliance. He repeated that the State is sovereign to implement the decisions of the Court, and recalled that consultative opinions are not binding, in the terms of the Convention itself.

The rapporteur explained that she had taken into account some of the comments made in the previous session by Dr. Mata with regard to the role of judges vis-à-vis the Principle of Conventionality. She clarified that she avoided using the word “sentences” due to the fact that the interpretation is made by means of judicial decisions, monitoring procedures and consultative opinions.

She went on to explain that the local judges of the member states of the Convention, when they apply the conventionality norm, must bear in mind the interpretation that the Court has made in sentences and consultative opinions; this is why she did not wish to suggest in her text that the opinions are per se binding.

In this regard, the Chair suggested revising the wording for the sake of clarification of the last item discussed, in the sense that the only obligation as such is that of enforcing the Convention.

Dr. Mata made further reference to the inclusion of consultative opinions of the Inter-American Court. Accordingly, he asked to include a sub-chapter explaining and providing the fundamentals as to i) whether the enforcement of these opinions is “preferential” but not binding, ii) whether the State requesting the consultative opinion must necessarily adopt it, and iii) if all the remaining party States are obliged to enforce consultative opinions.

Seconding this view, the Chair suggested removing the reference to consultative opinions and limiting the Guide to enforcement of the Court’s decisions. In his opinion, considering that the Court’s jurisprudence is a precedent, it goes beyond the scope of the wording of the Convention and the intent of party States. He submitted the topic to the consideration of the members.

Dr. García-Corrochano said that in the area of international law, conventions usually set up a tribunal for interpreting the convention itself, and that said organ cannot exceed the scope of the convention that actually created the organ. However, some courts at the international level claim that they are entitled to produce norms. He clarified that when States wish to take on obligations they reach agreements through their representatives rather than ask the tribunal to create those obligations.

The rapporteur informed that the Guide is the result of the study of several factors, including the practice of the States, and that it is based on the scope that the Court itself has provided for the control of conventionality. She offered to present a revised version for the consideration of members, clarifying the items previously addressed. She then announced that she would provide comments on the role played by consultative opinions and follow-up decisions, but would not remove the references to these opinions.

The Chair asked the rapporteur to provide a change in wording to reflect the consensus of the minimum criteria of the CJI so as to avoid voting on the item; should this prove impractical, he proposed omitting the discussion of the issue. The members agreed to this proposal.

During the 93rd Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, August 2018), the rapporteur, Dr. Ruth Stella Correa Palacio, began her presentation by recalling that the principle of conventionality is based on an assumption that States which have signed a convention are obligated to comply with it. Moreover, as human rights rules have been extending themselves by the decisions of the Inter-American Court on Human Rights, it is important to bear in mind the interpretations of these rulings.

Among the observations submitted at the last session held in February in Mexico, she found that it had been remarked that it was a very descriptive guide without recommendations. Likewise, concerns had been expressed as to whether the report included consultative opinions of the court. She expressed the view that her work speaks only in a general manner of the rulings and decisions, which does not include opinions or pronouncements on their binding effects. Regarding the guidelines themselves, she said it would not be appropriate to consider the language as in the mode of a recommendation by the Committee that states should apply the principle of conventionality. Rather, it should be viewed as a suggestion and that states will choose to incorporate the language however they wish. She noted that it is established in Guideline 3 that judges are the recipients because constitutional control is with the judges, but she is aware that the first recipient is the legislator.

Dr. Espeche invited the rapporteur to consider the specific characteristics of the opinions of the International Court of Justice within the UN system.

Dr. Hernández acknowledged that this represented work on a very complex topic. He noted that several states are making progress in addressing this matter and that the document will be useful not only for legislators and judges but also in terms of its contributions to doctrine so that many will understand the topic so much better. He had the following specific comments:

- Page 5, para. 2 in which is anticipated the difficulty of applying the principle with respect to the binding of those states that have not accepted jurisdiction of court. He suggested that it should state clearly to which states this applies: those bound by the American Convention without accepting the jurisdiction of the court, and those that have accepted the court's jurisdiction. He explained that he has doubts about the binding nature of decisions of the Court for those States that have not recognized the contentious jurisdiction of the Court, and that even if the decision was based in a source of law stated by Article 38 of the Statute of the ICJ. He noted that the guide would not be applicable to all member states and that Dr. Hollis had been clear to stress the non-binding nature. He suggested that it would be very useful to pinpoint the juridical reasons of each State.
- Footnote 8 should be corrected. According to his information, there are currently 20 states parties to the Convention, not 15.
- References to the Inter-American Court of Human Rights and the Inter-American Commission of Human Rights should be stated precisely, such as the ones referred on page 6, numbers 3 and 5.

Dr. Mata agreed that this is a complex topic and noted that the principle of conventionality arose from the Inter- American Court on Human Rights. He understands that the document is intended as guidelines for the operators and the Court, therefore, it should be avoided to verify or describe what happens, as is done in certain proposals of the report, whose clauses are descriptive in nature.

Due to the different effects that should be attributed to the judgments of the Court, noted the need for a distinction among the different categories of countries vis-à-vis the Convention. For those states that are parties to a case are bound by the ruling. But those that have not been parties to that process, even when they have recognized the jurisdiction of the Court they may take into account those decisions, but are not obliged to share the judgment since they are not parties of this process. The Court distinguishes between the binding precedent and the principle of conventionality. Furthermore, based on what has been said, it would be worthwhile to differentiate between those parties that recognize the contentious jurisdiction of the Court and those that do not, in spite of having ratified the Convention. It is also suggested to refer to those who have not ratified the Convention.

Dr. Mata then referred to item 4 and considered that this discussion should not delve into constitutional law considering this matter is not of interest under International law. If a State has ratified a convention, it must abide and the Committee should not be concerned with internal matters. As regards item 10, the competence is always subsidiary and it is not only for the control of conventionality, since that local bodies should act first.

Dr. Hernández clarified his views regarding advisory opinions in page 2, para. 2, stating that they are not part of the principle of conventionality. Secondly, he pointed out that the document is a guide, and as such it should not be a single model for 35 member states but a snapshot to which each state will look to see where it can find itself. Some States, such as his own, will base its determination on the execution of sentences where the court has established obligations *pro personae* for all three branches of the State. This represents a group of states that have accepted to incorporate all the judgments of the Court through the principle of conventionality, and the report should not be limited to those countries, but integrate all level of incorporation. If possible it should set up five different groups:

- States parties to the American Convention on human rights;
- States that have recognized the contentious jurisdiction of the Court;
- Those that have endorsed the resolutions of the Court both in cases in which they are a party and in those in which they are not a party;

- Those that do not accept the principle of conventionality when they are not a party in a case having accepted contentious jurisdiction
- States that are not party to the Convention.

Dr. Baena Soares offered his congratulations to the rapporteur on a complex topic. He fully endorsed the comments made by Drs. Mata and Hernández, which he asked the rapporteur to take into account. The document as currently presented is interesting as a basis but not as a guideline. He said that the Committee would need to present a guide as it is defined in all aspects, as only a guide and not as an obligation.

The Chair offered thanks to the rapporteur and wished to address a conceptual difference. First, he understood this principle that the rules of the Inter-American Convention on Human Rights and other conventions in the field have a mandatory nature based on *pacta sunt servanda*. Likewise, he recognized that states that have accepted the mandatory competence of the court are bound by the ruling of the case in which they are involved and that the convention can bind third Party States where this is an expression of customary international law. What he found difficult to accept, however, was that the rulings of the court could be binding for third states. He could not accept that the decisions constitute a precedent in jurisprudence that is mandatory; that, he felt, goes beyond the role of an international court. He considered that it would be necessary to reflect further on this point as a guide to that effect would be difficult for states to accept. Secondly, the President expressed his agreement with the comments of Dr. Mata regarding internal control under constitutional law, which could be included as a footnote but not within the guide itself. He also agreed with comments made on subsidiary competency. For the internal mechanisms to act, it is necessary to exhaust all internal mechanisms. Furthermore, he requested the rapporteur to take into account the fulfillment of decisions by States which is to be decided by the state itself in accordance with its own domestic law. The application of the principle of *ius cogens* should not be exceeded. Decisions should not be imposed as to constitute mandatory precedent. There is a minimum agreed, but a wide range of differences. Although he would find it difficult to approve of the concept that the jurisprudence of the court is a mandatory precedent for third parties that are not parties to a case. The interpretation of a sentence may be taken into account but it is not a mandatory precedent.

In response to these comments made, the rapporteur agreed that this is a highly complex topic. She noted that the document is in its third or fourth iteration and is evolutionary. She mentioned that the way the principle is applied by different states had been included in the second version, which had incorporated the responses of states that had replied 14 States to questions about the domestic mechanisms and constitutionality control. Thus, the work mentioned the control that is concentrated and control that is mixed. This query provided results that show the link and states had replied that it is good to control the constitutionality and almost all incorporate the “block of constitutionality.” In previous reports it was shown the application of the controls of constitutionality. If the Committee so desires, the rapporteur said she would be willing to include the results received and the analysis. She referred to the two modalities of control recognized by the doctrine and the jurisprudence – 1. Domestic judge and 2. Inter-American Court. It is only if the domestic court does not exercise the control that the matter falls under the Inter-American court’s control. She explained that the principle of conventionality, according to the Court, does not imply for those States that are not parties to a judgment to submit to a decision but rather to the scope given by the Court to a norm. And this applies to States that have accepted the jurisdiction of the Court, considering that the non-observance of the criteria for applying the rule of interpretation under the Convention may give rise to the international responsibility of the State. It does not seek to validate the mandatory nature of the precedent, but rather to assert that the Court is an authorized interpreter of the Convention. There is no intention to homologate any principle giving a mandatory nature to the precedent.

The rapporteur asked members to review the version of the document presented in March 2017, a guide that included 15 points, and as Dr. Mata has now suggested adjusting her work with current version which is more analytical. The rapporteur said that she understood the concerns that had been expressed and would accept most of the suggestions. She noted however that there is a difference in conceptual positions that would be difficult to harmonize. She requested members to start from the idea that the document is a guide, non-mandatory, that presents all ideas, and that States would adopt what is useful for them.

Dr. Arrighi noted that this topic is acquiring practical importance leaving no doubts about the supremacy of international law over domestic law. However granting the same hierarchy of international norm to courts decisions creates a practical problem. When a court hands down an opinion, it takes into account legal issues and facts particular to a case; therefore a domestic judge who interprets the principle of conventionality should rule on different facts and legal issues. While the idea might work in theory, when both facts and law concur, in practice, when that is not the case, leaving too much discretion to domestic judges could give rise to decisions contrary to the spirit of the decisions of the Inter-American Court. That being so, the Court should, when handing down a judgment, expound principles to guide the domestic judge, with respect to both similar and divergent topics, limiting what is left to his or her discretion.

The Chair noted that interpretation of what the Inter-American Court does or does not do cannot create international responsibility to third parties that have not applied a decision in which they have not been a party. Secondly, regarding the block of constitutionality, he noted that decisions of the Court may serve as a criterion of interpretation, but that this does not mean that the jurisprudence is compulsory. That is where the substantive difference lies. He considered that this conceptual gap, which had been mentioned in various interventions, should be reflected in the guide - different interpretations that exist in the body of the CJI and in the region. We do not have to arrive at a single conclusion.

Dr. Hernández felt that after this exchange it would be much easier to advance. He suggested elaborating a guide as expressed by Dr. Baena Soares. He felt that what was lacking was context explaining all different applications depending upon the legal situation of each State, and also clarify the intention to inform about the content of the principle without forcing a model on them. In the end, who ends up applying the principle is the national court, and this will determine its scope based on its constitution.

The rapporteur said that it would be necessary to define what the language would be that would be used. With all of these differences, the guide has now changed to be more descriptive than recommendatory.

Dr. Mata agreed that the discussions were bringing the Committee closer to a solution allowing the adoption of a guideline. He noted that the Committee had decided that its work cannot be only from an academic perspective, but to have a utility for the States, therefore a guide provide an orientation about each type of situations.

Dr. Hernández noted three levels of working: one is prescriptive; the other is descriptive; and finally, a third in which some recommendations are made. Here we might decide to maintain a descriptive tone but with some recommendations. He felt that the rapporteur in the current version had presented a very good basis, but that just needed to be polished a bit – he confirmed that it should not be viewed as an attempt to establish principles for the States.

The Chair agreed and closed the discussion on the topic.

During the 94th Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, February, 2019), the rapporteur for this topic, Dr. Ruth Correa, explained her approach to it, underscoring that she had been guided by the parameters established by the Inter-American Court of Human Rights (hereinafter “I/A Court H.R.” or “the Court”), which distinguishes between the

principle of conventionality and conventionality control. She also noted that it is a topic that meets with resistance from both theorists and judges, and that she, as the rapporteur, does not intend to adopt a stance. Consequently, the purpose of the work is to explore how States handle the issue and, based on the findings, to draw up a very clear guide to all facets of States' practices that will facilitate treatment of the subject, of the fifteen replies received from the States, some were in favor of incorporating the principle of conventionality in the constitution, while for others there is no constitutionality block.

Dr. Luis García-Corrochano criticized the Court for overstepping its jurisdiction by claiming that its interpretation is valid in any circumstances and for different actors, when judging situations that are applicable to particular cases. The principle of conventionality must be respected, including by entities in charge of overseeing such compliance. He argued, finally, that the trustworthiness of a Court depends on the work of its members.

Dr. George Galindo warned about the ramifications of this topic for international law, particularly when the Court imposes a duty for the states to apply the conventionality control principle. He believes that this could create confusion over what must be replicated: the decision, the precautionary measures and/or the *obiter dictum* contained in the judgment. Moreover, it raises questions about the principle of "*la competencia de la competencia*" of international courts, because a prerogative of that nature would endow said Court with enormous power. Finally, the *erga omnes* effect with respect to *res judicata* needs to be reviewed, when wishing to impose decisions handed down by the I/A Court H.R. on other States.

Dr. Miguel Espeche-Gil agreed with the members who consider that the I/A Court H.R. has overstepped its sphere of jurisdiction.

Dr. Mariana Salazar noted that the work of the rapporteur is not intended to impose any position, but rather to explain the principle in question, and asked the rapporteur to include a comparison with the practices used in countries that accept these principles.

Dr. Íñigo Salvador noted that this issue highlights the dichotomy in the application of international human rights legislation in domestic law, and agreed with Dr. García-Corrochano regarding the attempt to apply judgments to cases other than those that gave rise to a lawsuit. Judgments must be applied only to the parties in a dispute; otherwise, several of the principles mentioned would be contravened, such as the effect of *res judicata*.

Dr. Carlos Mata agreed on the complexity of this current issue regarding the effect of judgments of the I/A Court H.R. The rapporteur's work refers to discussions within the Court. However, several pending challenges still need to be explained, such as the differences between Roman and Anglo-Saxon law; whether a Court decision on a case is binding for non-parties; and the distinction between the norms themselves and the interpretation of those norms. He suggested not delving deeper into the status of jurisprudence in Europe, given its differences to the inter-American system. Regarding item 10 of the Guide, he asked for details on how I/A Court H.R. authority would be exercised in a subsidiary manner, absent control at the national level.

Dr. Milenko Bertrand asked about the work plan on the subject and urged that a contribution be made to achieving a better grasp of the matter within the judiciary, citing internal conflicts within States when efforts are made to incorporate principles that run counter to national decisions. The work must have a clear focus on providing for better compliance with law in the inter-American human rights system.

The rapporteur for this topic thanked the members for their opinions and comments, reiterating her reasons for explaining the principle under the I/A Court H.R. parameters. She undertook to incorporate the discussions, including the responses sent by States, which in most cases indicate compliance with the principle and control in the terms established by the I/A Court H.R.. The Guide must clearly describe existing viewpoints, leaving it up to States to opt for one

approach or the other. Well aware of the difficulties raised by this issue, she explained that she would present a new document proposing a Guide, for members to comment on.

Dr. José Moreno asked the rapporteur whether the purpose of her next report was to present the different positions put forward in this session. In response, the rapporteur explained her intention to eschew mention of positions contrary to the provisions of the I/A Court H.R., so as to avoid any controversy with the work of the Court. Dr. Milenko Bertrand asked whether contrary positions within the members of the Court should be presented, in order to avoid generating conflicts with the Court. Dr. Carlos Mata proposed making reference to the issue of conventionality with its different meanings, for both judges and legal theorists to clarify the issue. Dr. Jean-Michel Arrighi said there was a pressing need to address the topic of the principles and sources of current inter-American law (resolutions, the Inter-American Democratic Charter, OAS Charter, and so on, given their impact on all the member states of the OAS.

The rapporteur said she intended to include the suggestions made by Dr. Milenko Bertrand and Dr. Jean-Michel Arrighi.

During the 95th Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, July/August, 2019), the topic was not considered.

During the 96st Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, March 2020), the rapporteur of this topic, Dr. Ruth Correa presented the fourth report on the subject, (document CJI/doc. 604/20). She noted some resistance in the plenary on this issue. She explained that this report deals with a work that is merely descriptive of the situation as understood by the Inter-American Court of Human Rights, including its detractors. This new version does not analyse the practices of the States that have a constitutionality block. She clarified that the intention is not to commit the Committee with respect to the application made by the Court. Finally, she stated that she is aware that the main recipients of the Guide are those States that have accepted the jurisdiction of the Court, and that must assume international responsibility in case of non-compliance.

Dr. Espeche Gil thanked the rapporteur for distinguishing between international conventions and the interpretation of the rule made by the Court

Dr. Milenko Bertrand referred to the suitability of the methodology presented. He also requested the inclusion of additional developments on the subject related to the control conventionality. He asked the rapporteur if this subject might modify the domestic rule when conflicting with the interpretation of the Court. He also suggested to refer to national hierarchy of norms to deal with this type of situation. The rapporteur said that the bound State relies on the legal system, and in that regard the March 2017 report included a list of countries, arranged by diffuse and concentrated control type (constitutional and conventional). She added that should the Committee be interested, this issue could be reinstated.

Dr. Eric Rudge asked the rapporteur about references to the case law established in her report, querying as well about some details in item 3. Regarding case law, the rapporteur explained that the reference is the European Court of Human Rights. Whereas item 3, it would be dealt with in a booklet drafted by the Inter-American Commission of Human Rights on the application of conventionality control.

Dr. Mariana Salazar asked about the path to follow: adopting a legislative guide or a report. In the light of the rapporteur's statement that be a descriptive of the trends identified in the report, apart from being a single reference and mapping document, there would be no need to refer to earlier reports from the rapporteurship for consultation. If this report is to be adopted, she proposed to integrate a mapping section with a list of the States of the region.

Dr. George Galindo congratulated the rapporteur on her thoughts on the different stances on the conventionality control principle. He suggested rethinking the purpose of the Guide in terms of

the imperative nature of “some” human rights rules. With regard to amendments to domestic legislation and the prevalence of the rule (domestic/international), a logic structure should be prepared with some hierarchy involvement in conventionality control, taking into consideration the application of the most favorable rule. The Committee must have a vision that is not critical of the Court, but the problems that the application of the control may impose must be addressed. The obligatory nature of Court decisions would also imply referring to the binding nature of these decisions. Finally, it would be necessary to explore the practices of the States more widely in this matter. The rapporteur agreed with the need to refer to the principle of the most favorable rule.

Dr. José Moreno commented on the descriptive nature of rapporteur’s work, and asked her whether a guide or a document of a different nature would be approved.

With regard to the issue of the prevalence of standards mentioned by Dr. Galindo, Dr. Mariana Salazar referred to the fact that the *pro omine* principle is not restricted to national rules, but allows for the direct application of the international rule. She also indicated the trend towards considering that monism and dualism is not something that prevails absolutely in each country, and that the approach is directed towards the way of incorporating international rules in national law.

Dr. Jean-Michel Arrighi felt it was necessary to clarify that the international legal order should prevail over the internal order, in accordance with the Vienna Convention on the Law of Treaties. Hence the importance of the role of the national judge in interpreting the international legal order. In this context, it is essential to think about how to handle cases where a national court hands down a decision running counter to what was decided by the IACHR; in these cases, can anyone intervene?

Dr. Luis García-Corrochano mentioned considerations of practical order regarding the decisions rendered by domestic judges. He noted that, in the administrative field, the control of constitutionality is in the hands of certain courts, which are not necessarily aware of the complexities in the international law field. In his opinion, the prestige of the Committee allows it to adopt a position that might be opposite to that of the Court.

The rapporteur for this topic, Dr. Correa, referred to the complexity of the subject. She invited the Committee to maintain a neutral position that does not clash with the Court’s interpretation of the Convention. In relation to the end-recipient, the rapporteur identified the judge of the XXI century as an entity with ample power, including repealing powers of legislative scope. A stronger judge *versus* a weaker parliament. The descriptive approach of the work is intended to help the States and the judges play their roles in the best ways possible. As for the path to pursue, the rapporteur said that the purpose of the Guide is to publicize the state of the matter, developing the practice in the countries to which it applies. She clarified that the information is based on the responses sent in by the States, entered in Excel spreadsheet. In short, the work of the Committee should be a presentation of the ways in which States apply the principle of conventionality and conventionality control, but without taking sides.

Regarding the question from Dr. José Antonio Moreno on the title of the study, in light of the purpose of the document, the rapporteur expressed the suitability of referring to a Guide for Enforcement, but not in the sense of good practices. She suggested avoiding qualifications. Dr. Mariana Salazar agreed with Dr. Moreno’s proposal, indicating that a “guide” has a steering effect and that this report aims more at a description of different models in the region, so other names could be explored. Dr. George Galindo opposed the use of the name “Guide”, and added that perhaps it called a “Report”. Dr. Duncan Hollis, who joined the Committee at noon, supported Dr. Galindo’s proposal. Additionally, he requested clarification that the principle referred by the Guide does not apply to all OAS member states. Finally, in relation to the aforementioned obligations that are consistent with international law, States with regulations in this area should be included. The rapporteur proposed replacing the name of the guide. In relation to the recipients referred to by Dr.

Hollis, the corresponding adjustments will be made. Concluding her presentation, the rapporteur committed to present a new version of her work.

During the 97th Regular Session of the Inter-American Juridical Committee (Virtual session, August 2020), the topic was not considered.

The following document was presented by the rapporteur for the topic, Dr. Ruth Stella Correa, in February 2020:

CJI/doc. 604/20

GUIDELINES FOR APPLYING THE CONVENTIONALITY PRINCIPLE

(presented by Dr. Ruth Stella Correa Palacio)

I. BACKGROUND

This is the fourth report prepared by the undersigned rapporteur on the “Guidelines for Applying the Conventionality Principle.”

At its 87th regular session, the Inter-American Juridical Committee included this issue on its agenda on its own initiative. Initially, and to establish the status of the application of the conventionality principle and conventionality control within the countries forming part of the OAS, they were sent a questionnaire, to which 14 States responded. All of them are signatories to the American Convention on Human Rights, and some of them are also subject to the jurisdiction of the Inter-American Court of Human Rights.

The first report on this issue was presented by this rapporteur during the 88th regular session of the Inter-American Juridical Committee, held in Washington DC in April 2016 – document CJI/doc.500/16. This report will provide some analysis and discussion, along with several recommendations from the rapporteur.

The subject was taken up again by this Committee during its 89th regular session held in Rio de Janeiro in October 2016, as well as during its 90th regular session, also held in Rio de Janeiro in March 2017, at which time this rapporteurship presented its second report (document CJI/doc. 526/17), containing analysis of the responses provided by 14 States to questions from the CJI aimed at establishing the mechanisms used within those States to apply international human rights instruments. The report produced significant discussion and several suggestions to be taken into account for a subsequent document.

During the 92nd regular session of the Inter-American Juridical Committee, held in Mexico in February 2018, a third report was presented, document CJI/doc. 557/18. The report was analyzed and discussed during that session and several more recommendations were made for incorporation.

The issue was subject to analysis and discussion by the Inter-American Juridical Committee again during its 93rd (Rio de Janeiro, August 2018) and 94th (Rio de Janeiro, February 2019) regular sessions.

At that time, the rapporteur presented a new report that includes the suggestions made by the members of the Inter-American Juridical Committee during previous sessions and proposes draft guidelines for applying the conventionality principle, which were presented to the Inter-American Juridical Committee for discussion.

II. PURPOSE OF THE GUIDELINES

The purpose of this guide is to contribute to the strengthening of suitable mechanisms for achieving the overarching aim that all the states share of strengthening respect for human dignity, the safeguarding of which prompted the incorporation in different international

instruments, especially multilateral ones, of the array of human rights, against which, as peremptory norms of general international law, any contradicting provision is void *ipso facto*.¹

With the harmonization of the principles of State sovereignty and *pacta sunt servanda*, under which free and sovereign States have—by subscribing to, ratifying, accepting, adopting, or acceding to those international agreements comprising the body of international human rights law—chosen to subject themselves to the content of these instruments and incorporate them into their domestic systems of laws.

Starting from the undisputable premise that “Human rights must be respected and guaranteed by all States”² and with the aim of moving forward toward establishing mechanisms that make this guarantee effective on an equal footing for all persons, independent of the country in which they live, the aim is to promote the unification of minimum standards for protecting human rights and guaranteeing human dignity.

Recognizing the important role that the Inter-American Court of Human Rights has played in guaranteeing the application of international human rights instruments, especially in the progress toward applying the conventionality principle and building on the concept of conventionality control.

Taking into account that the countries comprising the OAS are bound by different degrees by the American Convention on Human Rights and the jurisprudence of the Inter-American Court of Human Rights.

The Inter-American Juridical Committee proposes the following Guidelines to orient and facilitate the application by domestic authorities of the international instruments comprising the body of human rights law, pursuant to the parameters of the conventionality principle and its main tool, conventionality control.

III. DRAFT GUIDELINES FOR APPLYING THE CONVENTIONALITY PRINCIPLE

1. Conventionality principle

Under the conventionality principle, States who are signatories to an international human rights instrument commit to incorporating it into their domestic legal systems, either by enacting the laws necessary for compliance with its application or by repealing such laws that obstruct compliance. States also must establish mechanisms to permit and facilitate control of their effective application, especially by domestic judges.

The conventionality principle requires domestic law be subjugated to international human rights law and that international human rights law be applied and supervised by domestic authorities. It requires that the body of international human rights law—comprised of the instruments they have enshrined—be applied by States domestically.

Articles 26 and 27 of the Vienna Convention on the Law of Treaties enshrine, *sui generis*, the principle of “*Pacta sunt servanda*”—that every treaty in force is binding upon the parties to it and must be performed by them in good faith. Second, it prohibits invoking the grounds of domestic legal effects as justification for failure to comply with a treaty.³

The American Convention on Human Rights also develops these principles in its articles 1, 2, and 29.

Thus, article 1 establishes that States Parties commit to respect the rights and freedoms recognized in the treaty, along with an obligation “to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination

¹ Vienna Convention, Article 53.

² Inter-American Court of Human Rights, Advisory Opinion OC-18 of September 17, 2003, paragraph 73.

³ Article 27 of the Vienna Convention on the Law of Treaties: “Internal law and the observance of treaties. A party may not invoke the provisions of its domestic law as justification for its failure to perform a treaty. This rule is without prejudice to article 46.”

for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition....”

Along with this, article 2 of the ACHR establishes that States Parties have an obligation to enact legislative or other provisions, where necessary, to guarantee the exercise of the rights and freedoms enshrined in the treaty: “Where the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms.”

Along these same lines, article 29 prohibits interpreting the Convention in a way that limits the enjoyment and exercise of the rights and freedoms recognized therein.

In sum, the conventionality principle entails guaranteeing the incorporation and application of international human rights law into domestic legal systems, without using interpretations that would tend to limit the enjoyment and exercise of the rights and freedoms recognized in the ACHR or in other international instruments enshrining them.

2. Measures to apply international human rights law in domestic legal systems

According to the States’ responses, it is a commonly accepted practice to give the human rights treaties they sign, ratify, or adhere to the rank of constitution, placing such treaties in the constitutional bloc (*bloque de constitucionalidad*) and thereby facilitating control by domestic judges.

Some States also incorporate provisions of the Convention into their domestic legal systems, taking into account the interpretations issued by the Inter-American Court of Human Rights through its judgments. This practice takes into account that the State is subject to the Court’s jurisdiction, as well as the State’s participation in the contentious case on responsibility in which the interpretation was made.

This practice clashes with another approach that only accepts the Convention as binding under the terms in which it was agreed upon, not complimented with the interpretation of it by the Inter-American Court. This stance is based on the argument that States are only required to comply with the terms of the treaty itself.

States opting to accept that the Inter-American Court’s interpretation of international human rights law is binding tend to establish this in the constitution, requiring the Convention be applied based on the Inter-American Court’s pronouncements interpreting it—that is, in both contentious judgments and advisory opinions.

In sum, the States’ responses to the questionnaire sent by the Inter-American Juridical Committee show that there is no single, unanimous criteria for applying the conventionality principle, and measures can include the following:

- i. The incorporation of international law into domestic legal systems, either automatically as a consequence of signing or accepting a treaty, or enacted explicitly by a legislative body.
- ii. The repealing of domestic laws that run contrary to international human rights law.
- iii. The enshrining of additional laws giving domestic judges competency to review domestic law based on international law, allowing for application of the latter when it is in conflict with the former.
- iv. Enacting laws enabling other justice operators to apply international human rights law when it comes in conflict with domestic law.
- v. The obligation to interpret domestic law according to the ACHR in such a way as to not limit the enjoyment and exercise of the rights and liberties enshrined therein.
- vi. The application of the Convention pursuant to its terms.
- vii. The application of the Convention pursuant to its interpretation by the Inter-American Court. In some cases, this is enshrined in the constitution, while in others,

domestic courts—especially constitutional courts—are in charge of reaching such conclusions.

3. Conventionality control

Conventionality control involves comparing domestic legal provisions with the body of international human rights law to ensure that the rights and guarantees enshrined in the latter are made effective within States.

Thus, conventionality control represents the principle tool for guaranteeing the effective application of international human rights instruments—the conventionality principle—within States, however they may be applying international human rights law domestically.

In addition to enshrining States' obligation to guarantee the incorporation and application in their domestic legal systems of its provisions without using interpretations leading to limitations on the enjoyment and exercise of its rights and freedoms, the ACHR established the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights as the bodies with authority to hear matters related to compliance with the commitments made by States.

Specifically, the exercise of conventionality control by the Inter-American Court of Human Rights in a particular case requires the State Party to the ACHR to declare that it recognizes the jurisdiction of this court over all cases involving the interpretation or application of the Convention as fully and lawfully obligatory and not requiring special agreement.⁴

The Inter-American Court of Human Rights has been responsible for establishing the concept of conventionality control as a means of guaranteeing application of the provisions of the American Convention on Human Rights and other international human rights instruments in domestic law, emphasizing the subsidiary nature of its involvement with the aim of making the guarantee effective—that is, while responsibility first falls to domestic judges to exercise this control, it is only in a subsidiary role—i.e., when this control fails or errs—that the Inter-American Court of Human Rights steps in to exercise control.

In the words of the Inter-American Court, domestic judges are responsible to “ensure the effects of the provisions of the Convention are not impacted by application of laws that run contrary to their aim and purpose.”⁵ “...In other words, the Judiciary should exercise not only a control of constitutionality, but also of ‘conventionality’ *ex officio* between domestic norms and the American Convention; evidently in the context of their respective spheres of competence and the corresponding procedural regulations.”⁶

Thus, exercise of conventionality control falls first to domestic judges or justice officials, and only on a subsidiary basis—that is, should this domestic forum fail to exercise this domestic control—should the Inter-American Court of Human Rights exercise that control through decisions in which it may find the State internationally responsible for violating the Convention and, as a remedy, order the removal or addition of provisions domestically or the adoption of different measures where necessary to secure the effectiveness of the rights and guarantees enshrined in international human rights instruments.

This is to say that the conventional control carried out by comparing domestic law with the provisions of treaties should preferably be exercised by domestic judges, and only on a subsidiary basis by the Inter-American Court of Human Rights, when domestic control is not exercised.

Accordingly, clear domestic regulations on the authority of judges and other justice officials to exercise conventionality control in their decisions, along with adequate training for these justice officials on international human rights instruments provide useful tools for properly exercising conventionality control within States, without need to engage the

⁴ ACHR, article 62.

⁵ Inter-American Court of Human Rights, case of *Almonacid Arellano et al. v. Chile*, judgment of September 26, 2006.

⁶ Inter-American Court of Human Rights, case of *Radilla Pacheco v. Mexico*, judgment of November 23, 2009.

jurisdiction of the Inter-American Court of Human Rights, thereby avoiding finding States internationally responsible for violating such instruments.

Other domestic State authorities that act as justice officials may also end up exercising conventionality control given that when international human rights instruments are adopted by States, they bind all State authorities.⁷

4. Principle of consistent interpretation

The principle of consistent interpretation is based on article 29 of the American Convention on Human Rights and requires interpretation of the Convention to permit the enjoyment and exercise of the rights and freedoms established in the Convention without limiting them beyond the measures provided for therein; without suppressing or restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another convention to which one of the said States is a party; without precluding other rights or guarantees that are inherent in the human personality or derived from representative democracy as a form of government; and without excluding or limiting the effect that the American Declaration of the Rights and Duties of Man and other international acts of the same nature may have.

Interpretation of the domestic law pursuant to the ACHR, its protocols, and the caselaw under the conventions has been especially encouraged in a bid to harmonize domestic law and international human rights law, a practice that ensures that domestic judges exercise conventionality control in countries that do not have a diffuse system of constitutional review. This is without prejudice to the principle of interpretation according to which the constitutional review system States choose is applied independently.

The incorporation of procedural rules into domestic legal systems in order to provide clarity with regard to the competence of judges and other justice officials on applying the Convention and interpreting domestic law in keeping with the American Convention on Human Rights facilitates the application of this principle.

The principle of consistent interpretation has been expressly adopted by a number of States in their constitutions, make it mandatory for the interpretation of human rights law to be consistent with the international treaties and agreements on such matters.

Requiring this of judges entails a high degree of training among judiciary officials on international human rights instruments and their effects.

5. Target audience of this guide

In keeping with the aim of this documents to support the States comprising the OAS by providing them with a guide to facilitate application of the conventionality principle and the exercise of conventionality control, following are a series of situations deriving from these States' connections to international human rights instruments—including the ACHR—and their submission to the jurisdiction of the Inter-American Court:

- i. States not bound by the American Convention on Human Rights.⁸
- ii. States bound by the American Convention on Human Rights but that have not accepted the jurisdiction of the Inter-American Court of Human Rights.⁹

⁷ Inter-American Court of Human Rights, case of *Radilla Pacheco v. Mexico*, Judgment of November 23, 2009.

⁸ Of the 35 countries comprising the OAS, the ACHR has not been signed or ratified by 9 of these States and has been denounced by 2 others.

⁹ The jurisdiction of the Inter-American Court of Human Rights is accepted by 20 States. As already noted in this document, under the terms of article 62 of the ACHR, whether States Parties are subject to the jurisdiction of the Inter-American Court depends on whether they have expressly declared that they recognize as binding, *ipso facto*, and not requiring special agreement, the jurisdiction of the Court on all matters relating to the interpretation or application of the Convention.

- iii. States signatories to the American Convention on Human Rights that have also recognized the obligatory jurisdiction of the Inter-American Court, especially in cases involving the interpretation or application of the Convention.
- iv. States signatories to the American Convention on Human Rights that have accepted the jurisdiction of the Inter-American Court and have been party to the process through which this Court carries out interpretation of the Convention.
- v. States signatories to the ACHR that have accepted the jurisdiction of the Inter-American Court but have not been party to a process through which this Court carries out interpretation of the Convention.

The States described in categories ii through v are the direct target audience of this guide, which describes the subject and the application of the conventionality principle and the main tool for guaranteeing its effectiveness: conventionality control, through both the Inter-American Court of Human Rights and the different OAS member states.¹⁰

6. Scope of conventionality control

As described in this document, the application of conventionality control within States—especially but not exclusively by domestic judges—is performed through the comparison that these officials must make of domestic laws with the ACHR and international human rights instruments with the aim of guaranteeing the effectiveness of the rights and guarantees contained in those instruments, giving priority to application of the Convention over domestic laws that are not in line with it.

In a subsidiary manner, when domestic control is nonexistent or does not adequately guarantee the application of the Convention or any other human rights treaty, the Inter-American Court of Human Rights is the body in charge of exercising this control through its judgments.

The Inter-American Court also interprets the provisions of the ACHR through its judgments and has indicated that its interpretations are obligatory for States Parties to the Convention: “... In other words, the Judiciary should exercise not only a control of constitutionality, but also of ‘conventionality’ *ex officio* between domestic norms and the American Convention; evidently in the context of their respective spheres of competence and the corresponding procedural regulations. Toward this, the Judiciary must take into account not only the treaty but also interpretation of it by the Inter-American Court, the final interpreter of the American Convention.”¹¹

Additionally, in exercising its consultative role, the Inter-American Court issues advisory opinions when member states of the Organization consult the Court regarding the interpretation of the ACHR or of other treaties concerning the protection of human rights in the American states.¹²

This means that the Inter-American Court’s interpretation of the provisions of the Convention can be found in both its judgments and in its advisory opinions.

Currently, the scope of the obligation to apply the ACHR or other human rights treaties within States Parties ranges between two extremes: the application of international human rights law pursuant to the terms under which it was agreed to—*pacta sunt servanda*; or in accordance with the Inter-American Court’s interpretation of international human rights law, which entails accepting the jurisprudence of the Court as binding.

Also in dispute is which of the Inter-American Court’s pronouncements interpreting the ACHR’s provisions are binding for its application. That is, if limited to the judgments—contentious function—or also including advisory opinions—consultative function.

¹⁰Specifically, the 14 countries that responded to the questionnaire sent by this Committee that asked about the application of this principle and the domestic exercise of conventionality control.

¹¹Inter-American Court, case of *Radilla Pacheco v. Mexico*, Judgment of November 23, 2009.

¹²ACHR, article 64.

This means that currently, determining the scope of conventionality control involves a series of different jurisprudential and precedential angles that diverge or converge in relation to the binding nature of the Inter-American Court's jurisprudence as far as interpretation of the ACHR and other international human rights instruments, based on either its judgments or its advisory opinions.

On one hand, the Inter-American Court has, in numerous pronouncement, defined the scope of the application as including all States Parties to the ACHR, including not only its specific provisions but also the Court's interpretations of them in its judgments and advisory opinions: "The judiciary must exercise a type of 'conventionality control' for domestic legal provisions [...] and the American Convention on Human Rights. Toward this, the Judiciary must take into account not only the treaty but also interpretation of it by the Inter-American Court, the final interpreter of the American Convention."¹³

Specifically with regard to interpreting the provisions of the ACHR while exercising its consultative function, the Inter-American Court finds the effects are binding: "the Court finds it necessary to recall that, pursuant to international law, when a State is a party to an international treaty, such as the American Convention on Human Rights, such treaty is binding for all its organs, including the Judiciary and the Legislature, so that a violation by any of these organs gives rise to the international responsibility of the State. Accordingly, the Court considers that the different organs of the State must carry out the corresponding control of conformity with the Convention, based also on the considerations of the Court in exercise of its non-contentious or advisory competence, which undeniably shares with its contentious jurisdiction the goal of the inter-American human rights system, which is 'the protection of the fundamental rights of the human being.'"¹⁴

In the same advisory opinion from which the quoted text in the previous paragraph was drawn, the Inter-American Court said that its interpretation of international human rights instruments constitutes a guide for OAS member states to help them avoid human rights violations: Furthermore, the interpretation given to a provision of the Convention through an advisory opinion provides all the organs of the member states of the OAS, including those that are not parties to the Convention but that have undertaken to respect human rights under the Charter of the OAS (Article 3(l)) and the Inter-American Democratic Charter (Articles 3, 7, 8 and 9), with a source that, by its very nature, also contributes, especially in a preventive manner, to achieving the effective respect and guarantee of human rights. In particular, it can provide guidance when deciding matters relating to children in the context of migration and to avoid possible human rights violations."

The Inter-American Court has based pronouncements reaffirming the binding nature of its jurisprudence on its status as the interpreter authorized by the Convention, along with the argument that based on article 69 of the ACHR, the judgments it adopts through its adversarial function must be transmitted to all States Parties to the Convention to ensure they are publicized and disseminated.

One school of thought in the scholarship departs from the thesis of the Inter-American Court by arguing that this interpretation is excessive and the Court's jurisprudence is not binding and could eventually nullify a decision:

¹³Quoted in CUADERNILLO DE JURISPRUDENCIA DE LA CORTE INTERAMERICANA DE DERECHOS HUMANOS No.7: CONTROL DE CONVENCIONALIDAD, citing Inter-American Court, case of *Almonacid Arellano et al. v. Chile*. Preliminary Objections, Merits, Reparations, and Costs. Judgment of September 26, 2006. Series C No. 154, para. 124: Cfr, Inter-American Court. Case of *La Cantuta v. Peru*, Merits, Reparations, and Costs. Judgment of November 29, 2006. Series C No. 162, para. 173.

¹⁴Original footnote to the quoted text: Inter-American Court. The Effect of Reservations on the Entry Into Force of the American Convention on Human Rights Advisory Opinion OC-2/82 of September 24, 1982. Series A No. 2, para. 29; Inter-American Court. Case of *Boyce et al. v. Barbados*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 20, 2007. Series C No. 169. Par. 15.

“Furthermore, the Court has gone further to the point of ordering conventionality control based on its own jurisprudence, which may be excessive given the juridical nature of international jurisprudence.

“... Technically, the Court is not correct on this, as this jurisprudence is not, by nature, binding (see article 38-1 of the ICJ). Perhaps the Court should use an argument other than the binding nature of the jurisprudence. The *pro homine* principle could be applied here, but not the application of jurisprudence, as it is not binding.”¹⁵

In addition, the two positions remain clearly defined in the responses of the States Parties¹⁶ to the questionnaire sent by this Committee, with some limiting application of conventionality control to the text of the ACHR, while others, either by enshrining a provision in their constitutions or through judgments issued by their courts, requiring application of the Convention as it has been interpreted by the Inter-American Court in both its contentious function and its advisory opinions—that is, recognizing the binding nature of the Inter-American Court's jurisprudence.

In view of the foregoing, and once again turning to categorizing the target audience of this guide, in the scope of the exercise of conventionality control, States can be placed in the following categories:

- i. States not bound by the American Convention on Human Rights. These States are not bound by the text of the ACHR, and therefore neither are they bound by interpretations of its provisions by the Inter-American Court. Without prejudice to this, as the Inter-American Court itself has noted, its interpretations of the ACHR can serve as a guide to guaranteeing human rights.
- ii. States bound by the American Convention on Human Rights but that have not accepted the jurisdiction of the Inter-American Court of Human Rights. By virtue of the principle of *pacta sunt servanda*, these States are bound by the text of the Convention. The Inter-American Courts interpretations of the Convention can serve as a guide in the application of international human rights law.
- iii. States signatories to the American Convention on Human Rights that have also accepted the jurisdiction of the Inter-American Court. The States are indisputably bound by the ACHR based on the principle of *pacta sunt servanda*. However, their acceptance of the Inter-American Court's interpretations of the provisions of the Convention as binding is not a settled matter.

According to the response from several States, acceptance of the effects of the provisions of the Convention pursuant to their interpretation by the Inter-American Court is enshrined in their constitutions. However, other States only view the Inter-American Court's interpretations of the Convention as binding when offered during a process to which they were party and had the opportunity to exercise the right to defense and challenge.

- iv. States signatories to the American Convention on Human Rights that have accepted the jurisdiction of the Inter-American Court and have been party to the process through which this Court carries out interpretation of the Convention. The status of international *res judicata* enjoyed by the Inter-American Court's judgments without question makes their interpretations binding for States Parties.
- v. States signatories to the American Convention on Human Rights that have accepted the Inter-American Court's jurisdiction and requested an advisory opinion on interpretation of a provision of the Convention. They are bound by the interpretation offered by the Inter-American Court.
- vi. States signatories to the American Convention on Human Rights that have accepted the Inter-American Court's jurisdiction but have not requested the advisory opinion

¹⁵Becerra, Ramírez Manuel, *El Control de la Aplicación del Derecho Internacional*, Universidad Nacional Autónoma de México, pgs. 129 and 130. Translated from the original Spanish.

¹⁶Answers were received from 14 States.

interpreting a provision of the Convention. Interpretation of the Convention in an advisory opinion can serve as a guide for its application.

7. The stance of States Parties to the ACHR on applying conventionality control

The countries bound by the ACHR, some of which responded to the questionnaire sent by the IJC, conduct domestic conventionality control through their domestic judges and other judicial authorities.

In several legal systems, human rights treaties are incorporated into the constitution to form part of the constitutional bloc, enabling domestic judiciary officials to apply them directly.

Some constitutions require domestic judges to apply the ACHR and the interpretations of its provisions made by the Inter-American Court, recognizing the binding nature of its jurisprudence.

In other domestic legal systems, only international human rights law is seen as binding, with no mention of the decisions of international control bodies.

A broadly-accepted practice in the absence of applicable constitutional or legal provisions is for constitutional and other domestic courts to issue judgments whose grounds include the Inter-American Court's interpretations of the Convention, from both its judgments and its advisory opinions.

8. Domestic authorities in charge of exercising conventionality control

Domestic judges are the first instance responsible for applying the Convention to guarantee the recognition and protection of the rights and guarantees enshrined in the ACHR and in international human rights instruments.

Other authorities can also play this role of recognizing, protecting, and guaranteeing the application of the ACHR and other international human rights instruments, which could lead to the exercise of conventionality review by administrative authorities.

To facilitate conventional review, some domestic legal systems require procedural rules on the competence of judges and other administrative authorities on applying the Convention. They also establish a duty to interpret domestic law based on the American Convention on Human Rights and the Inter-American Court's interpretation thereof in both its judgments and its advisory opinions.

Subsidiary to this, control is exercised by the Inter-American Court, which, in multiple pronouncements, has emphasized the subsidiary nature of its intervention, requiring first that domestic judges' fail to conduct conventional review required of them to guarantee the application of international human rights instruments.

9. Mechanisms for exercising conventionality control

Conventionality control within States is, in practice, carried out through whatever constitutional review process is in place, whether diffuse, concentrated, or mixed. In the first system, control can be exercised by any judge, while in the second system, responsibility falls to a judicial body within the State structure established especially for that purpose. In the third system, despite the existence within the State structure of a body with the authority to exercise concentrated constitutional oversight, with competence to remove from the legal system any law that violates the constitution, every judge has the authority to disregard provisions that run counter to the Constitution in specific cases.

Judges and the specialized body in charge of constitutional control have generally tended to exercise conventionality control through:

- i. direct application of the provisions of the Convention, in the absence of applicable domestic law provisions;
- ii. suspension, by judges within States, of application of the domestic legal provisions that run contrary to the ACHR and the Inter-American Court's interpretation of its provision—conventionality control in the strict sense;

- iii. use of the provision of the Convention as the basis for their argument or interpretation in enforcing domestic human rights law.
- iv. application of interpretations of the Convention's provisions as set forth in Inter-American Court's judgments.
- v. Another commonly-accepted practice identified is the application of the conventionality principle by high courts of justice through orders that are based on their jurisprudence and on the Court's interpretations set forth in its judgments.

* * *

2. Validity of foreign judicial decisions in light of the Inter-American Convention on extraterritorial validity of foreign judgments and arbitral awards

Document

CJI/doc. 611/20 Domestic procedures for the recognition and enforcement of foreign judgments: recommendations
(presented by Dr. Ruth Stella Correa Palacio)

* * *

At the 90th Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, March, 2017), Dr. Ruth Stella Correa Palacio proposed the addition of a new topic titled: “Validity of foreign judicial decisions in light of the Inter-American Convention on extraterritorial validity of foreign judgments and arbitral awards.”

The plenary accepted the proposal which was added to the agenda, and Dr. Correa, the rapporteur designated, pledged to provide a report for the next session.

At the 92nd Regular Session (Mexico City, February 2018), the rapporteur Dr. Ruth Stella Correa Palacio recalled that her work consisted of conducting a search on the prevailing legal framework and good practices, in order to demarcate the situation of the topic in the region. She mentioned the New York Convention, the Panama Convention and also the Montevideo Convention as the baselines for better understanding the current situation of the theme in the region, and she referred to the relative progress implied by the suppression of the *exequatur* in Europe (in certain cases).

From her comparative study we may infer that the recognition of foreign judicial decisions depends on the reciprocity practices in the area of treaties among States, and that there seems to be more flexibility for the recognition of the decisions awarded by arbitrators, vis-à-vis the sentences awarded by the courts, in addition to the requirements in terms of homologation that the latter must follow. She also pointed out the differences in the procedural burden required for trade arbitration awards and the costly procedures that the decisions ruled in litigation trials must endure. In the case of judicial decisions with evidential purposes, these are subject to homologation (confirmation) in some States such as Bolivia, or otherwise to authentication procedures. She also noticed differences between the competent authorities for the homologation of judicial decisions (high-rank officials) and the authorities in charge of enforcing arbitration awards (low-rank judges). In her opinion, communications and information technologies have not been used properly for simplifying the recognition process and the enforcement of sentence procedures. Finally, the rapporteur proposed drafting a guide of good practices on facilitating the recognition of judicial decisions, so that these good practices might devise and implement a speedy procedure for the recognition of foreign judicial awards, especially in the absence of opposition by the party subject to the execution process.

Dr. José Moreno highlighted that there is abundant information on the recognition and enforcement of decisions both in ASADIP and in other forums on the issue, and that these could be used as valuable input for the work being carried out by Dr. Correa. At the same time, he asked the rapporteur to specify the scope of the proposed guide.

Dr. Carlos Mata complimented Dr. Correa on her work and agreed with Dr. Moreno as regards the need to specify the scope and purposes of the proposed guide, taking into consideration that there is significant progress on the topic both at the domestic and regional levels, making special mention of The Hague Conference.

Dr. Hollis pointed out the relevance of the study made by Dr. Correa and highlighted the challenge in implementing a simplified recognition system for judicial decisions amidst such a diversity existing in the region regarding the requirements and procedures in that area.

The Chair was of the opinion that the New York Convention provides a solution to the problem involving the enforcement of foreign decisions in the area of arbitration, and suggested that the focus of the rapporteurship should consist in seeking standards beginning with the Panama Convention regarding the enforcement of national decisions and identifying the difficulties that this Convention has encountered in terms of massive ratification. He also suggested proposing specific actions, because the CJI cannot restrict its activities just to efforts of systematizing and codifying, and must be proactive in terms of propositions and effectively contribute to the progressive development of international law. The Chair's suggestion was therefore to concentrate efforts on enforcement of foreign decisions by local judges, and to make further progress in the study before determining the desired results.

Dr. Moreno was of the opinion that the topic is not completely resolved by the New York Convention and that there is still a considerable path ahead. He added that as the topic is being thoroughly addressed in other forums, perhaps the proposed guide should not elaborate too much on the issue of arbitration.

Dr. Correa explained that the proposal could consist in a legislative guide aimed at facilitating the procedure of homologating enforcement of sentences, or else a guide of good practices containing proposals enabling a more dynamic solution to the enforcement of decisions. The work would be restricted to the decisions awarded by the institutional organs of the Judiciary so as to facilitate juridical cooperation.

The Chair was in agreement with the need to introduce a dynamic procedure in the enforcement of foreign judicial decisions, but explained that the issue was well routed in The Hague Conference, so it would perhaps be wise to wait and see if those efforts reach a safe harbor or - on the contrary - just reach a point of stagnation. Should the Hague Conference - in which several OAS members are involved - achieve any result, it should be assessed whether the CJI can and should use such an outcome as the starting point for further study. He therefore proposed keeping the topic on the CJI agenda, in order to ask the legal advisers of the ministries of foreign affairs during the next session about the attitude of the OAS States *vis-à-vis* the work carried out by The Hague Conference, in order to determine whether the CJI is in fact the competent forum.

The rapporteur suggested sending out a questionnaire to the member states in order to find out their opinion on the issue.

Dr. Moreno urged keeping the topic on the agenda and waiting to see the result of the consultations with the legal advisers.

Dr. Dante Negro explained that not all the member states are involved in the preparatory work of The Hague Conference. In this context, the Chair, taking into consideration that the Conference must not be seen as the sole parameter in the decision-making process, proposed sending the questionnaire suggested by Dr. Correa, and added that - on the basis of the responses received and the consultations carried during the next session - the CJI might be in a position to make the corresponding decisions.

Dr. Mata was of the opinion that the questionnaire must be drafted very carefully so that the questions focus on the efficacy of procedures instead of merely concentrating on the description of those procedures.

Dr. Moreno asked the Department of International Law to compile the material that The Hague Conference and ASADIP made available to the public for further study by the rapporteur.

The Chair agreed with this suggestion and proposed including this theme at the meeting with the legal advisers in the region during the next session, in order to receive less standardized responses, the preference being for more candid replies regarding the efficacy of enforcement procedures, and then compiling the inputs regarding the content and wording of a proposed

questionnaire that might be previously forwarded to each State. The members approved this proposal by unanimous decision.

During the 93rd Regular Session (Rio de Janeiro, August 2018), the rapporteur Dr. Ruth Stella Correa Palacio presented a report entitled "Recognition and enforcement of foreign judgments and arbitral awards: preliminary report, (document CJI/doc. 564/18). The purpose of her report is to determine the necessary requirements within the States for a foreign sentence to produce mandatory effects. She confirmed that both the Convention on the Recognition and Enforcement of the Foreign Arbitral Awards of New York of 1958 and the Inter-American Convention on Extraterritorial Efficacy of Foreign Sentences and Arbitral Awards of 1979 (the Montevideo Convention) were been signed by the majority of the OAS member states. The first refers to arbitration decisions, while the Montevideo Convention refers to recognition and enforcement. She found a certain resistance to technological advances such as electronic commerce. She also estimated that enforcement is the responsibility of the highest courts in systems that entail many stages, once a foreign judgment has been accepted. Aware of the preliminary draft that is being working by The Hague Conference on the subject and the need to avoid duplication of work, she considered that this case justifies the efforts of the Committee. The preliminary draft of the Conference is source of some concern; among other things, it only applies to the civil and commercial area, ignoring the labor issue. Additionally, it maintains a difference between recognition and enforcement by imposing cumbersome procedures. The Montevideo Convention on the other hand has a specific regulation that allows States to determine internal procedures without offering guidelines. This leaves a space for each State to make free judgments, something that repeats the preliminary draft. Therefore, the rapporteur found it convenient for the Committee to takes a stand and develop something in this area. By way of conclusion, there is no obligation in internal legislations regarding the recognition of foreign court decisions; this contrasts with arbitration decisions, where recognition is undeniable, so the report should not rule on arbitration. Likewise, international regulation does not guarantee access to justice in the case of decisions produced by the judicial bodies of other States, so fundamental rights would be restricted. Therefore, it is suggested that certain procedures be changed, and it should be ask whether it is necessary to maintain duality, recognition and enforcement, or else reduce everything to enforcement.

Dr. José Moreno thanked Dr. Ruth Stella Correa Palacio for her work and explained that the New York Convention on sentences and arbitral awards is one of the most successful, with a large number of States parties, despite imposing challenges in the enforcement of judicial decisions. The issue of enforcement of sentences led to many divergences, and this discussion was resumed at the 2001 Conference of The Hague, whose diplomatic conference was scheduled for 2019. He proposed that this topic be part of the discussion with the representatives of The Hague Conference and that the Committee should define the type of product be dealt with by the Committee. Dr. Moreno recommended as well preparing a guide or a *soft-law* document to serve States. There is a very important work of ASADIP related to the issue of international procedures that must be taken into consideration. He recalled that there will always be considerations of a domestic nature.

Dr. Luis García-Corrochano thanked the rapporteur for the importance of the issue of enforcement of sentences, an issue that involves various aspects and which is a source of concern when States resort to defense of public order. He urged the rapporteur to work on all aspects, not just the commercial ones. He referred on issues that are related to the valuation of society, such as family law where a conflict arises between foreign and domestic law.

Dr. Duncan Hollis expressed his agreement with removing arbitration issues that the report should be involved with access to justice as a central objective and take into account challenges imposed by new technologies. He consulted the rapporteur on the expression "change the norms" in the conclusions and asked her if she meant changing instruments or adopting new rules. Finally, he recommended combining the Civil Law and Common Law systems in her report, regardless of the nature of the final product that is decided upon.

Dr. Carlos Mata Prates congratulated Dr. Correa on her work, which stresses on foreign awards, and asked her about the nature of the instrument to be developed (the product to be expected). Considering the work of The Hague Conference on the matter, suggested that the Committee should take a position once it has a better idea of the outcome of those negotiations.

Dr. Joel Hernández thanked and congratulated the rapporteur on her dedication. Regarding the contribution of the CJI to the development of the topic, the expertise of the members and the progress made in other forums must be taken into account. Aware of the progress of The Hague Conference with regard to the Preliminary Draft Law, it would not be appropriate to launch a document of the same nature. However, what the Committee could do would be a communication including recommendations to the Conference. A second contribution would be the drafting of a guide for the States to facilitate the internal regulation with very precise recommendations to guide the States on minimum elements that allow the future enforcement of the Convention. In this regard, Dr. José Moreno proposed to ask Professor Nadia de Araújo if, in her capacity as observer of The Hague Conference, she could represent of the CJI.

The Chair thanked the rapporteur on her report, clearly stating the need not to embark on something that duplicates the work of The Hague Conference. He said that he understood the difficulties imposed by enforcement, in particular by reason of the formal aspects. Progress must be made in conformity with existing developments. He shared the views expressed by Dr. Hernández regarding the available options, and also verified that next Thursday's meeting will be an excellent opportunity to discuss the subject. Finally, it was important to reach an agreement on the type of product that you want to work with.

Dr. Joel Hernández explained that in his opinion there was no duplication in this case due mainly depending on the time each institution takes to develop its topics, therefore there was no impediment in proceeding with the subject. He also noted that the idea of submitting amendments to the Montevideo Convention may take even longer.

The rapporteur of the topic, Dr. Ruth Stella Correa Palacio, stated that, based on what emerges, the Committee is not expected to seek to modify the Montevideo Convention but should work on a guide or model law, in accordance with the preference of the rest of the members, limiting the issue to domestic recognition of decisions so as to face the problem of access to justice. The aim should be to provide States with mechanisms and procedures to facilitate authentication of foreign documents. She clarified that The Hague Conference seems not to be addressing these topics. She concluded by stating her option to favor a model law.

The Chair explained that the issue would remain on the agenda of the Committee, and invited members to take advantage of both meetings expected for the next days, the VII Joint Meeting with the Advisors (August 15, 2018) and the Session with Representatives of The Hague Conference (August 16, 2018), to determine the path to be followed.

During the 94th Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, February 18 to 22, 2019), the rapporteur for the topic, Dr. Ruth Stella Correa Palacio, presented her report entitled "Recognition and enforcement of foreign judgments and arbitral awards," (document CJI/doc. 581/19), the purpose of which is to facilitate the adoption of mechanisms to ensure effective recognition of foreign decisions within States, including the possibility of proposing suitable mechanisms, taking as a reference the universal and regional regulations, in accordance with the 1958 New York Convention and the 1979 Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards - Montevideo Convention.

The rapporteur then briefly described the international instruments governing the subject and some of the national laws mentioned in her first report, as well as the discussions held at the last working session on the status of the preliminary draft convention prepared by The Hague Conference, which showed, among other things, that the Committee was not seeking to replicate what that body was proposing. She also devoted space to the positive comments offered by the legal

advisers in favor of a Committee pronouncement on the matter, noting the difficulties in enforcing court decisions abroad (among which she mentioned the cumbersome and obsolete procedural and enforcement processes, the obstacles imposed, or the reciprocity required by certain States). The rapporteur also referred to the state of play in the United States where there would appear to be consensus on the applicability of state laws with regard to the recognition and enforcement of foreign judgments, despite the absence of a pronouncement by the U.S. Supreme Court. She concluded by describing the developments of the American Association of Private International Law (ASADIP) and the Ibero-American Institute of Procedural Law (IIDP), whose common denominator is the execution of the transnational effectiveness of judgments, included in the Montevideo Convention but not in the preliminary draft of The Hague Conference.

In that context she explained the options available for defining the work to be done:

- to prepare a guide or soft document that will be useful for States in the implementation of the Montevideo Convention;
- develop a model law for the implementation of the Montevideo Convention;
- send a communication to the Hague Conference with recommendations to be taken into account in the development of the draft.

Dr. José Moreno congratulated the Chair on her proposal, which had been shared with Professor Ochoa from Venezuela, an authority on the subject, who had praised the contribution proposed by the rapporteur. He noted an asymmetry between this issue and arbitration, which lacks instruments in the area of enforcement of judgments. He also supported the initiative of developing a model law accompanied by comments that proposed a set of regulations (a sort of mixed text of guidelines and model laws). Among the considerations that should be incorporated into the Chairperson's paper, he proposed that the *exequatur* be left voluntary and not included in the implementation process, and that the report refer to new technologies and the importance of flexibility.

Dr. Carlos Mata asked for clarification about the Committee's objective in this area, so as to avoid entering into conflict with developments in other forums and to take into account aspects regulated at the internal level (particularly considerations relating to procedures). He also mentioned an academic event to be held in Uruguay on the Montevideo Convention, in which the rapporteur could participate, a proposal that was supported by Dr. José Moreno.

Dr. Iñigo Salvador noted that the draft covered important issues aimed at making effective the decisions of courts of foreign jurisdiction. It urged the inclusion of the legal framework for recognition and enforcement of arbitral awards, which could serve as an example for judgment in terms of their modalities. With regard to the nature of the work to be undertaken by the Committee, he noted that the two initial proposals did not contradict each other and, in the light of the opinion of the legal advisers, he would be in favor of a model law. He concluded by proposing some specific formulations with respect to the text presented.

The Vice Chair, Dr. Luis García-Corrochano, referred to some of the obstacles in domestic legislation and the important role of parliaments in making rules.

Dr. Milenko Bertrand consulted on whether the work would include the enforcement of judgments of international courts or only of domestic courts. He also asked about the situation where the respondent is the State and where other bodies should appear, such as on labor issues. Finally, he addressed the matter of jurisdiction disputes between foreign courts in the light of the issue of forum shopping.

On the subject of forum selection, Dr. José Moreno invited the rapporteur to harness the real value of the work being done by The Hague Conference. In relation to the nature of the work, he suggested that the rapporteur first prepare a Guide and then work on the model law.

Dr. Mariana Salazar asked the rapporteur about the pros and cons of each of the proposed alternatives. With regard to the incorporation of judgments of international courts, she proposed that they not be incorporated into this study because they deal with different subjects.

The rapporteur first referred to the issue of the asymmetry of the decisions of international tribunals, including arbitration tribunals, or in the field of human rights, which are automatically recognized by States by an express regulation or constitute an authoritative interpretation, differing, therefore, from the situation of judgments issued by State bodies. The aim is to facilitate procedures and achieve greater efficiency by prioritizing enforcement procedures (without burdening the beneficiary of the judgment with the recognition procedure). She expressed her interest in developing a properly supported model law that could serve as a practical guide, taking due account of the good practices of the Montevideo and New York Conventions. She was grateful for the invitation to Montevideo, which would serve as an input for her work as rapporteur (which should be disseminated by all members of the CJI on the issues that concern them). She concluded by explaining that all the observations would be taken into account. Dr. José Moreno observed the good timing of this work, which coincided with a time when reforms of various kinds were being carried out in several States in the area of private international law.

During the 95th Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, July 31 to August 9, 2019), the rapporteur for the topic, Dr. Ruth Stella Correa Palacio, described recent developments in the field and the challenges to ensuring an efficient mechanism in the face of the complexity of the rules. Based on the replies received to the questionnaire sent to States, he noted a certain flexibility on the part of national judicial bodies. At the regional level, he highlighted as an example to follow the regulations of the IACHR/Court that have special rules to facilitate the effectiveness of decisions. In the light of the recommendations presented by the members, the rapporteur explained her intention to present rules providing for expeditious procedures on matters where there are divergences, including exceptions with respect to the enforcement of foreign judgments, and to set aside the *exequatur*.

Dr. José Moreno thanked the rapporteur for her explanations, considering the important contribution of the subject to internal rules on enforcement of judicial decisions. Many procedural codes do not include standards adapted to the reality of civil procedural law, especially in view of the recent adoption of the Convention on the Enforcement of Judgments. He suggested as a way forward to develop a model law or model standard that countries could incorporate into their procedural codes, and that an explanatory text be included.

Dr. Milenko Bertrand noted that the courts do not make good use of the rules, and therefore a guide to the enforcement of judgments should be worked on.

Dr. Mariana Salazar requested the incorporation of a greater number of States to the extent of that the rapporteur's possibilities allowed.

Dr. George Galindo urged reflection on the object of what is to be done, and suggested developing a guide to good practice in normative language.

The rapporteur for the topic, Dr. Ruth Correa Palacio, noted the difficulty of drawing up a guide to good practices due to the high number of exceptions imposed by the procedures in the Hemisphere. She therefore welcomed Dr. José Moreno's suggestion to work on a model law that would serve as an explanatory guide on how to easily access justice, which could respond to Dr. Milenko Bertrand's concern.

Dr. José Moreno suggested to develop a model law following the example in the area of UNCITRAL arbitration.

Dr. Espeche-Gil referred to his experience in the field of letters rogatory in his role as Ambassador of Argentina in Switzerland, in relation to which the complex processing of the

mechanisms required by that country obliged him to provide the information in Spanish at the different levels of his country.

Dr. Milenko Bertrand referred to the challenge posed by judges' lack of knowledge of their own domestic law, and therefore urged the linkage of key concepts to the rapporteur's work that could help modernize national systems.

Dr. José Moreno brought up the importance of dissemination and the experience of the Department of International Law in that regard, citing as an example the training of judges in the field of arbitral awards.

The rapporteur undertook to work on a model law accompanied by explanations, including, insofar as possible, good practices.

During the 96th Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, March, 2020), this issue was not considered.

During the 97th Regular Session of the Inter-American Juridical Committee (virtual session, August 2020), the rapporteur for the item, Dr. Ruth Correa, presented the report titled “Domestic Procedures for the Recognition and Enforcement of Foreign Judgments: Recommendations” (document CJI/doc. 611/20), aimed at simplifying domestic procedures used in the recognition and enforcement of foreign judgments, and described the main features of the proposed recommendations.

The study reviews the main international instruments applied in this area and notes the existence of domestic procedures in the majority of the OAS member states. In light of the Montevideo Convention, it also indicates the importance of mutual cooperation for greater effectiveness. It should likewise be noted that the rapporteur made it clear that the recommendations do not apply to matters related to arbitral awards; fiscal, customs, or administrative matters; or judgments and other matters that the States deem should be excluded.

Among the recommendations, the proposal supports the enforcement of foreign judgments without making the principle of reciprocity compulsory (third recommendation). Concerning extraterritorial validity, Dr. Correa stressed that what was being sought was compliance with the requirements of a convention or international standard – all subject to particular conditions, such as respect for public order, the ability to mount a defense, the principle of *res judicata*. It presents options for cases in which the States are not party to a particular convention, leaving it clearly established that they should not proceed to a review of foreign judgments with respect to the merits. The recommendations contain a list of grounds for denial that includes the improper exercise of jurisdiction over a case by a judge or court, failure to properly subpoena the parties, or a decision that violates the principles of public order (fourth recommendation). The rapporteur thanked Dr. José Moreno for his analysis of this point, indicating that she had accepted all his recommendations, except the grounds for denial, which she had decided to address separately.

Concerning procedural requirements, the report examines several aspects related to the expected analogous treatment of foreign judgments, which should be reviewed with all due speed. Within this context, she noted that documentation is a key issue and that technological advances have made it possible to simplify procedures, including the virtual consultation of documents and decisions. She therefore proposed merging the recognition and enforcement procedures, and if they are not merged, allowing the grounds for denial to be alleged only once during the recognition stage.

At the conclusion of her presentation, the rapporteur offered her special thanks to the Department of International Law – in particular, to Drs. Dante Negro and Jeannette Tramhel, for all their cooperation in the preparation of this report. She also thanked Dr. José Antonio Moreno for his thoughtful analysis of the topic and relevant recommendations.

Dr. Luis García-Corrochano thanked the rapporteur for her clear and systematic presentation. All members who took the floor thanked the rapporteur and congratulated her on her good work, its

accuracy, and the quality of the writing. Some of them also said that her contribution would be very useful for the region.

Dr. José Antonio Moreno declared that the report would be a positive contribution of the Committee in this area. He mentioned two specific matters that could be clarified. In point 4 i) “Extraterritorial Efficacy,” it did not seem appropriate to leave efficacy requirements duplicated as grounds for denial; while the notification of the original judgment is only relevant in situations of defiance, therefore it should not be added among the requirements for the recognition and enforcement of judgments (as is stated on point 5.3 a) ii)). In this context and for the purposes of consistency with current standards, he proposed leaving the mechanism used in the Brussels and Lugano Conventions in place. He concluded by thanking the rapporteur and the Department of International Law for their outstanding work.

Dr. Duncan B. Hollis asked the rapporteur to ensure that the recommendations were drafted in the proper format, citing point 4, whose English translation says “shall” instead of “should.” He suggested reviewing the entire text to ensure its uniformity, so that the wording reflected the non-binding nature of the recommendations. He asked whether there had been conversations with the Hague Conference, given the efforts of that institution in the realm of foreign judgments, to ensure that this was viewed as a supplemental rather than competitive project. He also inquired what the next steps would be.

Dr. Alix Richard requested the rapporteur’s opinion about the concept of public order, in which cultural principles or religious beliefs play a part, and her views on how to handle this issue when cultural differences were involved.

In relation to point 3.2, Dr. Eric Rudge inquired about the enforcement of judgments given the principle of reciprocity. He also expressed doubts about the enforcement process established in point 5.3.

Dr. Mariana Salazar also asked the rapporteur for her opinion about the next steps to take, given how advanced the work was, determining whether this report would be approved only by the Committee or if there were plans to secure the approval of the States through the General Assembly. Given its importance, she suggested circulating the report among the judicial authorities and judicial operators of each State and not confine it to the ministries of foreign affairs or embassies.

Dr. Iñigo Salvador focused on the issue of documentation (paragraph 5.4 of the proposal) – in particular, the introduction of electronic technologies that would obviate the need for domestic authentication of the documents that must be submitted with the request for recognition and enforcement of judgments. He expressed concern about the functional equivalency requirement, which could prove unrealistic in the region and for the moment could not replace the authenticated copy, given the lack of equivalence among the States and even the region when compared with other regions of the world. He explained that the apostille in our Hemisphere is a physical document that in the best of cases has an electronic signature. The apostille itself, however, is not electronic, as it is in Spain.

Dr. George Galindo recommended standardizing the verbs denoting the absence of any obligation on the part of the States to “should” instead of “shall.” With regard to reciprocity, he commented that the documents cited in point 3 “Access to Justice” are not clearly reflected in the proposal.

Dr. Espeche-Gil underscored the importance of circulating this report to the Supreme Courts of the OAS member states.

Regarding Dr. Moreno’s comment on the issue of defiance, the rapporteur stated that those who oppose the recognition of a judgment are generally those responsible for the burden of proof. Thus, if notification of the original judgment is imposed, it would mean changing the way the burden of proof has been established.

Given the comments of Drs. Duncan Hollis and George Galindo concerning the language of the text, the rapporteur agreed to revise the recommendations drafted in the imperative, since the intent was to present a series of guidelines to the States that they can use when drafting rules for the recognition of foreign judgments.

The rapporteur also agreed with the proposals of Drs. Espeche and Salazar and suggested circulating the report to both the Supreme Courts and legislatures.

She recognized that the concept of public order mentioned by Dr. Alix Richard was an issue that could pose real obstacles to the enforcement of foreign judgments and that it was therefore essential to ensure respect for the autonomy of States.

In response to the comments of Drs. Eric Rudge and Iñigo Salvador on the simplification of documentation and the modernization of technology, the rapporteur considered both issues challenges for the States.

Finally, Dr. Correa thanked Dr. George Galindo for his comments on the principle of reciprocity and proposed taking up the issue again in the coming days.

Due to time constraints, the revised report was not submitted to the plenary, and its discussion was postponed to the next session.

The following is the document presented by the rapporteur for the topic, Dr. Ruth Stella Correa Palacio, in August 2020:

CJI/doc. 611/20

**DOMESTIC PROCEDURES FOR THE RECOGNITION AND ENFORCEMENT OF
FOREIGN JUDGMENTS: RECOMMENDATIONS**

(presented by Dr. Ruth Stella Correa Palacio)

Commentary: Part I provides context for the recommendations that follow in order to explain why this work was considered necessary, its purpose and how that is to be achieved. It also identifies the existing international instruments that have been taken into consideration to demonstrate that this work does not duplicate other efforts but rather, that it is consistent with and supplementary to the international standards for the recognition and enforcement of foreign judgments. Part II outlines the current situation, namely, the limitations of international instruments, challenges in domestic law, and the advances that have been made possible by technology. Part III contains the Recommendations with accompanying explanatory commentaries. Part IV provides the brief summarized conclusion. Annexes A, B and C contain text that is referenced in the Recommendations.

PART I. Context

1. Overarching Rights

Access to justice is a fundamental right recognized in the *Universal Declaration of Human Rights* (Article 8) and the *American Declaration of the Rights and Duties of Man* (Article 25). The right is not restricted solely to recourse to judges and courts, legal representation, and completion of the corresponding proceedings, it also implies access to all “the means through which rights become effective.”¹ Thus, the actualization of the right may require overcoming barriers or obstacles to the recognition and enforcement of judgments outside the states in which they are handed down (*Recognition and Enforcement of Foreign Judgments and Arbitral Awards: Report*. CJI/doc. 564/18, August 3, 2018).

¹ CAPELLETI & GARTH. *Accès à la Justice et Etat-Providence*, Institut Universitaire Européen, Economica. Paris, 1984. Cited in CJI/doc. 564/18, *infra*, at page 2.

2. Problem

International instruments on recognition and enforcement of judgments do not *effectively* guarantee the fundamental right of access to justice and judicial protection. Although these instruments address the *substantive* legal issues for the recognition and enforcement of judgments, the *procedure* for the actualization of recognition and enforcement is delegated to the domestic law of each state. However, these domestic procedures vary greatly from one state to another and are typically so strict and surrounded by formalities that they pose an obstacle to the fundamental right of access to justice (CJI/doc. 564/18).

3. Purpose and Goal

The purpose of these Recommendations is to improve access to justice in the region by suggesting guidelines for the domestic procedures used in the recognition and enforcement of foreign judgments. This in turn will support and foster the right of access to justice, strengthen rule of law, and promote development based on the actualization of human rights and equality before the law.

The goal of these Recommendations is to simplify domestic procedures used in the recognition and enforcement of foreign judgments by providing guidance for the interpretation, application and, where necessary, legislative reform of such procedures, in conformity with international standards and best practices, and to encourage, wherever possible, application and use of technological advances for greater efficiency by courts in the recognition and enforcement of foreign judgments.

PART II. Current Situation

1. Limitations of Applicable International Instruments

There are international instruments that address the recognition and enforcement of foreign judgments. With some variations, they essentially outline the bases on which a judgment (or arbitral award) in one state is to be recognized and enforced in another state. Their main similarities and differences have been described elsewhere (*Recognition and Enforcement of Foreign Judgments and Awards: Preliminary Report*. CJI/doc. 558/18, February 20, 2018, Part III).

Although these instruments address the substantive legal bases for the recognition and enforcement of judgments, almost all of them delegate the civil procedure for the recognition and enforcement to the domestic law of each state, as illustrated below.

The *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (New York, 1958) (hereinafter “NY Convention”) outlines the conditions under which the Contracting Parties shall recognize arbitral awards as binding and the requirements for obtaining their recognition and enforcement, as well as the grounds for refusal of recognition. Regarding procedure, it provides that:

- “Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon,…” (Article III).

In the regional context, the *Inter-American Convention on International Commercial Arbitration* (Panama, 1975) (hereinafter “Panama Convention”) provides that an arbitral award shall have the force of final judicial judgment and outlines the conditions under which recognition and enforcement may be refused. Regarding procedure, it provides that:

- “...execution or recognition [of an arbitral decision or award] may be ordered in the same manner as that of decisions handed down by national or foreign ordinary courts, in accordance with the procedural laws of the country where it is to be executed...” (Article 4).

The *Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards* (Montevideo, 1979) (hereinafter “Montevideo Convention”) was designed as an instrument of judicial cooperation to ensure the extraterritorial efficacy of both judgments

and arbitral awards issued in the States Parties' respective territorial jurisdictions. Regarding procedure, it provides that:

- “The procedures for ensuring the validity of foreign judgments, awards and decisions, including the jurisdiction of the respective judges and tribunals, shall be governed by the law of the State in which execution is sought” (Article 6).

Most recently, the *Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters* was concluded by the Hague Conference on Private International Law (2019) (hereinafter “HCCH Convention”). It establishes a set of core rules to facilitate such recognition and enforcement. Regarding procedure, it, too, provides that:

- “The procedure for recognition, declaration of enforceability or registration for enforcement, and the enforcement of the judgment, are governed by the law of the requested State ...” (Article 13)².

In addition to these conventions, consideration has also been given to Regulation No. 1215/2012 of the European Parliament and Council on *Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters* (hereinafter “EU Regulation”) which has among its objective to facilitate access to justice through mutual recognition of judicial decisions. Consideration has also been given to the work completed in 2016 by the American Association of Private International Law (Asociación Americana de Derecho Internacional Privado), namely, the *ASADIP Principles on Transnational Access to Justice (TRANSJUS)* (hereinafter “ASADIP Principles”) and work produced in 2008 by the Iberoamerican Institute of Procedural Law (Instituto Iberoamericano de Derecho Procesal), namely, the draft *Model Code of Interjurisdictional Cooperation for Iberoamerica* (Proyecto de Código de Cooperación Interjurisdiccional para Iberoamericana) (hereinafter “Draft IIDP Code”). Consideration has also been given to the joint work by the American Law Institute (ALI) and the International Institute for the Unification of Private Law (UNIDROIT) that resulted in 2004 in the adoption of the *ALI/UNIDROIT Principles of Transnational Civil Procedure* and ongoing efforts on a similar project with the European Law Institute (ELI) to develop the draft *ELI/UNIDROIT European Rules of Civil Procedure*, as well as a current project about to begin at UNIDROIT to develop “Principles on Effective Enforcement.” These various initiatives will be referenced where relevant in the commentary below.

2. Domestic Procedures

Most OAS Member States, including those that have ratified the Montevideo Convention, have their own unique domestic procedures for the recognition and enforcement of foreign judgments, as described in a survey of such procedures (CJI/doc. 558/18, Part IV). The survey found that “it is common for States’ internal regulations to require an exequatur or judicial proceeding for requesting recognition of a foreign judgment...; there is no automatic obligation to enforce foreign decisions.”

The impediments that these procedural hurdles create for access to justice have been widely recognized. For example, during the CJI’s 92nd regular session, a meeting was held with experts on private international law who stressed the importance of the topic and referred to the need “to get rid of the ‘specter’ of multiple formalities” (CJI/doc. 564/18, at page 1). Moreover, during that same regular session, a meeting was also held with several of the Legal Advisers of the Ministries of Foreign Affairs of OAS Member States at which “there was warm acceptance of the fact that the Committee was working on this issue to the extent that it could render massive services to the law in the region, as well as the administration of justice for private parties in the region, [...] that would allow domestic proceedings to be more efficient and less costly” (*Recognition and Enforcement of Foreign Judgments and Arbitral Awards*. CJI/doc. 581/19, February 14, 2019, at page 5).

² For the Spanish version, as the official text of this Convention is not yet available, the reference was taken from Article 14, numeral 1 of the Annex on Recognition and enforcement of foreign judgments and awards. CJI/doc. 581/19, February 14, 2019, page 19.

3. Technological Advances

In the 40-plus years since the Montevideo Convention was concluded in 1979, significant advances have been made in Information Technology (IT) and Information and Communication Technology (ICT). Many of the concerns that preoccupied judges in previous centuries, when faced with recognition and enforcement of a paper-based foreign judgment, are dwindling and many are no longer an issue. For example, it is much easier today to verify the validity of a foreign judgment with the click of a mouse at an official government website.

Thus, these Recommendations are made in keeping with the spirit of the Montevideo Convention, while at the same time acknowledging that the law needs to stay abreast of technological developments in order to achieve the broader goals to ensure the fundamental right of access to justice. These were set out first and foremost in the Montevideo Convention, namely, “that the administration of justice in the American states requires mutual cooperation for the purpose of ensuring the extraterritorial validity of judgments...”

PART III. Recommendations

The domestic legal regime of States should be consistent with the following Recommendations:

1. Definitions

In these Recommendations,

- (a) “judgment” means any decision on the merits given by a court, whatever that decision may be called, including a decree or order, and a determination of costs or expenses of the proceedings by the court (including an officer of the court).
- (b) “Requested State” means the State in which the judgment is sought to be recognized and enforced and in which it is to take effect.
- (c) “State of Origin” means the State in which the judgment was issued or rendered.

Commentary: These Recommendations should be applicable to the widest possible range of decisions issued by court authorities. Accordingly, the term “judgment” has been broadly defined as adapted from the HCCH Convention, Article 3. However, while the HCCH Convention definition goes on to exclude interim measures, States should decide for themselves, given their own particular circumstances, whether or not these Recommendations should extend to also include decisions involving such measures or other rulings as would be consistent with the desire for improved effectiveness in the right of access to justice. For example, the Montevideo Convention provides in Article 1 that States could, upon ratification, extend its application “to rulings that end proceedings, to the decisions of authorities that exercise some jurisdictional function and to judgments in penal proceedings ordering compensation for damages resulting from an offense.” Also noteworthy in this regard are the ASADIP Principles, in which Article 7.7 states that “to ensure the extraterritorial effect of decisions, appropriate provisional measures of protection shall be facilitated...” as well as articles 13 and 14 of the Draft IIDP Code, which propose the execution of an urgent precautionary measure and even the provisional execution of an unsigned foreign sentence.

2. Scope

2.1. These Recommendations apply to judgments rendered in civil, commercial or labor proceedings.

2.2. These Recommendations do not apply to the following matters:

- (a) arbitral awards;
- (b) revenue, customs or administrative matters;
- (c) any other types of judgments or subject areas that a State considers should be excluded.

Commentary: The Recommendations are intended to encompass judgments rendered in the widest possible range of matters. At the aforementioned meeting on private international law that was held during the CJI's 92nd regular session, among other things, these experts referred to the need to eliminate distinctions such as those between judgments handed down on commercial or non-commercial matters; between international contracts or domestic business (CJI/doc. 564/18, at page 1). Language of Paragraph 2.1 has been adapted from the Montevideo Convention, Article 1.

Paragraph 2.2(a) excludes arbitral awards from the scope of these Recommendations, because the recognition and enforcement of such awards is the subject of a different set of international instruments (CJI/doc. 564/18).

Paragraph 2.2(b) excludes revenue, customs or administrative matters, consistent with the language of the HCCH Convention, Article 1. This is because of the general principle under the act of state doctrine that courts will not enforce the tax laws of another sovereign state.

Paragraph 2.2(c) offers an exclusion category for any other types of judgments or subject areas that a State considers should be excluded from the scope of these Recommendations. Examples of the types of such exclusions may be found in the HCCH Convention, Article 2.

3. Access to Justice

3.1. Judges and other state authorities should always endeavor to give force and effect to foreign judgments.

3.2. The principle of reciprocity should not be considered as a requirement in the determination of the extraterritorial validity of foreign judgments.

Commentary: Access to justice is a fundamental right recognized in the *Universal Declaration of Human Rights* (Article 8) and in the *American Declaration of the Rights and Duties of Man* (Article 25) as was discussed above. This is an important grounding principle for an approach to the extraterritorial validity of foreign judgments. Paragraph 3.1 has been adapted from the ASADIP Principles, Article 7.1, which states that “The extraterritorial effect of decisions is a fundamental right, closely related to the right to access to justice and fundamental due process rights. Therefore, judges and other State authorities shall always endeavor to favor the effect of foreign decisions when interpreting and applying the requirements those decisions are submitted to.”

At the aforementioned meeting on private international law that had been held during the CJI's 92nd regular session, among other things, these experts stressed the importance of the topic and referred to the need to eliminate the principle of reciprocity as the basis for recognition of judgments handed down by a tribunal of another State (CJI/doc. 564/18, at page 1). This is also consistent with the ASADIP Principles, Article 7.6 which states that “the requirement of reciprocity for giving effect to decisions and acts of foreign authorities is presumed to violate the right to access to justice.” The Commentary to the United Nations Commission on International Trade Law (UNCITRAL) *Model Law on Arbitration* points out that “reciprocity is not included as a condition for recognition and enforcement” (para. 52). This is also included in the General Principles of the Draft IIDP Code in Article 1.IV, that is, “no dependency on reciprocity of treatment, except as expressly provided in this Code.”

4. Extraterritorial Validity

4.1. Determination: When the extraterritorial validity of a judgment by a court in one State (State of Origin) is sought in another State (Requested State),

(a) where both States are parties to a convention on extraterritorial validity that applies to that judgment, extraterritorial validity shall be determined in accordance with that convention;

(b) where no such convention is applicable, extraterritorial validity shall be determined in accordance with international standards as outlined below, namely, that;

- The judge or tribunal that rendered the judgment exercised proper jurisdiction to try the case and to pass judgment on it in accordance with the law of the Requested State;
- The parties against whom the judgment was rendered were summoned or subpoenaed in due legal form substantially equivalent to that accepted by the law of the Requested State;
- The parties had an opportunity to present their defense in the State of Origin;
- The judgment is final or, where appropriate, has the force of *res judicata* in the State of Origin;
- The judgment is not manifestly contrary to the principles and laws of the public

Commentary: For greater clarity, in Recommendation 4 the term “extraterritorial validity” is used to encompass the broader concept of recognition and enforcement of foreign judgments in its entirety and from the perspective of substantive requirements; Recommendation 5, which follows below, uses the terms “recognition” and “enforcement” specifically in relation to the domestic procedure used to achieve actualization of extraterritorial validity.

Paragraph 4.1(a) defers to the requirements of any convention that may be in force between the State of Origin and the Requested State because those requirements would prevail. This might be the Montevideo or HCCH Conventions or some other convention or treaty. Paragraph 4.1(b) addresses those situations where there is no convention between the two States. It is adapted from Montevideo Convention, Article 2, but rather than including all the listed items from (a)-(h), several of which are procedural formalities, it summarizes the substantive requirements, which are also consistent with the HCCH Convention (see Articles 4, 5 and 7) and the ASADIP Principles (see Articles 7.2, 7.3, 7.4 and 7.8).

If the requirements for extraterritorial validity have been met, whether pursuant to an applicable convention or international standards, the judgment has extraterritorial validity. This is consistent with the ASADIP Principles, Article 7.9 which states that “A foreign decision produces effects in the Requested State from the moment that the decision becomes effective in the State of Origin.”

4.2. No review of merits: Where the bases for extraterritorial validity have been satisfied in accordance with 4.1(a) or (b) above, there shall be no review of the merits of the foreign judgment by any court or other entity in the Requested State.

Commentary: Foreign judgments are not to be reviewed on the merits (CJI/doc.564/18, Recommendation 5.7). As stated in the ASADIP Principles, Article 7.5, “The revision of the merits of a foreign judicial decision violates the right to access to justice...” This is also reflected in the HCCH Convention, Article 4.2, which states that “There shall be no review of the merits in the requested State.”

4.3. Grounds for refusal: Recognition of a foreign judgment may only be refused by a court or appropriate judicial authority in the Requested State under the following circumstances:

(a) where both States are parties to a convention on extraterritorial validity that applies to that judgment, if the grounds for refusal under that convention have been met;

(b) where no such convention is applicable, if any of the internationally accepted grounds for refusal as outlined below have been met, namely, that;

- The judge or tribunal that rendered the judgment did not exercise proper jurisdiction to try the case and to pass judgment on it in accordance with the law of the Requested State;
- The parties against whom the judgment was rendered were not summoned or subpoenaed in due legal form substantially equivalent to that accepted by the law of the Requested State;
- The parties did not have an opportunity to present their defense in the State of Origin;
- The judgment is not final;
- The judgment is manifestly contrary to the principles and laws of the public policy (*ordre public*) of the Requested State;
- or if any other grounds for refusal as provided in the law of the Requested State have been met.

Commentary: These are the fundamental grounds for refusal and are consistent with Recommendation 4.1(b) above, which outlines the requirements for extraterritorial validity. Clearly, failure to meet these requirements constitutes grounds for refusal (see ASADIP Principles, Articles 7.2 and 7.4). A State may wish to add other grounds for refusal. For example, the ASADIP Principles provide that extraterritorial effect also may be denied if a court of the Requested State has already rendered a prior decision on the same cause of action or if another foreign court has rendered a decision on the same cause of action that could be recognized in the Requested State (Article 7.3), where the jurisdiction of the rendering authority is based on a choice of court agreement not freely consented to by the affected party or that is in conflict with a prior agreement that was validly concluded, or where the jurisdiction of the rendering authority disregarded other pending proceedings in a court of a State reasonably connected to the claim or the parties (Article 7.4, (b) and (c)). Additional grounds for refusal are outlined in the HCCH Convention, Article 7. However, if a State should consider that there may be additional grounds for refusal, it is recommended that such grounds be outlined clearly in the law; this will provide guidance and transparency in the process and minimize arbitrariness in judicial decision-making.

5. Procedural Requirements

5.1. Analogous treatment: Foreign judgments that are final and definitive should be treated analogously to their equivalents in the Requested State, even if issued by public authorities different from those that would have been competent in the Requested State.

Commentary: Foreign judgments should be treated no differently than those rendered by domestic courts. Paragraph 5.1 has been adapted from the ASADIP Principles, Article 7.8. It is also consistent with the Panama Convention, which provides that "...execution or recognition [of an arbitral decision or award that is not appealable] may be ordered in the same manner as that of decisions handed down by national or foreign ordinary courts..." (Article 4).

5.2. Expediency: Domestic procedures should involve as few steps as possible and should enable and encourage the court of the Requested State to act expeditiously, including consideration of the possible automatic effect of a foreign decision.

Commentary. Justice delayed is justice denied. Domestic procedures must be carried out as swiftly as possible (CJI/doc. 564/18, Recommendation 5.3). States should review their procedural laws and remove any barriers that would prevent their courts from acting expeditiously in the recognition and enforcement of a foreign judgment. This Recommendation is also consistent with HCCH Convention, Article 13.1 and as noted in the HCCH Convention Draft Explanatory Report,³ para 356, “the court must use the most expeditious procedure available to it. States should consider provisions to avoid unnecessary delays.”

This Recommendation is overarching. It flows from the reality that in many states, there exists a duplicity of domestic procedural steps and requirements that may be referred to by various names (recognition, declaration of recognition or exequatur proceedings, declaration of enforcement, or registration of enforceability). In some states, grounds of defense may be raised at more than one of these stages in the process. This only delays justice and is addressed in the following paragraphs.

Inasmuch as it promotes the automatic effects of a foreign decision, this Recommendation takes into account Article 10 of the Draft IIDP Code.

5.3. Documentation: Requirements for documentation during the internal process of recognition and enforcement should be simplified and modernized to take advantage of technological advances as follows:

(a) The **only** documents of proof required to request recognition and execution of judgments should be the following, which may be either paper-based or made available using any electronic form or by means of any technological media that offers functional equivalency:

- certified copy of the judgment⁴;
- certified copy of the documents proving that the bases for the recognition and enforcement of the judgment have been complied with;
- certified copy of the document stating that the judgment is final or has the force of *res judicata*; and,
- translation of the above documents into an official language of the Requested State, where necessary, if the originals are in another language.

(b) Other documents used during the process of recognition and enforcement of judgments may be either paper-based or made available using any electronic form or by means of any technological media that offers functional equivalency, in particular as follows:

- in the authentication and legalization of documents;
- in the verification of judicial decisions;
- any other documents or process that a state may identify in order to improve the efficiency of domestic procedures for the recognition and enforcement of foreign judgments.

Commentary: As was noted above, in Recommendation 4 the term “extraterritorial validity” is used. To distinguish the domestic procedures that are used to actualize extraterritorial validity, in Recommendation 5 the terms “recognition” and “enforcement” are used. (The terms “declaration of recognition” and “registration for enforcement” are explained in the Commentary to Paragraph 5.4, below.)

The overarching Recommendation is that documentation requirements should be modernized to enable new formats enabled by advances in technology (CJI/doc. 564/18, Recommendation 5.5). It has been noted that the documentation requirements for recognition and enforcement “should be reviewed given the value that legal proceedings nowadays attach to any copy, as well as the documents that can be found posted on the official websites of judicial organs.” (CJI/doc. 564/18 at page 3). Although electronic records are not accepted yet by all

³ HCCH, Judgments Convention: Revised Draft Explanatory Report. Prel. Doc. of December 2018. Twenty-Second Session, Recognition and Enforcement of Foreign Judgments, 18 June – 2 July 2019. <https://assets.hcch.net/docs/7d2ae3f7-e8c6-4ef3-807c-15f112aa483d.pdf>

⁴ The Montevideo Convention uses “authenticated” in the Spanish and “certified” in the English.

States, legislators should be encouraged to adopt legislation that will provide for “functional equivalence.”

Paragraph 5.3(a) specifies that the enumerated items should be the **only** documents required. The provisions are consistent with those outlined in the Montevideo Convention, Article 3 and the HCCH Convention, Article 12, although both conventions include additional details (for example, HCCH Convention requires that the judgment be complete and certified). It should be possible to provide these documents either in paper form or electronically.

Paragraph 5.3(a) also advocates, in effect, for elimination of the translation certification requirement, opting instead for translation of the above documents “where necessary”, which is consistent with the General Principles of the Draft Model Code of Inter-jurisdictional Cooperation for Ibero-American States.

Paragraph 5.3(b) specifically addresses authentication and legalization. It is recommended that this process be adapted to incorporate procedural improvements that are now possible with the use of new technology (CJI/doc. 564/18, Recommendation 5.4). At the aforementioned meeting on private international law that had been held during the CJI’s 92nd regular session, these experts “underscored the merits of using [information] technology instead of authentication/legalization [in the recognition process]” (CJI/doc. 564/18, at page 1).

5.4. Process: In the procedure to obtain recognition and enforcement in the Requested State,

(a) if any of the grounds for refusal as outlined above in Recommendation 4 are to be raised, they may be raised **only** during the request for recognition as follows:

- where the rules of civil procedure provide for a single recognition and enforcement process, at any time during that process;
- where the rules of civil procedure maintain duality of recognition and enforcement, at any time during the recognition process.

(b) where no grounds for refusal have been found during the aforementioned process and the judgment has met the requirements of extraterritorial validity as outlined in Recommendation 4, that judgment shall be recognized in the Requested State.

(c) once a judgment has been recognized as outlined above, no further procedures as to its recognition are required; its enforceability may be presumed.

Commentary: In most instances, some type of process to obtain formal recognition of the foreign judgment will be required. While some states may have a single procedure, others maintain a dual process of recognition and enforcement. Moreover, in some states, grounds for refusal may be raised at multiple stages - during recognition and again at enforcement. It is suggested that States review their domestic procedural requirements and either maintain the duality or reduce these to a single proceeding. In any case, if recognition of the foreign judgment is disputed, grounds for refusal of recognition should only be raised once, and only during the recognition stage. This is the essence of Paragraph 5.4(a) (CJI/doc. 564/18, Recommendation 5.1 and 5.2).

If no grounds for refusal have been evidenced and the requirements for extraterritoriality have been met, then the judgment is recognized; once so recognized, nothing further should be necessary. That is the essence of Paragraphs 5.4(b) and (c).

In many states, however, the domestic law of procedure may contain additional requirements, such as a declaration of recognition or exequatur. As explained in the HCCH Convention Draft Explanatory Report, para 354, terms such as “declaration of recognition” are terms that “refer to the so-called ‘exequatur’ proceedings, *i.e.*, special proceedings by which the competent authority of the requested State confirms or declares that the foreign judgment is enforceable in that State.”

The problems inherent in such additional procedures are widely acknowledged and have been explained as follows: “The lack of more specific regulation of the mechanism to be used for recognition and enforcement has led to the inclusion in procedural codes of a series of proceedings known variously as *exequatur*, final judgment or recognition statements, and so on, pertaining to procedural mechanisms designed to determine the enforceability of a foreign judgment, provided that it meets certain requirements for its recognition. Competence to conduct the recognition proceeding is usually assigned to higher-ranking officials or, in some cases, Supreme Courts, whereas competence for enforcement is left to other judges, according to the usual assignment of competence regulations” (CJI/doc. 564/18, at page 4). Moreover, at the aforementioned meeting held with several of the Legal Advisers of the Ministries of Foreign Affairs of OAS Member States, “[...] the speakers qualified domestic procedures on *exequatur* as a type of trap for parties engaged in litigation, doomed to face all types of difficulties when attempting to enforce legal decisions abroad” (CJI/doc. 581/19, at page 5).

Therefore, Paragraph 5.4(c) emphasizes that once a judgment has been recognized, nothing further is required and its execution should not entail any more demands than those required to enforce a domestic judgment; in essence, this eliminates the “red tape” surrounding recognition and enforcement procedures (CJI/doc. 564/18, Recommendation 5.6; see also ASADIP Principles, Article 7.11). Also noteworthy is the EU Regulation, which provides that “A judgment given in a Member State shall be recognized in the other Member States without any special procedure being required” (Article 36). That EU provision has essentially “abolished the *exequatur*” and brings domestic rules of civil procedure into alignment with modern developments; the Recommendation here seeks to do the same.

Paragraph 5.4(c) also provides that enforceability may be presumed, without the need for any declaration of enforcement. As explained in the HCCH Convention Draft Explanatory Report, para. 354, enforcement “refers to the legal procedure by which the courts (or competent authorities) of the requested State ensure that the defendant obeys the foreign judgment. It includes measures such as seizure, confiscation, attachment, etc. The enforcement of the foreign judgment presupposes a declaration of enforceability or a registration for enforcement.” It has been pointed out that “In enforcement proceedings, some legislations even allow the defense to present arguments against the judgment whose enforcement is being sought” (CJI/doc. 564/18, at page 4). Pursuant to this Recommendation, paragraph 5.4(a), grounds for refusal could only be raised during the process seeking recognition, unless that procedure has been abolished or merged with that of execution. This will also improve efficiencies of both recognition and enforcement.

5.5. Probative Effects: Procedural rules may provide different parameters for recognizing the probative effects of judgments.

Commentary: This Recommendation recognizes that in some instances, a party does not seek recognition of a foreign judgment in order for it to be enforced by the Requested State, but rather, so that the foreign judgment may serve as evidence. In such cases, a different set of standards may be applicable. This follows from the observation that there is “[a] different legal treatment of cases in which the enforcement of only the imperative and probative aspects of the judgment is sought; in such cases the *exequatur* is omitted” (CJI/doc. 564/18, at page 4, and Recommendation 5.8). It is also consistent with the ASADIP Principles, Article 7.10.

PART IV. Summary

These Recommendations offer suggestions to simplify domestic procedures used in the recognition and enforcement of foreign judgments. They provide guidance for the interpretation, application and possible

legislative reform of such procedures, if necessary, to bring domestic practice into conformity with international standards and best practices. They also encourage, wherever possible, application and use of technological advances for greater efficiencies.

As a result of simplifying domestic procedures for the recognition and enforcement of foreign judgments, significant advances can be made towards improving access to justice in the region. This in turn will strengthen rule of law and promote development based on the actualization of human rights and equality before the law.

* * * *

ANNEX A

Recognition and Enforcement of Foreign Judgments and Arbitral Awards: Report CJI/doc. 564/18, August 3, 2018

5.1. The need to maintain the duality of the recognition and enforcement procedures, or else to abolish it and keep just the enforcement process. [See 5.4(b)]

5.2. If the recognition procedure is eliminated, exceptionally allow arguments in the enforcement procedure alleging circumstances established as grounds for denying recognition. [See 5.4(b)]

5.3. Urge that domestic procedures involve as few stages as possible and be carried out as swiftly as possible. [See 5.2]

5.4. In the authentication and legalization of documents process, adopt the procedural improvements made possible by the use of new technology. [5.3(b)]

5.5. Embrace the use of information technology and its impact on knowledge of judicial decisions. [See 5.3]

5.6. Combat the red tape surrounding recognition and enforcement procedures. [See 5.4(c)]

5.7. Disallow revision of the merits of the decision. [See 4.2]

5.8. Provide different parameters for recognizing the probative effects of judgments. [See 5.5]

* * *

ANNEX B

ASADIP Principles on Transnational Access to Justice (TRANSJUS) **Chapter 7** **The effect of foreign decisions**

Article 7.1. The extraterritorial effect of decisions is a fundamental right, closely related to the right to access to justice and fundamental due process rights. Therefore, judges and other State authorities shall always endeavor to favor the effect of foreign decisions when interpreting and applying the requirements those decisions are submitted to.

- See III.3.1 Access to Justice

Article 7.2. The right to obtain extraterritorial effect of a foreign judicial decision shall not be infringed where such a decision has been issued in violation of fundamental rights related to the proceedings or where the full effects of its recognition or enforcement would be manifestly contrary to fundamental rights related to the substance of the dispute.

- See III. 4.1(b)

Article 7.3. The requested State may also deny extraterritorial effect to a foreign judicial decision where a court of the requested State has rendered a prior definitive judgment on the same cause of action, or if a foreign court has rendered a prior definitive judgment on the same cause of action which may be able to be recognized in the requested State.

- See III.4.1(b)

Article 7.4. The recognition or enforcement of a foreign decision may be refused on grounds of indirect jurisdiction only in the following cases:

a.- Where the jurisdiction of the rendering authority is based on an exorbitant ground of jurisdiction.

b.- Where the jurisdiction of the rendering authority is based on a choice of court agreement not freely consented to by the affected party or that is in conflict with a prior agreement that was validly concluded.

c.- Where the jurisdiction of the rendering authority disregarded other pending proceedings in violation of Article 3.7 of these Principles.

- See III.4.1 (b)

Article 7.5. The revision of the merits of a foreign judicial decision violates the right to access to justice, without prejudice of the prerogative of the requested State to impose the necessary safeguards to avoid the violation of fundamental rights.

- See III.4.2.

Article 7.6. The requirement of reciprocity for giving effect to decisions and acts of foreign authorities is presumed to violate the right to access to justice.

- See III.3.2

Article 7.7. To ensure the extraterritorial effect of decisions, appropriate provisional measures of protection shall be facilitated, including prior to the commencement of homologation or *exequatur* proceedings in the State in which recognition is sought.

- See III.1(a)

Article 7.8. In order to ensure the extraterritorial effect of foreign decisions, they shall be treated analogously to their equivalents in the requested State, as long as they produce final and definitive legal effects in the State of origin, irrespective of their denomination. This rule shall also apply in cases where the relevant decisions were issued by public authorities different from those that would have been competent in the requested State.

- See III.5.1

Article 7.9. A foreign decision produces effects in the requested State from the moment that the decision becomes effective in the State of origin.

- See III.4.1

Article 7.10. When the effect of a foreign decision is invoked in the course of proceedings, the requested State shall afford it incidental recognition, without prejudice to the homologation or *exequatur* proceedings that the requested State may be able to initiate for its recognition or enforcement.

- See III.5.5

Article 7.11. The homologation or *exequatur* of foreign decisions shall be decided pursuant to a motion for summary judgment, limited to a verification of the basic requirements for its recognition or enforcement in the requested State. The effective enforcement of such decisions shall be decided in an expeditious manner, with any provisional measures granted being maintained until enforcement has been finalized.

- See III.5.4

* * *

**Ibero-American Institute of Procedural Law
Draft Model Code for Inter-Jurisdictional Cooperation for Ibero-American States⁵**

Section V. Efficacy of foreign judgments

Article 10. Automatic effect of foreign judgments

The effects of the foreign judgments will automatically occur and do not depend on prior judicial recognition.

Article 11. Requirements for the efficacy of a foreign judgment.

The efficacy of the foreign decision in the required State will depend on the compliance of the following requirements:

I - to be compatible with the fundamental principles of the required State;

II - to have been given in a process in which the guarantees of the due legal process are in place;

III - to have been given by a competent international court according to the rules of the required State or to the norms established in Section IV above;

IV - not be dependent on a decision about an appeal accepted with suspensive effect;

V - to be compatible with another decision ruled in the required State, in an identical case, or in other State, in an identical process having the necessary conditions to gain efficacy in the required State.

Sole paragraph. The efficacy of the foreign decision may be controlled ex officio, by the judge, in an ongoing process, with due respect for the controversial procedure, or by challenging it in the terms of articles 42 to 47.

Section VI. Enforcement of a foreign judgment

Article 12. Enforcement

“The enforcement of a foreign judgment is subject to the compliance of the requirements established in the previous article ...”

“Challenge procedure of the efficacy of the foreign judgment”

Section III. Action and ancillary challenging procedure of the efficacy of the foreign judgment

Article 42. Active legal standing for filing a challenging ancillary action

The action for challenging the efficacy of a foreign judgment shall be filed by the person having a legal interest in the rejection of its effects in the required States.

Sole paragraph. The competent court to deal with the challenging procedure will be that which, according to the procedural norms of the required State, is the one competent to address the main issue of the case.

Article 43. Guarantees for the due process

Procedures for the current action, of a controversial jurisdiction, will ensure the parties the guarantees of the due legal procedure.

Article 44. Reasons for filing a challenging action.

⁵ For the English version, as the official text of this document is not yet available, the reference was taken from CJI/doc. 581/19.

The challenge shall be restricted to the compliance of the requirements established in Article 11, and the foreign judgment will revise the merits of same under any circumstances.

Article 45. Retroactive effects on the judgment of the action

The effects of the judgment accepting the challenging procedure shall be retroactive to the date on which the efficacy in the required State started.

Article 46. Ancillary procedure on foreign *res judicata*

Pursuant to the provisions contained in Articles 42 to 44, the challenging procedure against the efficacy of the foreign judgment will be accepted if and when one of the parties claims the efficacy of the foreign *res judicata* decision, and the other party, or a legally interested third party, intends to discuss the enforcement of the requirements established in Article 11.

Sole paragraph. The court competent to address the main action will be the one to judge the challenging ancillary procedure.

Article 47. Challenging ancillary process on plea of *lis pendence* (*litispence*)

The challenging ancillary procedure may be filed against the party that has been successful in the international *litispence*.

* * *

3. Protection of Personal Data

Documents

CJI/doc. 606/20 corr.1 Updating the principles on privacy and protection of personal data
(presented by Dr. Mariana Salazar Albornoz)

CJI/doc. 616/20 rev.1 corr.1 Inter-American Juridical Committee. Draft updates to the “Principles on Privacy and Personal Data Protection with annotations” adopted by the CJI in 2015

* * *

At the 92nd Regular Session of the Inter-American Juridical Committee (Mexico City, 26 February to March 2, 2018), Dr. Carlos Mata spoke of the work of the CJI on the theme of protection of personal data, and proposed that the Committee return to and follow up on the theme to enable contributing to the revision of the Model Law on Access to Public Information in the light of the work of the Ibero-American Network of Protection of Data (RIPD).

Dr. Hollis requested that the follow-up to be done on the theme of protection of data should not be restricted to the activities of the RIPD, nor reduced to attempting to implement this in the Americas, given the risk of excluding common-law countries.

Dr. Negro explained that document DDI/doc.9/17 presented by the Department of International Law on Monday’s session includes a comparison between the work of the CJI and the new Ibero-American standards precisely so that members use this analysis as a starting-point to produce a result made to measure for the member states of the OAS.

Dr. Correa agreed with Dr. Mata Prates as to the advisability of the revision of the Model Law on Access to Information articulating with protection of personal data in the hands of authorities.

Dr. Hollis asked that this discussion include the theme of the responsibility of whoever has possession of the personal data of third parties, and their obligation to notify these third parties when the personal data in their possession have been compromised or used in some unauthorized manner.

Dr. Cevallos warned that the CJI should not ignore this chance to revise the juridical bases on which both themes – protection and access – lie.

The Chair concluded that there exists a need for the CJI to resume the themes of the revision of the Inter-American Model Law on Access to Information and the principles related to the handling of personal data; delimiting the mandate is all that remains to be done.

Dr. Mata suggested using the document presented by the Department of International Law to start developing a proposal to update the guide of principles drawn up by the CJI, as well as incorporating other perspectives.

The members agreed to revisit the subject as proposed by Drs. Mata and Hollis, and appointed Dr. Carlos Mata as the rapporteur.

In June 2018, the General Assembly of the OAS reiterated the mandate initiated within the Committee and requested the CJI that "it begins updating the Principles on Protection of Personal Data, bearing in mind how such data have evolved," resolution AG/RES. 2926 (XLVIII-O/18).

During the 93rd Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, 6 – 16 August, 2018), the topic was not discussed.

During the 94th Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, 18 – 22 February, 2019), the rapporteur for this topic, Dr. Carlos Mata Prates, presented a report on his participation in the XVI Ibero-American Meeting on the Protection of Personal Data, held in Costa

Rica on November 28 and 29, 2019. The meeting gathered together members of the Ibero-American Network on Data Protection (RIPD) which included the main national authorities on the issue, where he explained the OAS Principles on Privacy and Protection of Personal Data, drafted by the CJI on March 27, 2015. The meeting served to conduct a debate on the importance of protecting personal data and its relationship with the free flow of information. He referred to the comparative work done by the Department International Law, represented in this case by Dr. Magaly McLean.

The rapporteur also submitted his first report on the Protection of Personal Data (document CJI/doc. 582/19), pursuant to the mandate of the General Assembly which requested updating the aforementioned OAS Principles on Privacy and Protection of Personal Data, “*bearing in mind how such data have evolved*” AG/RES. 2926 (XLVIII-18) item “i”- International Law, “Observations and recommendations on the Annual Report of the Inter-American Juridical Committee (CJI)”. He explained that most Latin-American countries have enacted legislation on this issue in the past decade, and that the provisions were included – in some cases – in their constitutions. He then referred in detail to the ‘OAS Principles on Privacy and Protection of Personal Data.’”

The rapporteur proposed studying the following aspects of the Principles in greater detail:

- a) measures seeking to “*prevent the identification or re-identification of a natural person without deploying disproportionate efforts*”;
- b) the relationship and effects of the Principles vis-à-vis rights under domestic law;
- c) the handling of personal data of children and adolescents;
- d) the right of *portability* of personal data;
- e) the broadening of the legitimation of natural persons related to dead persons or designated by them;
- f) the right to be forgotten.

The rapporteur ended his speech with a request that the civil law and common law traditions be included in the update, so as to encompass all the OAS member states.

Dr. Milenko Bertrand referred to the difficulties and challenges of the subject under study, and urged the rapporteur to include information on data control, citing in this regard the transfer of data transmitted to the IRS in the United States, that are not necessarily protected by those handling them. He also invited the rapporteur to consider the storage of data on transitional justice in the private sphere, considering that national institutions may be weak in providing due care and diligence in the area of information protection.

Dr. Luis García-Corrochano emphasized the problem of the proper use of personal data and raised as a challenge the search for a penalty in the event of inadequate use of such data.

The Chair welcomed the judicious work of the rapporteur on this matter, and recommended that he take into account situations involving the handling of personal data linked to informed consent, in which the owner of the data should know where the data will be disclosed. She also urged him to check out the topic of financial data protection with respect to the declaration of income and assets, where the use of such data may have negative consequences on a person’s financial record.

Dr. George Galindo congratulated Dr. Milenko Bertrand for proposing that the rapporteur include the issue of global governance.

The rapporteur thanked the members for their comments pointing out the complexity of the subject. He indicated that the provision needed to be consistent with the close relationship between data protection and the issue of freedom of movement and access to information. He agreed with the members of the Committee on the importance of consent in the field of private data protection and use of the information. Finally, he referred to the challenges posed by the difficulty of striking a balance between privacy and freedom of movement and (access to) information, citing the

declassification of international banking system accounts and diplomatic communications, as revealed by the Assange case.

During the 95th Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, July 31 to August 9, 2019), the rapporteur for the topic, Dr. Carlos Mata Prates, presented an updated version of his previous report, "Update on the Principles on Privacy and Personal Data Protection," (document CJI/doc.597/19), in which he noted, among other things, that the protection of personal data is covered by existing regulations, at both the regional and the state level, in addition to pronouncements by the Inter-American Court of Human Rights. On that occasion, he submitted proposed elements that could accompany the OAS Principles on Privacy and Personal Data Protection, adopted in 2012:

- a) so-called anonymization;
- b) the linkage and effects of the OAS Principles with internal rights, it being understood that the Principles establish a minimum that does not prevent internal rights from establishing systems that provide more guarantees for individuals than those established in the Principles;
- c) treatment of personal data concerning children and adolescents;
- d) the right to the portability of personal data;
- e) extension of the legitimacy of natural persons linked to or designated by deceased persons, under the terms established to exercise the right of access, rectification, cancellation, opposition and portability;
- f) the so-called right to forget, under a broad concept;
- g) the incorporation of proactive responsibility; and,
- h) the establishment of security as a substantive principle.

Dr. George Galindo asked the rapporteur about the duty of confidentiality and the general rule of consent. Dr. Duncan Hollis thanked the rapporteur for his report which has ramifications for the issue of cybersecurity, the topic for which he was rapporteur. He asked if it would be possible to find common themes in light of the different conceptions visualized today (China and India, USA, Europe). The issue of portability and the right to forget could encounter resistance from the United States. Dr. Espeche-Gil consulted the rapporteur on precisely what his understanding was of the right to portability. Dr. Milenko Bertrand congratulated the rapporteur and expressed his concern about the abusive use of data protection by public officials who want to avoid control or oversight. Dr. Mariana Salazar urged adaptation to the new trends, and asked the rapporteur if he had considered the problem of missing persons.

The rapporteur for the topic, Dr. Carlos Mata, explained that his work sought to update the Committee's developments on the subject and be consistent with the times. The right to forget is not something that is accepted by everyone, which is why he proposes it in the conditional in his report, in order to see if it would be acceptable under certain constraints, mindful that it is a European tradition that is not accepted by the United States or Canada. With regard to public officials, he noted that several OAS member states have laws on access to information and protection of personal data. In relation to Dr. Salazar's question, the rapporteur explained that his intention of legitimization referred to the situation of deceased persons (not to missing persons, in the case of which a stronger relationship would have to be sought). In response to Dr. Galindo, the rapporteur expressed the possibility of distinguishing knowledge from consent. He noted that the entry of information in a legitimate manner required that the database accessed be public. The rapporteur explained his intention to include the issue of portability from a broad perspective that took into account European developments in the field. Finally, in Latin America the right to forget would not appear to imply an obstacle to freedom of expression; they can and should coexist.

Dr. García-Corrochano addressed some of the exceptions that arise in implementing access to information of public interest.

The Chair, Dr. Ruth Correa, thanked the rapporteur, and noted that certain developments remained pending that would be seen in other reports, such as access to information and cybersecurity, in addition to the issues raised by Dr. Bertrand. At the end of the discussion, the plenary designated as co-rapporteurs Dr. Mariana Salazar and Dr. Milenko Bertrand, who expressed their interest in following up on the work of Dr. Mata, whose mandate would conclude in December that year.

During the 96th Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, March, 2020), the rapporteur Dr. Mariana Salazar presented her report on the “Update of the Principles on Privacy and Personal Data Protection” (document CJI/doc. 606/20). As an introduction, she explained that she has been working directly with the Department of International Law since accepting her position as rapporteur, having been invited to participate in a couple of conferences on this matter. She recalled the background of this mandate, through which the General Assembly requested in 2018 to update the OAS Principles on Privacy and Personal Data Protection, stressing that this is a topic on which the CJI has worked since 1996, with an extensive experience. That the Committee adopted the Principles in 2012, which were then updated in 2015 through the adoption of a Legislative Guide. In this context, the rapporteur suggested that the update to be undertaken by the CJI should make good use of work already done, taken into account the Legislative Guide adopted in 2015 and including therein the main international developments that have taken place since then. As this is a specific step forward in the region, she underscored the importance of bearing in mind the “Ibero-American Standards” developed by the Ibero-American Personal Data Protection Network in 2017, as applicable thereto, recalling that not all the States are members of this Network, and the Committee mandate strives to reflect principles common to the region. Additionally, she introduced two regulations in the field, the California Principles on Consumer Protection Initiatives and the European regulations. Among the topics addressed, the rapporteur highlighted the principles on anonymization and ARCO rights (access, rectification, cancellation and opposition). Given the interest in respecting language that is acceptable to a greater number of States, Dr. Mariana Salazar said to have included issues relating to data protection entity in each country. At the end, she requested that members submit their comments within two months, in order to then submit a proposal from the CJI to the States.

Dr. Duncan Hollis supported the proposal to work on the basis of the 2015 Legislative Guide and the path of the proposed work. On the substantive side, he recommended including a reference in the text to the California Law mentioned verbally by the rapporteur. He noted that issues related to big data, such as consent and anonymity, must be considered over the long term, especially as earlier assumptions about both concepts have not proven to be evident in practice. He commented on the correlation with the European Council and the African Union Convention, which has not yet come into effect, with the rapporteur agreeing to reflect these rules in the Report.

Dr. George Galindo asked for clarification on the use of the term "sexual preference" and proposed using a more current reference, such as "sexual orientation," instead. In regard to Principle 11 he suggested to dedicate a further development to the application of questions regarding extraterritorial jurisdiction due to the transcending significance acquired by this issue today. It would help to bring up illustrations of its application in different countries. On this aspect, Dr. Hollis suggested considering Principle 11 in the light of the Cloud Act.

The Chair drew attention to the issue of consent, because the absence of consent might violate the rights of the individual. She suggested including a proposals that would require "actual consent" for the use of personal data.

Dr. Mariana Salazar agreed to include the change requested by Dr. Galindo on "sexual orientation". She stressed that her project will allow members to consider a reference to the exercise

of the rights of dead and missing persons. With regard to Principle 11 on transborder data sharing and the application of extraterritoriality, she welcomed the suggestion of using the Cloud Act and agreed to include a proposal for a general paragraph encompassing the different approaches in the region. About consent, she underlined that recommendations have been included for strengthening the language, based on the Ibero-American Standards, and stated her intention to integrate the ideas suggested by Dr. Correa.

During the 97th Regular Session of the Inter-American Juridical Committee (virtual session, August 2020), the rapporteur for the item, Dr. Mariana Salazar, presented the second report on this topic (document CJI/doc. 616/20). She first referred to earlier efforts in this area covered by the Committee since 2012, including the proposal for a legislative guide in 2015 and regulatory developments, such as the European Union's General Data Protection Regulation (which applies to European Union businesses and any other business in the world that processes the data of European Union residents). Concerning developments in the Hemisphere, the rapporteur described the standards set by the Ibero-American Data Protection Network in 2017, which, among other things, cover the rights of children and ARCO rights, in addition to promoting the role of enforcement authorities. Finally, she noted two recent pieces of legislation: California's Consumer Privacy Act, which establishes specific guidelines for privacy notices for businesses working in the State of California, and Brazil's draft legislation on the protection of personal data.

She recalled that since 2018, there has been a mandate from the General Assembly requesting the Committee to "begin updating the Principles on Protection of Personal Data, bearing in mind how such data have evolved," resolution AG/RES. 2926 (XLVIII-O/18). In this context, their updating is based on the OAS Principles of Privacy and Personal Data Protection, with Annotations, corresponding to the comprehensive legislative guide adopted by the IAJC in 2015.

Following the established roadmap, the rapporteur presented an updated version of the draft that took the comments from two members, Drs. José Moreno and Duncan Hollis, into account and reflected the informal preliminary observations of experts and authorities responsible for the protection of personal data in their respective countries. She explained that the new version of her report contained an initial section that described the principles, shortened the introduction, amended some of the 12 existing principles, and included one new one. Finally, she informed the Committee that the yellow highlighting indicated the changes and additions, a format used only for internal discussion among AIJC members.

At the close of her presentation, she proposed that the IAJC approve this initial draft, which could then be circulated by the Department of International Law (DIL) for comments from the OAS member states. She then suggested that the comments of the States be incorporated to enable the Committee to state its position in a final text.

Dr. Luis García-Corrochano found the report submitted to be both meticulous and interesting. He proposed that portability be approached as subject to people's ownership so that nothing, such as copyright, would be lost. He noted the wide array of entities with control over personal information, including sensitive data, as well as the abusive and ill-intentioned use of information (citing as an illustration the harm that could result from the misuse of information on payments for the purchase of medicines for a third party by a future candidate for public office). In short, preventing the misuse of information should be linked to the protection of people's human rights.

Dr. Eric Rudge suggested a number of minor changes to the English and the inclusion of a list of acronyms to aid the reader. He also asked the rapporteur for her opinion about the proposal's recipient.

Dr. George Galindo thanked the rapporteur for the report on this essential and timely topic. He stated that the draft legislation in Brazil had not yet been passed. He asked the rapporteur whether the term "electronic files" was expansive enough to protect data – if not, the term "digital" would be preferable to "electronic." He also noted that some parts of the report were still written in the

imperative and therefore needed to be changed. He asked her to revise the comment on principle 3, in which there is a reference to the original text on the principle of necessity and proportionality that makes no mention to individuals (which the European Court and the Inter-American Court have addressed under the concept of the “horizontal effect of human rights”). He also asked the rapporteur about the retention of personal data described on page 16, which would appear to contradict or be more restrictive than the text on page 15. Finally, with respect to principle 12, which subjects restriction to the passage of a law, he asked that it be replaced with something that does not imply such formality, referring to a norm.

Dr. Duncan Hollis thanked the rapporteur for her work and asked her to review the report to ensure its uniformity, avoiding the use of verbs that gave the impression that it was binding. He asked the rapporteur about the relevance at this point of introducing the topic of data transport in her report.

The Chair thanked the rapporteur for her comprehensive report and stated that this was a good time to submit it to the States for consideration, given the pandemic’s impact on the personal data situation. The authorities in Colombia have required citizens to register to track the disease, affecting their free movement and the protection of personal data. Thus, suggestions that allude to consent should be aired before the OAS so that the States consider and apply them. This was an issue where the Committee could make a significant contribution, highlighting the limits of the State in public health to guarantee effective protection of personal data. She requested additional explanations of the exception made in the report that allowed businesses to obtain personal data when providing a particular service.

The rapporteur thanked Dr. Luis García Corrochano for his comments on the portability issue, which underscored the importance and need for this study.

The rapporteur concurred with Dr. Eric Rudge about the need to include a list of acronyms and would await his corrections. Concerning enforcement, she stated her intention that it be in relation to information in the hands of both public and private entities. Finally, she pledged to circulate a clean copy before the close of the session.

In response to Drs. Galindo and Hollis, the rapporteur proposed revising the entire Spanish and English texts. In addition, she thanked Dr. George Galindo for his information about the status of the draft legislation in Brazil, which will serve as a guide for the region. She also agreed to modify the description of the principle of conventionality and the proposed solution for private entities. Finally, concerning the use and preservation of information, she noted a distinction made when it is used for archival purposes, especially when it is in the public interest, since it can be preserved longer (making a distinction with its use). She explained that principle 12 originally referred to standards, a concept that seemed more appropriate than that of law, and therefore agreed to change it.

She noted that the cross-border flows mentioned by Dr. Hollis were an issue that required the States to adopt interoperability standards and assured the Committee that this would be indicated in the new version of her report.

In response to the Chair’s comment, the rapporteur said that the issue of consent was something that came from the original text as the prerogative of a private business. However, she would make the changes requested in line with Dr. Correa’s suggestion about the preeminence of data protection over business, taken into account that private enterprises should be at the service of all.

At the end of the discussion, Dr. Bertrand asked to withdraw as a co-rapporteur of this topic to devote himself to the development of the report on the issue of fireworks.

On the last day of the session, the rapporteur for the item, Dr. Mariana Salazar, presented a new version of her report, titled “Draft Updates to the Principles on Privacy and Personal Data Protection, with Annotations,” (document CJI/doc. 616/20 rev.1). The rapporteur indicated that this

clean draft reflected the suggestions of the IACJ's members, among them the list of acronyms, the use of non-binding language, the concept of digital file, the reference to the public interest. She also included the allusion to "standard" instead of "law" and deleted the exception of requests for personal data by businesses. The proposal was endorsed by the plenary, and the Technical Secretariat was requested to proceed with its circulation to the Permanent Missions for comments by the States.

On August 21, 2020, the Department of International Law submitted a request for observations to the Permanent Missions before the OAS, setting November 16, 2020 as the deadline for response.

The following is the document presented by the rapporteur for the topic, Dr. Mariana Salazar, in February as well as the report of the Committee of August 2020 that was sent to member states for comments:

CJI/doc. 606/20 corr.1

**UPDATING THE PRINCIPLES ON PRIVACY AND PROTECTION OF
PERSONAL DATA**

(presented by doctor Mariana Salazar Alborno)

I. PRECEDENTS AND MANDATE

The issue on the protection of personal data started to be examined by the Inter-American Juridical Committee (IAJC) in the year 1996, following the request of the General Assembly (GA) of the Organization of American States (OAS) to provide specific relevance to the topic involving the right of information¹ (which, in turn, has been under consideration by the IAJC since 1980).

In 2011 the GA decided to ask the IAJC *to present a document on the principles of privacy and protection of personal data in the Americas with the aim of exploring the possibility of a regional framework in this area*,² taking into consideration a Project on principles and a study on compared legislation prepared by the OAS Department of International Law (DIL).³ In compliance with the mandate, and having appointed Dr. David P. Stewart as rapporteur of the theme, the IAJC adopted – in March 2012 – the *“Proposal for a declaration of Principles on privacy and Protection of personal Data in the Americas”*⁴ which was presented to the GA. In June 2012, the GA thanked the IAJC for the adoption of the resolution and asked the Permanent Council, through the Commission of Legal and Political Affairs, to *“include in its agenda the analysis of the studies received on the issue of protection of personal data, and to consider the possibility of a regional framework in this area, taking into account the ongoing review of other international instruments on the theme”*.⁵

¹ GA/RES. 1395 (XXVI-O/96).

² GA/RES. 2661 (XLI-O/11) of June 7, 2011.

³ Project on Principles and Recommendations on the Protection of Personal Data, embodied in document CP/CAJP-2921/10 rev.1 corr.1; Comparative study on the different legal and political systems and mechanisms of enforcement existing for the protection of personal data, contained in document CP/CAJP-3063/12.

⁴ Resolution CJI/RES. 186 (LXXX-O/12) of March, 2012.

⁵ Through Resolution GA/RES. 2727 (XLII-O/12) of June 4, 2012, the GA thanked the IAJC for the adoption of its resolution and also requested the Permanent Council, through the Commission of Legal and Political Affairs, to *“include in tis agenda the analysis of the studies received on protection of personal data, and to consider the possibility of a regional framework in this area, taking into consideration the ongoing revision of other international instruments on the issue”*. It also decided to ask the General Secretariat to *“continue promoting cooperation*

In 2013 the GA asked the IAJC

“to prepare proposals for the CAJP on the different ways in which the protection of personal data can be regulated, including a model law on personal data protection, taking into account international standards in that area”.⁶

The IAJC appointed Dr. David P. Stewart as rapporteur of the theme again who, based on extensive consultations came to the conclusion that in view of the diversity of ways in which the topic has been adopted in the countries of the Hemisphere, the most productive orientation to comply with the GA mandate would be the preparation of a legislative guide for the States, through the updating of the Principles adopted in 2012, and the inclusion, in those principles, of annotations that could guide the states on the issue. The IAJC coincided with the path proposed: through resolution CJI/RES. 212 (LXXXVI-O/15) of March 27, 2015, the IAJC approved, as a legislative guide, the updating of the *“OAS Principles on Privacy and Personal Data Protection with Annotations”* attached to that Resolution⁷ and decided to consider concluded the works of the IAJC on this topic.

In August 2017, during the IAJC 91st Regular Session, Dr. Elizabeth Villalta suggested retaking the theme and producing a model law,⁸ that would reflect the latest legislative developments in some countries of the region, as well as the *Ibero-American Standards for the Protection of Personal Data*, adopted in June 2017 by the Ibero-American Personal Data Protection Network (RIPD).⁹ To consider the proposal, the IAJC asked the DIL to prepare a study comparing the legislative guide of principles adopted by the IAJC in 2015 with the aforementioned 2017 Ibero-American Standards.¹⁰

During the 92nd Regular Session in February 2018, the IAJC examined the comparative work prepared by the DIL (document DIL /doc.9/17) and concluded that there was a need for the IAJC to return to the topic on the revision of the IAJC principles on personal data protection, appointing Dr. Carlos Mata as rapporteur.¹¹ In Resolution GA/RES. 2926 (XLVIII-18) of June 5, 2018, the GA resolved to *“request the Inter-American Juridical Committee [...] to start updating the Principles on Personal Data Protection, taking into consideration the evolution of same”*. In 2019, the GA asked the IAJC to continue with the mandate.¹²

channels with other international and regional organizations that convey efforts in the area of data protection, in order to facilitate the exchange of information and cooperation.”

⁶ Resolution GA/RES. 2811 (XLIII-O/13) of 2013. The mandate was reiterated in the same terms through resolution GA /RES. 2842 (XLIV-O/14) of June 2014.

⁷ Embodied in the IAJC Report “Privacy and Protection of Personal Data”, CJI/doc.474/15 rev.2 of March 26, 2015.

⁸ CJI/doc.541/17 corr.1.

⁹ The RIPD, whose main object is to promote the drafting and approval of legislation guaranteeing the right to data protection and privacy in the countries of the region, in made up of 14 Members and 19 Observers. The 14 Members are the organizations and public entities with encumbrances in the area of protection or privacy of personal data of 10 member countries, seven of them being OAS members, that is, Argentina, Chile, Colombia, Costa Rica, Mexico, Peru and Uruguay, and the Ibero-American countries, Andorra, Portugal and Spain. The 19 Observers include entities from several countries in Latin America, Europe and Africa, among which there are eight OAS Member States: Brazil, Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras and Paraguay. The OAS also participates as Observer in the RIPD.

¹⁰ *cf.* IAJC Annual report to the 2017 GA of the OAS, CJI/doc.551/17, of August 16, 2017.

¹¹ *Cf.* Report of the IAJC to the OAS GA 2018, CJI/doc.551/17, of August 16, 2017.

¹² Through Resolution AG/doc.5655/19 of June 20, 2019, the FA asked the IAJC *“to continue updating the Principles on Personal Data protection, taking into consideration their evolution”*.

During his term as rapporteur, Dr. Mata presented three reports to the IAJC, with concrete proposals of topics in which the duty of updating the principles could be focused.¹³ In August 2019, and due to the expiration of Dr. Mata's mandate, Drs. Mariana Salazar and Milenko Bertrand were appointed co-rapporteurs.

With the aim of facilitating the IAJC discussion on the theme, the DIL distributed document DIL/doc.5/19 to the IAJC members on September 11, 2019, under the title "Principles of privacy and Personal Data Protection in the Americas", prepared by the DIL, and containing some suggestions for updating the principles adopted by IAJC in 2012, embodying some texts taken from the legislative guide on principles adopted in 2015 and of the aforementioned Ibero-American Standards. No comments to this document were received from the IAJC members.

II. EVOLUTION OF THE INTERNATIONAL SOURCES OF PERSONAL DATA PROTECTION

Following on from the reports of the former rapporteur Dr. David P. Stewart,¹⁴ some of the main existing international sources on the topic that were considered when drafting the OAS principles in 2012 and when updating them in 2015 included:

- The African Union Convention on Cybersecurity and Personal Data (adopted on June 27, 2014);
- The 1980 guidelines of the Organization for Economic Cooperation and Development (OECD) on de protection of privacy and transborder flow of personal data, which were revised in 2013;
- The Principles on privacy of the 2011 Asia-Pacific Economic Cooperation forum (APEC), adopted as part of the 2004 APEC Privacy Framework and of its System of Transborder Privacy Regulations;
- The Madrid resolution: International Standards on the Protection of Personal Data and Privacy (2009);
- The 2002/58/EC Directive of the European Parliament and of the Council on privacy and the electronic communications (July 12, 2002);
- The 1981 Convention of the Council of Europe for the protection of persons regarding the automated treatment of personal data (Convention 108¹⁵), and its 2001 Protocol;
- The 95/46/EC Directive of the European Parliament and of the Council, on the protection of natural persons regarding the treatment of personal data and the free circulation of data (October 24, 1995); and
- The UN Guiding Principles on the regulation of computerized personal data card files, adopted through resolution 45/95 of the UN General Assembly (December 14, 1990).

International standards on personal data protection are constantly evolving, as they have been adapted and updated in response to the dizzying development of technologies for transmitting and processing personal data, which will undoubtedly continue.

It should be recalled that the mandate given to the IAJC by the GA in 2018 was to update the principles "taking into account the evolution thereof". The main international normative developments from 2015 to date include:

¹³ The Report on the XVI Ibero-American Meeting on the protection of personal data (CJI/doc.579/19), and of the reports on the "Updating of the principles on privacy and personal data protection" (CJI/doc.582/19 and CJI/doc.597/19).

¹⁴ Report CJI/doc.402/12 rev. 2 of 2012 regarding the sources used for the 2012 principles; and report CJI/doc.474/15 rev.2 (Appendix) in relation to the "Texts that will most probably be useful for legislators and other governmental authorities".

¹⁵ Three countries in the Americas region have ratified Convention 108: Argentina, Mexico and Uruguay. As observers we find Brazil, Canada, Chile and the United States of America.

- On 25 May 2018, the application of the General Data Protection Regulation (GDPR) began in all the Member States of the European Union;
- On 10 October 2018, the Protocol amending the Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (known as "Convention 108 Plus"¹⁶) was opened for signature;
- On June 20, 2017, the Personal Data Protection Standards for Ibero-American States were approved by the RIPD;¹⁷ and
- In November 2016, the APEC Ministers approved the update of the APEC Privacy Framework.¹⁸

III. STATUS OF LEGISLATION IN THE REGION AND ADDED VALUE OF UPDATING THE IAJC PRINCIPLES

According to UNCTAD,¹⁹ of the 35 OAS member States, 21 countries have legislation in force on personal data protection and privacy,²⁰ five countries are in the process of adopting legislation in this area,²¹ and nine countries do not yet have such legislation.²²

As may be seen from the international sources cited above, various regions of the world have harmonized personal data protection standards or principles. The Ibero-American Standards adopted by the RIPD in 2017 were a watershed in establishing principles for the countries of the Ibero-American region, some of which – but not all – are also OAS Member States.

Due to the above, and considering that the IAJC has already engaged in the arduous exercise of updating the principles in 2015 through the adoption of the legislative guide entitled "*OAS Principles on Privacy and Personal Data Protection with Annotations*", this rapporteur suggests that the IAJC update be based on the text of the aforementioned 2015 legislative guide, incorporating updates based on international normative developments that have occurred from 2015 to date,²³ including those that occurred in our region, namely the Ibero-American Standards adopted by the RIPD in 2017. In this process, it is felt that is essential to duly take into account the particularities and differences in the treatment of this subject by the different States in our region, including those under common law. Consequently, it is not a matter of imposing foreign parameters but rather of finding those that satisfy the needs of our inhabitants while adapting to the political, historical, cultural and practical aspects that are common to all the countries in our region.

IV. PROPOSED UPDATE

Based on the above remarks, Annex I proposes an update of the "OAS Principles on Privacy and Personal Data Protection with Annotations" adopted in 2015 by the IAJC. The suggested modifications are shown in revision marks, identifying in brackets (as provisional

¹⁶ Three countries in the Americas region have ratified Convention 108: Argentina, México and Uruguay. Observers are Brazil, Canada, Chile and the United States of America.

¹⁷ https://www.redipd.org/sites/default/files/inline-files/Estandares_Esp_Con_logo_RIPD.pdf

¹⁸ <http://www.apec.org/Groups/Committee-on-Trade-and-Investment/Digital-Economy-Steering-Group>

¹⁹ https://unctad.org/en/Pages/DTL/STI_and_ICTs/ICT4D-Legislation/eCom-Data-Protection-Laws.aspx

²⁰ Antigua and Barbuda, Argentina, Bahamas, Bolivia, Brasil, Canada, Chile, Colombia, Costa Rica, United States of America, México, Nicaragua, Panamá, Paraguay, Perú, Dominican Republic, St. Kitts and Nevis, San Vicente and the Grenadines, Santa Lucía, Trinidad and Tobago, and Uruguay.

²¹ Barbados, Dominica, Ecuador, Honduras and Jamaica.

²² Belize, Cuba, El Salvador, Granada, Guatemala, Guyana, Haiti, Suriname and Venezuela.

²³ In his Report CJI/doc. 503/16 dated 2016, Rapporteur Stewart described some of the international normative advances achieved in terms of personal data protection between 2015 and 2016.

text) the international normative source on which they were based, for ease of reference by the members of the IAJC.

The rapporteur would appreciate any comments from the members of the IAJC on this report and the proposal for updating the principles appended thereto. The rapporteur would also like to seek the valuable views of the members of the IAJC on the possible path to be pursued for their eventual approval and adoption. This is in the light of the importance of the adopted principles establishing a common denominator for all States in our region, including those that are members and observers of the RIPD and those that are not. Subject to the comments of the members of the IAJC, one possible path would be that: (i) the comments of the members of the IAJC on the draft update of the principles are requested within two months; (ii) at the next session of the IAJC, this rapporteur presents an updated version of the draft, incorporating the members' comments, for eventual approval as a first draft by the IAJC; (iii) the draft approved by the IAJC may be submitted, through the DIL, for comment to the OAS member states; and (iv) once the comments of the states have been incorporated, the IAJC may approve a final version of the text and submit it to the GA for consideration.

* * *

CJI/doc. 616/20 rev.1 corr.1

**INTER-AMERICAN JURIDICAL COMMITTEE (CJI).
DRAFT UPDATES TO THE “PRINCIPLES ON PRIVACY AND PERSONAL DATA
PROTECTION WITH ANNOTATIONS”
ADOPTED BY THE CJI IN 2015**

FOR COMMENTS BY OAS MEMBER STATES

For ease of reference, some of the proposed updates are followed by temporary bracketed text indicating the cross-reference to similar provisions contained in other international instruments regarding data protection, namely:

- *The Personal Data Protection Standards for Ibero-American States, adopted by the Ibero-American Network for Data Protection on June 20, 2017 (hereinafter, the “Ibero-American Standards”);*
- *The General Data Protection Regulation of the European Union, in force since May 25, 2018 (hereinafter “GDPR”);*
- *The California Consumer Privacy Act, in force since January 1, 2020 (hereinafter “CCPA”).*
- *The Decision of the Secretary-General of the Organization for Economic Cooperation and Development (OECD) on the Protection of Individuals with regard to the Processing of their Personal Data, effective as from 3 May 2019 (the “OECD Decision”).*
- *Asia-Pacific Economic Cooperation (APEC) Cross-Border Privacy Rules (CBPR) Framework, which implements the APEC Privacy Framework updated in 2015 (hereinafter “APEC CBPR”).*
- *United States Mexico Canada Agreement, in force since July 1, 2020 (hereinafter “USMCA”).*

**UPDATED OAS PRINCIPLES ON PRIVACY AND PERSONAL DATA
PROTECTION WITH ANNOTATIONS**

I. THE PRINCIPLES

FIRST PRINCIPLE

Lawful and Fair Purposes

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

SECOND PRINCIPLE

Transparency and Consent

The categories of personal data to be collected, the purposes for which personal data is collected and shall be used, the recipients or categories of recipients to whom the personal data have been or will be disclosed, and the rights that the data subject will have regarding personal data to be collected, should be specified at or before the time the data is collected. When processing is based on consent, personal data should only be collected with the consent of the individual concerned.

THIRD PRINCIPLE

Relevance and Necessity

The data should be relevant and necessary to the stated purposes for which it is collected.

FOURTH PRINCIPLE

Limited Use and Retention

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

SIXTH PRINCIPLE

Protection and Security

The confidentiality, integrity and availability of personal data should be protected by reasonable and appropriate technical or organizational security safeguards against unauthorized or unlawful processing and against accidental loss, destruction or damage.

SEVENTH PRINCIPLE

Accuracy of Data

Personal data should be kept correct, accurate, complete and up-to-date to the extent necessary for the purposes for which it was collected.

EIGHTH PRINCIPLE

Access, Rectification, Erasure, Objection and Portability

Reasonable methods should be available to permit individuals whose personal data has been collected the rights to access, obtain rectification, and obtain erasure of personal data regarding them, as well as the right to object to its processing and, where applicable, the right to data portability thereof. As a general rule, the exercise of such rights should be free of cost. Should it be necessary to curtail the scope of these rights, the specific grounds for any such restrictions should be specified in accordance with domestic law.

NINTH PRINCIPLE

Sensitive Personal Data

Some types of personal data, given its sensitivity in particular contexts, are especially likely to cause material harm to individuals if misused. Data controllers 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

Data controllers should adopt and implement appropriate technical and organizational measures to ensure and to be able to demonstrate that processing is performed in accordance with these Principles. The data controller and processor and, where applicable, their representatives, should cooperate, on request, with the data processing authority in the performance of their tasks.

ELEVENTH PRINCIPLE

Trans-Border Flow of Data and Accountability

Member States should cooperate with one another in developing mechanisms and procedures to ensure that data controllers and processors operating in more than one jurisdiction can be effectively held accountable for their adherence to these Principles.

TWELFTH PRINCIPLE

Exceptions

When national authorities make exceptions to these Principles for reasons relating to national sovereignty, national security, public security, protection of public health, the fight against criminality, regulatory compliance or other public order policies, the protection of rights and freedoms of others, or public interest, they should establish them specifically by a law or norm and make those exceptions known to the public.

THIRTEENTH PRINCIPLE

Data Protection Authorities

Member States should establish independent supervisory bodies, in accordance with each State's constitutional, organizational and administrative structure, to monitor and promote the protection of personal data in consistency with these Principles.

II. THE ANNOTATIONS**Introduction**

The purpose of updating the “Principles on Privacy and Personal Data Protection” adopted by the Inter American Juridical Committee (CJI) in 2015 is to contribute to the development of a current framework for safeguarding the rights of the individual to personal data protection and informational self-determination in the countries of the Americas. The Principles are based on internationally recognized norms and standards, as these have evolved up until 2020. They are intended to support Member States' efforts to protect individuals from wrongful or unnecessary collection, use, retention and disclosure of personal data.

The following elaboration of the Principles is intended to provide a guide to the preparation, updating and implementation of national legislation and related rules within OAS Member States.

Each Member State should decide how best to implement these Principles in its domestic legal system. Whether by means of legislation, regulations or other mechanisms, Member States should establish effective rules for personal data protection that give effect to the individual's right to privacy and demonstrate respect for their personal data, while at the same time safeguarding that the individual may benefit from the free flow of information and access to the digital economy.

These Principles aim to provide the basic elements of effective protection. States may provide additional mechanisms to ensure the privacy and protection of personal data while taking into account the legitimate functions and purposes for which personal data is collected and used for the benefit of individuals. Overall, the Principles reflect the importance of effectiveness, reasonableness, proportionality and flexibility as guiding elements.

Scope

These Principles apply equally to the public and private sectors – that is, to personal data generated, collected or administered by government entities as well as to data gathered

and processed by private entities.¹ They apply to personal data contained in hard copy as well as electronic files. They do not apply to personal data used by an individual exclusively in the context of his or her private, family or domestic life. Neither do they apply to anonymous information, meaning data unrelated to an identified or identifiable natural person, as well as personal data that has gone through an anonymization process in such a way that the subject cannot be identified or reidentified (*cf.* definition of ‘anonymization’, *infra*).

[NOTE: Based on N° 4.3 of the Ibero-American Standards]

The Principles are interrelated and should be interpreted together as a whole.

The Concept of Privacy

The concept of privacy is well-established in international law. It rests on fundamental concepts of personal honor and dignity as well as freedom of speech, thought, opinion and association. Provisions on the protection of privacy, personal honor and dignity are found in all the major human rights systems of the world.

Within our own hemisphere, these concepts are clearly established in Article V of the American Declaration of the Rights and Duties of Man (1948) as well as Articles 11 and 13 of the American Convention on Human Rights (“Pact of San Jose”) (1969). (Appendix A.) The right to privacy has been upheld by the Inter-American Court of Human Rights.²

In addition, the constitutions and fundamental laws of many OAS Member States guarantee respect and protection for personal data as distinct and complementary to the rights of privacy, personal dignity and family honor, the inviolability of home and private communications and related concepts. Almost all OAS Member States have adopted some form of legislation regarding privacy and data protection (although their provisions vary in approach, scope and content). Consistent with these fundamental rights, the OAS Principles reflect the concepts of informational self-determination, freedom from arbitrary restrictions on access to personal data, and protection of privacy, identity, dignity and reputation.

[Note: Based on preambular paragraph (2) of the Ibero-American Standards]

At the same time, as recognized in all legal systems, the right to privacy is not absolute and can be restricted by reasonable limitations rationally related to appropriate goals.

The Concept of Free Flow of Information

Similarly, the fundamental principles of freedom of expression and association, and the free flow of information, are recognized in all the major human rights systems of the world, including within the Inter-American System, for example in Article IV of the American Declaration of the Rights and Duties of Man (1948) as well as Article 13 of the American Convention. (Appendix A.) These essential civil and political rights are reflected throughout our hemisphere in the constitutions and fundamental laws of every OAS Member States (although, again, their provisions vary in approach, scope and content). They are central to the promotion of democracy and democratic institutions.

In a people-centered and development-oriented “information society,” protecting the right of individuals to access, use and share information and knowledge can enable individuals, communities and peoples to achieve their full potential, to promote sustainable development,

¹ Regarding the specific right of individuals to access public information, see the Model Inter-American Law on Access to Public Information, adopted by the OAS General Assembly on June 8, 2010 in AG/RES. 2607 (XL-O/10), which incorporates the principles outlined by the Inter-American Court on Human Rights in *Claude Reyes v. Chile*, Judgment of Sept. 19, 2006 (Series C No. 151), as well as the Principles on Access to Information adopted by the Inter-American Juridical Committee in CJI/RES. 147 (LXXIII-O/08).

² “[T]he sphere of privacy is characterized by being exempt and immune from abusive and arbitrary invasion by third parties or public authorities.” Case of the Ituango Massacres v. Colombia, Judgment of July 1, 2006 (para. 149), available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_148_ing.pdf.

and to improve the overall quality of life, consistent with the purposes and principles of the OAS Charter and our regional human rights instruments.

Definitions

Anonymization. As used in these Principles, the term "anonymization" refers to the adoption of measures of any nature aimed at preventing the identification or reidentification of a natural person without disproportionate effort.

[NOTE: Based on N° 2.1(a) of the Ibero-American Standards]

Personal Data. As used in these Principles, the term "personal data" includes information that identifies, or can be reasonably be used to identify, a natural person, whether directly or indirectly, in particular by reference to an identification number, location data, an online identifier or to one or more factors specific to his or her physical, physiological, genetic, mental, economic, cultural or social identity. It includes information expressed in a numerical, alphabetical, graphic, photographic, alpha-numerical, audio, electronic, visual or any other manner. The term does not include information that does not identify (or cannot reasonably be used to identify) a particular individual.

[NOTE: Based on Article 4.1 of the GDPR, article 2.c of the Ibero-American Standards and §1798.140(o)(1) of CCPA]

The Principles intentionally use the term "data" broadly in an effort to provide the broadest protection to the rights of the individuals concerned, without regard to the particular form in which the data is collected, stored, retrieved, used or disseminated. The Principles generally avoid using "personal information" since that term might be construed by itself not to include specific "data" such as factual items or electronically-stored "bits" or digital records. Similarly, the term "data" might be construed not to include compilations of facts that taken together allow conclusions to be drawn about the particular individual(s). To illustrate, details about the height, weight, hair color and date of birth of two individuals might be "data" which, when compared, might reveal the "information" that they are brother and sister or perhaps identical twins. To promote the greatest protection of privacy, these Principles would apply in both situations and would not permit a data controller to make such distinctions.

Examples of personal data include identifiers such as real name, alias, postal address, unique personal identifier, online identifier, internet protocol address, email address, account name, social security number, driver's license number, passport number or other similar identifiers, or commercial information, biometric information, internet or other electronic network activity information (such as browsing history, search history and information regarding a data subject's interaction with an internet website, application, or advertisement, geolocation data, audio, electronic, visual, thermal, olfactory or similar information, professional or employment-related information, educational information and inferences drawn from the above to create a profile about the data subject's preferences, characteristics, psychological trends, predispositions, behavior, attitudes, intelligence, abilities and aptitudes, among others.

[NOTE: Based on §1798.140(o)(1) of the CCPA]

For purposes of these Principles, only people (natural persons) have privacy interests -- not the devices, computers or systems by which they interact. Neither do the organizations or other legal entities with which they deal. Minors (individuals below the age of adulthood) also have legitimate privacy interests which should be recognized and effectively protected by national law.

Data Controller. As used in these Principles, the term "data controller" refers to the natural or legal person, private entity, public authority or other body or organization or service (alone or jointly with others) with responsibility for the storage, processing, use, protection and dissemination of the personal data in question. In general, it will include the natural or legal persons or authorities empowered under national law to decide the content, purpose and use of a data file or data base. In some circumstances, the term will also apply to entities which can be described as "data collectors" since in most situations the entity that stores, uses, and

disseminates the personal data will also be responsible (directly or indirectly) for collecting that data.

[NOTE: Based on N° 2.1 (g) of the Ibero-American Standards and article 4.7 of the GDPR]

Data Processor. The term “data processor” refers more specifically to the natural or legal person, private entity, public authority or other body or organization that (alone or jointly with others) processes the data in question. In general and for the vast majority of the States in the Americas region, the data processor is separate from the data collector and acts on behalf of and in the name thereof. In some situations, the data controller might also be the data processor, or the data controller may make arrangements for others to do the processing through a contractual relationship. The term “data processing” is used broadly, to include any operation or set of operations performed on personal data, such as collection, recording, storage, alteration, retrieval, disclosure, or transfer.

[NOTE: Based on N° 2.1 (e) of the Ibero-American Standards and article 4.8 of the GDPR]

Data Protection Authority. As used in these Principles, the term “data protection authority” refers to the supervisory authorities established in Member States, empowered with setting and enforcing the laws, regulations and requirements relating to the protection of personal data, either at the national, regional or municipal level and in accordance with each State’s constitutional, organizational and administrative structure.

[NOTE: Based on article 4.8 of the GDPR]

Data Subject. This term refers to the individual whose personal data is being collected, processed, stored, used or disseminated.

Sensitive Personal Data. The term “sensitive personal data” refers to a narrower category that includes data affecting the most intimate aspects of natural persons. Depending on the specific cultural, social or political context, this category might, for example, include data related to an individual’s personal health, sex life or sexual preferences, religious, philosophical or moral beliefs, trade union membership, genetic data, biometric data for the purpose of uniquely identifying a natural person, political opinions or racial or ethnic origins. In certain circumstances, this data might be considered worthy of special protection because, if mishandled or improperly disclosed, it could lead to serious harm to the individual or to unlawful or arbitrary discrimination.

[NOTE: Based on N° 2.1 (d) and 9 of the Ibero-American Standards and on article 9 of GDPR and article 4.2 of the OECD Decision]

The Principles recognize that the sensitivity of personal data can be culture-specific, that it can change over time, and that the risks of actual harm to a person resulting from disclosure of such data can be negligible in one particular situation and life-threatening in another.

PRINCIPLES ON PRIVACY AND PERSONAL DATA PROTECTION (WITH ANNOTATIONS)

FIRST PRINCIPLE: LAWFUL AND FAIR PURPOSES

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

This Principle addresses two elements: (i) the “lawful purposes” for which personal data is initially collected and (ii) the “fair and lawful means” by which that data is initially collected.

The premise is that many if not most intrusions on the rights of individuals can be avoided if respect is given to the related concepts of lawfulness and fairness at the outset, when

data is initially collected. These Principles of course apply and should be respected throughout the process of gathering, compiling, storing, using, disclosing and disposing of personal data -- not just at the point of collection. Yet they are more likely to be honored and respected if they are emphasized and respected from the very beginning.

Lawful Purposes

The requirement of lawfulness in the purpose for which personal data is collected, retained and processed is a fundamental norm, deeply rooted in basic democratic values and the rule of law. In principle, the collection of personal data should be limited and undertaken on the basis of the individual's knowledge or consent. Data should not be collected about individuals except in situations, and by methods, permitted or authorized by law and (as a general rule) disclosed to those concerned at the time of collection.

Member States should, therefore, include in their national legislations specific provisions on the lawful purposes of personal data processing. As a general rule, these should include cases when: (a) the data subject has given consent to the processing of his or her personal data for one or more specific purposes; (b) processing is necessary for the performance of a contract to which the data subject is a party or in order to take steps at the request of the data subject prior to entering into a contract; (c) processing is necessary for the compliance with a legal obligation to which the data controller is subject; (d) processing is necessary to protect the vital interests of the data subject or of another natural person; (e) processing is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller; (f) processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party; (g) processing is necessary for compliance with a judicial order, resolution or mandate from a competent public authority; and (h) processing is necessary for the recognition or defense of the rights of the data subject before a competent public authority.

[NOTE: Based on article 6.1 of GDPR and N° 11.1 of the Ibero-American Standards]

The requirement of lawfulness embraces the notion of legitimacy and excludes the arbitrary and capricious collection of personal data. It implies transparency and a legal structure that is accessible to the person whose data is being collected.

In most contexts, the lawfulness requirement can be respected if the data collector or processor informs the data subject about the legal basis on which the data is being requested at the time of collection (e.g., "your personal identification number is requested pursuant to the National Registration Law of 2004" or "Ministry of Economy Directive 33-25," etc.).

In other situations, a different explanation may be required, such as "This information is required in order to guarantee that the refund of money is sent to the correct address of the claimant..." In such cases, the purposes for which the data is collected should be stated clearly so that the individual is able to understand how the data will be collected, used or disclosed.

Fair and Lawful Means

This Principle also requires that the means by which the personal data is collected should be both "fair and lawful." Personal data is collected by fair and lawful means when the collection is consistent with both the applicable legal requirements and the reasonable expectations of individuals based on their relationship with the data controller or other entity collecting the data and the notice(s) provided to individuals at the time their data is collected.

This Principle excludes obtaining personal data by means of fraud, deception or under false pretenses. It would be violated, for example, when an organization misrepresents itself as another entity in telemarketing calls, print advertising, or email in order to deceive subjects and induce them to disclose their credit card numbers, bank account data or other sensitive personal information.

[Based on No. 15 of the Ibero-American Standards]

"Fairness" is contextual and depends on the circumstances. It requires, among other things, that individuals should be provided appropriate choices about how and when they provide personal data to data controllers when collection would not be reasonably expected

given their relationships with the data collector or processor and the notice(s) they were provided at the time their data was collected. The choices provided to individuals should not interfere with the efforts and obligations of data controllers to promote safety, security, and legal compliance, or otherwise prevent them from engaging in commonly accepted practices regarding the collection and use of personal data.

In implementing these Principles, Member States may decide to contain a separate “fairness” requirement that is distinct from the issue of deception.

SECOND PRINCIPLE: TRANSPARENCY-AND CONSENT

The categories of personal data to be collected, the purposes for which personal data is collected and shall be used, the recipients or categories of recipient to whom the personal data have been or will be disclosed, and the rights that the data subject will have regarding personal data to be collected, should be specified at or before the time the data is collected. When processing is based on consent, personal data should only be collected with the consent of the individual concerned.

[NOTE: Based on N° 12,16 and 25 of the Ibero-American Standards; article 15 of GDPR and §1798.100(b) and §1798.110(a)(4) and (b)(4) of CCPA]

This Principle also focuses on the collection of personal data. It rests on the concept of “informational self-determination” and in particular on two basic concepts which are widely recognized internationally: the “transparency” principle and the “consent” principle. Together, they require that (i) the categories of personal data to be collected, the purposes for which personal data is collected and shall be used, as well as the recipients or categories of recipient to whom the personal data will be disclosed, and the rights that the data subject will have regarding personal data to be collected should be specified generally not later than the point at which collection begins, and (ii) when processing is based on consent, personal data should only be collected with the clear consent of the individual concerned.

Transparency

The categories of personal data to be collected, the purposes for which personal data is collected and shall be used, as well as the recipients or categories of recipient to whom the personal data will be disclosed, and the rights that the data subject will have regarding personal data to be collected should be specified clearly at or before the time the data is collected. In addition, individuals should be informed about the practices and policies of the entities or persons collecting the personal data so they are able to make an informed decision about providing that data. Without clarity, the individual’s agreement to collection cannot be meaningful.

In order to permit individuals to make informed decisions as to whom and for what reason they will provide their personal data, more information is needed than just the categories, purposes of the collection and handling of those data. It is also important for the individuals to be informed about the legal basis for such collection, how their personal data will be stored and processed, the identity and contact information of the personnel responsible for handling them, any data transfers that may be involved, the existence, forms and mechanisms or procedures at their disposal for exercising their rights to request from the data controller access, rectification or erasure of their personal data or to object to its processing, as well as their right to data portability and, where the personal data are not collected from the data subject, any available information as to their source.

[NOTE: Based on N° 16.2 of the Ibero-American Standards, article 15 of GDPR and §1798.105(b) and §1798.110 of CCPA]

The information should be provided to the data subject in a concise, transparent, intelligible and easily accessible form, using clear and plain language, in particular for any information addressed specifically to children.

[NOTE: Based on article 12.1 of GDPR and N° 16.3 of the Ibero-American Standards]

Consent

As a rule, the individual should be able to consent freely to the collection of personal data in the manner and for the purposes intended. The individual's consent should therefore be based on sufficient information and be clear, that is, leaving no doubt or ambiguity about the individual's intent. For consent to be valid, the individual should have sufficient information about the specific details of the data to be collected, how it is to be collected, the purposes of the processing, and any disclosures that may be made. The individual should have the ability to exercise a real choice.

There should be no risk of deception, intimidation, coercion or significant negative consequences to the individual from refusal to consent.

The method of obtaining consent should be appropriate to the age and capacity of the individual concerned (if known) and to the particular circumstances of the case. When obtaining the consent of children, the data controller should obtain authorization from the guardian or person *in loco parentis*, as set forth in the representation rules laid down in the internal law of the States, or should, if applicable, request authorization directly from the minor, should the domestic law of each State establish a minimum age for granting this directly and with no representation whatsoever from a guardian or person *in loco parentis*.

[NOTE: Based on article 8 of GDPR and N° 13.1 of the Ibero-American Standards]

Consent should reflect the preference and informed decision by the individual concerned. Clearly, consent obtained under duress or on the basis of misrepresentations or even incomplete or misleading information cannot satisfy the conditions for legitimate collection or processing.

[NOTE: Based on N° 12.1 of the Ibero-American Standards]

Context

The consent requirement should be interpreted reasonably in the rapidly evolving technological environment in which personal data is collected and used today. The nature of consent may differ depending on the specific circumstances. These Principles recognize that in some situations, "knowledge" may be the appropriate standard where personal data processing and disclosure satisfy legitimate interests. Implicit consent may be appropriate when the personal data in question is less sensitive and when information about the purpose and method of collection is provided in a reasonable way so that the requirements of transparency are satisfied.

For example, an individual's consent to the collection of some personal data may reasonably be inferred from previous interactions with (and notices provided by) data controllers and when collection is consistent with the context of the transaction for which data was originally collected. It may also be inferred from commonly accepted practices regarding the collection and use of personal data or the legal obligations of data controllers.

In some limited situations, non-consensual collection of some personal data may be authorized. In such instances, the party seeking to collect and process the data should show that it has a clear need to do so for the purposes of its legitimate interests or for those of a third party to whom the data may be disclosed. It should also demonstrate that the legitimate interests of the party seeking disclosure are balanced against the interests of the data subject concerned.

The "legitimate interests" condition will not be met if the processing will have a prejudicial effect on the rights and freedoms, or other legitimate interests, of the data subject. Where there is a serious mismatch between competing interests, the subject's legitimate interests should come first. The collecting and processing of data under the legitimate interests condition should be fair and lawful and should comply with all the data protection principles.

Sensitive personal data should only be processed without the individual's explicit consent where it is clearly in the substantial public interest (as authorized by law) or in the vital interests of the data subject (for instance, in a life-threatening emergency).

Timing

As a general rule, an individual should be informed of the purposes at the time the data is collected, and his or her consent should be obtained at that point. In most cases, consent will last for as long as the processing to which it relates continues. In some instances, the subsequent collection of additional data may reasonably be based on the individual's prior consent to the initial collection.

The data subject should be entitled to withdraw his/her consent at any time, for which purpose the controller should establish simple, swift, effective and no-cost mechanisms.–In general, withdrawal of consent does not affect the lawfulness of processing based on consent before its withdrawal.

[NOTE: Based on article 7.3 of GDPR and N° 12.2 of the Ibero-American Standards]

THIRD PRINCIPLE: RELEVANCE AND NECESSITY

The data should be relevant and necessary to the stated purposes for which it is collected.

Relevancy and necessity are critical concepts in respect of data protection and personal privacy. Of course, their requirements should be assessed in relation to the specific context in which the personal data is collected, used, and disclosed. Contextual considerations include what particular data is collected and the purposes for which that data is collected.

Relevance

The requirement that data be “relevant” means that it should be reasonably related to the purposes for which it was collected and is intended to be used. For instance, data concerning opinions may easily be misleading if they are used for purposes to which they bear no relation.

Necessity and Proportionality

As a general rule, data processors should only use personal data in ways commensurate with the stated purposes for which the data was collected, for example when necessary to provide the service or product that was requested by the individual. Moreover, data collectors and processors should follow a “limitation” or “minimization” criterion, according to which they should make a reasonable effort to ensure that the personal data handled correspond to the minimum required for the stated purpose. In some legal systems the concept of "proportionality" is used to refer generally to the balancing of competing values. Proportionality requires decision-makers to evaluate whether a measure has gone beyond what is required to attain a legitimate goal and whether its claimed benefits will exceed the anticipated costs.

[Based on article 5.1(c) of GDPR]

In the context of public sector data processing, the idea of necessity is sometimes measured by proportionality, for example to require balancing (i) the public interest in processing the personal data against (ii) protection of the individuals' privacy interests.

Under these Principles, the concepts of “necessity” and “proportionality” place general limitations on use, meaning that personal data should be used only to fulfill the purposes of collection except with the consent of the individual whose personal data is collected or when necessary to provide a service or product requested by the individual.

The Principles recognize, however, that the field of data management and processing is continually evolving technologically. In consequence, this Principle should be understood to embrace a measure of reasonable flexibility and adaptability.

FOURTH PRINCIPLE: LIMITED USE AND RETENTION

Personal data 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.

This Principle sets forth two fundamental premises regarding retention of personal data: (1) it should be kept and used in a lawful manner not incompatible with the purpose for which they were collected (sometimes referred to as the “principle of purpose” or “purpose limitation”) and (2) it should not be kept longer than necessary for that purpose and in accordance with relevant domestic law.

Limited Use

Regarding the first premise, personal data should be collected for specified, explicit and legitimate purposes. Retention and use of personal data should be consistent with individuals’ reasonable expectations, their relationship with the data controller collecting the data and the notice(s) provided by the data controller.

[NOTE: Based on article 5.1(b) of GDPR and on N° 17.1 of the Ibero-American Standards]

Personal data should not be kept or used for purposes other than those compatible with those for which it was collected, except with the knowledge or consent of the data subject or by the authority of law. The concept of “incompatibility” includes a certain measure of flexibility, allowing reference to the overall objective or purpose for which the individual’s consent to collection was initially given. In this regard, the appropriate measure may often be one of respecting the context in which the individual had provided his or her personal data and his or her reasonable expectations in the particular situation.

[NOTE: Based on §1798.100(b) of CCPA]

For example, when a data subject provides her name and mailing address to an online retailer, and that retailer in turn discloses that-subject’s name and home address to the shipper so that the purchased goods may be delivered to the subject, this disclosure is clearly a “compatible” use of personal data. However, if the online retailer discloses the subject’s name and home address to another retailer or marketer for purposes unnecessary for and unrelated to the completion of the subject’s online transaction, it would most likely be an “incompatible” use of the consumer’s data and not allowed unless the subject offers his/her express consent.

Subsequent processing of personal data for filing or archiving purposes, scientific or historical research purposes or statistical purposes, all in the public interest, shall not be deemed incompatible with the initial purposes.

[NOTE: Based on N°17.3 of the Ibero-American Standards, article 5.1(b) of GDPR and §1798.140(o)(3)(s) of CCPA]

Thus, another circumstance in which this Principle may be applied reasonably and with a degree of flexibility concerns the use of an individual’s personal data as part of a broad (or “aggregate”) processing of data from a large number of individuals by the data controller, for example for inventory, statistical or accounting purposes.

Limited Retention

Personal data should be kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the personal data are processed. A general limitation on data retention is required by modern technological realities. Because the cost of data storage has been reduced so sharply, it may often be less expensive for data controllers to store data indefinitely rather than to review and delete unnecessary data. Yet unnecessary and excessive retention of personal data clearly has privacy implications. As a general rule, therefore, data should be securely and definitively disposed of —by, for example, deleting them from the controller’s information files, records, databases, registers or systems—

or should be anonymized, when it is no longer needed for its original purpose or as otherwise required by national law.

[NOTE: Based on article 5.1(d) of GDPR and N° 19.2 and 19.3 of the Ibero-American Standards]

Personal data may be stored for longer periods insofar as the personal data will be processed solely for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes, subject to the implementation of the appropriate technical and organizational measures to safeguard the rights and freedoms of the data subject.

[NOTE: Based on article 5.1(e) of GDPR]

Furthermore, individuals may choose to consent, either expressly or by implication, to the use and retention of their personal data for additional purposes. Relevant domestic law may impose explicit legal requirements for data retention. Moreover, a data controller may have legitimate reasons to retain data for a certain period of time even if not explicitly required. For example, employers may retain records on former employees, or doctors may retain records on their former patients, in order to protect themselves against certain types of legal actions, such as medical malpractice, wrongful discharge, etc. It may also be necessary for data controllers to retain personal data for longer periods in order to comply with other legal obligations, or to protect the rights, safety or property of the individual, the data processor, or a third party.

[NOTE: Based on No. 19.4 of the Ibero-American Standards].

FIFTH PRINCIPLE: DUTY OF CONFIDENTIALITY

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

This Principle derives from the basic duty of the data controller to maintain the "confidentiality" of personal data in a safe and controlled environment.

This duty requires the data controller to ensure that such data is not given (or otherwise made available) to persons or entities except pursuant to the knowledge, consent or reasonable expectations of the individual concerned or under proper legal authority. The data controller should also ensure that the personal data is not used for purposes which are incompatible with the original purpose for which that data was collected. These responsibilities arise from the nature of the personal data itself and do not depend on assertions by the individuals concerned.

[NOTE: Based on N° 23 of the Ibero-American Standards]

This duty to respect limits on disclosure is in addition to the obligation of data controllers under the Sixth Principle to promote safety, security, and legal compliance in safeguarding data. Protecting privacy means not only keeping personal data secure, but also enabling individuals to control how their personal data is used and disclosed. An essential element of "informational self-determination" is the establishment and maintenance of trust between data subject and data controller, especially with regard to third-party disclosure of personal data.

In some situations, an individual's consent may reasonably be inferred based on the particular context of the individual's relationship and interactions with the data controller or its services, the notice(s) provided by the data controller, and commonly accepted practices regarding the collection and use of personal data. For example, in some situations it is entirely reasonable for a data controller to share data with a third party "service provider" (for example, a data processor) under a specified contractual arrangement.

Disclosure to law enforcement authorities and other government agencies pursuant to law would not contravene this Principle but should be authorized by clear and specific provisions.

Protection of personal data in the hands of public authorities may be subject to differing rules depending on the nature of the information and the reasons for disclosure. These reasons and rules should also be addressed by clear and specific provisions. In this regard, attention is drawn to the Model Inter-American Law on Access to Public Information, adopted in 2010, as well as the Draft Model Law 2.0 approved by the IAJC in 2020 that is currently under discussion by the OAS political bodies, which provides that subject entities should protect confidential personal information and particularly personal data whose disclosure requires authorization from the subjects thereof.

SIXTH PRINCIPLE: PROTECTION AND SECURITY

The confidentiality, integrity and availability of personal data should be protected by reasonable and appropriate technical or organizational security safeguards against unauthorized or unlawful processing and against accidental loss, destruction or damage.

Under this Principle, data controllers should take organizational and technical steps to put security safeguards in place that ensure the confidentiality, integrity and availability of personal data in their possession or custody (or for which they are responsible) and to ensure that such personal data is not processed or disclosed except in accordance with the individual's knowledge or consent or other lawful authority, nor is accidentally lost, destroyed or damaged. Accordingly, data controllers should also establish controls or mechanisms to ensure that the confidentiality of the personal data is maintained by processors and any other person involved in the handling of personal data, even after the relation with the data subject comes to an end.

[NOTE: Based on article 5.1(f) of GDPR and N° 21.1 and 23.1 of the Ibero-American Standards]

Data controllers should provide “reasonable and appropriate security safeguards.” It is based on achieving and maintaining a proper level of care in the context of the overall situation. Thus, considerations of proportionality and necessity may be taken into account.

In the modern context, absolute privacy and complete protection of personal data is technically impossible to guarantee, and the effort to achieve it would impose undesirable barriers and unacceptable costs. Moreover, different contexts may require different solutions and levels of safeguards. Accordingly, this Principle requires an exercise of reasoned and informed judgment and is not necessarily violated any time a data controller experiences an unauthorized access, loss, destruction, damage, use, modification or disclosure.

Personal data should be protected, regardless of the format in which it is held, by safeguards that are reasonably designed to prevent material harm to individuals from the unauthorized access to or loss or destruction of the data. The nature of the safeguards may vary depending on the sensitivity of the data in question.

Clearly, more sensitive data requires a greater level of protection. Reasons for providing enhanced protection might include, for example, the risks of identity theft, financial loss, negative effects to credit ratings, damage to property, loss of employment or business or professional opportunities.

The standard is not static. Threats to privacy, especially cyber threats, are constantly evolving, and the assessment of what are "reasonable and appropriate" safeguards should respond to those developments. The challenge is to provide meaningful guidance to data controllers while ensuring that the standards remain "technologically neutral" and are not rendered obsolete by rapid changes in technology.

Given the rapid rate of change in the current information environment, what might have been permissible practices only a few months ago could well be regarded today as intrusive or risky or dangerous to individual privacy. By the same token, what might have seemed a reasonable restriction a few months ago might in fact be obsolete or unfair in light of technological advances.

The assessment of “reasonable and appropriate security safeguards” should therefore be based on the current “state of the art” in data security methods and techniques in the light of evolving threats to personal privacy. It should also be subject to periodic review and reassessment.

[NOTE: Based on N° 21.3 of the Ibero-American Standards]

Protecting the privacy of individuals means keeping their personal data secure and enabling them to control their “on-line” experience. In addition to adopting effective security measures, data controllers (such as providers of online services) should have the flexibility to provide their users with effective tools to control the sharing of personal data as part of their overall measures of privacy protection.

Data Breaches

The growing incidence of outside intrusions (“personal data breaches”), in which unauthorized persons gain access to protected data, raises criminal as well as privacy concerns. In many countries, including within our region, domestic law imposes reporting requirements in such instances. Thus, in the event of a breach, data controllers may have a legal obligation to notify the individuals whose data has been (or might have been) compromised.

Such notifications permit the affected individuals to take protective measures and perhaps to access and seek correction of any inaccurate data or misuse resulting from the breaches. The notifications may also provide incentives for data controllers to demonstrate their accountability, to review their data retention policies and to improve their security practices.

At the same time, breach notification laws may impose obligations on data controllers to cooperate with criminal law enforcement agencies as well as other authorities (e.g. computer incident response teams or other entities responsible for cybersecurity oversight). National legislation should determine the specific (and limited) situations in which law enforcement authorities may require the disclosure of personal data without the consent of the individuals concerned. Care should be taken not to impose conflicting notification and/or confidentiality requirements on data controllers.

In cases where penalties are imposed on data controllers for non-compliance with the duty to safeguard and protect, such penalties should be proportional to the level of harm or risk. In this context, it may be useful for national jurisdictions to adopt specific definitions of what constitutes a “breach” (or “unauthorized access”), what types of data may require additional levels of protection in such an event, and what specific responsibilities a data controller may have in the event of such a disclosure.

SEVENTH PRINCIPLE: ACCURACY OF DATA

Personal data should be kept correct, accurate, complete and up-to-date to the extent necessary for the purposes for which it was collected.

Accuracy and precision are vitally important for the protection of privacy. Data accuracy is clearly important to the protection of privacy interests. Inaccurate data can cause harm to both the data processor and the data subject, but to an extent that varies greatly depending on context.

When personal data is collected and retained for continuing use (as distinct from one-time uses or periods of short duration), the data controller should take steps to ensure that the data in its possession is correct, accurate complete and up-to-date, as necessary for the purposes for which it was collected and is being used.

[NOTE: Based on N° 19.1 of the Ibero-American Standards]

The data may or may not need to be continually updated and/or supplemented in order to be accurate in relation to the stated purpose for which the data was collected. In deciding whether additional information is required, the standard should be one of “necessity,” that is,

the data in question should be accurate, complete and up-to-date to the extent necessary for the purposes of use. The obligation derives from the "use" for which the data was collected and has been or is intended to be put, and for which the individual has given consent. It is not an abstract requirement of objective accuracy. Therefore, the data controller or data controllers should adopt appropriate mechanisms – reasonable in light of the purpose for which the data was collected and is used – to make sure that the data remains correct, accurate, complete and up-to-date, and that the rights of the individual in question are not impaired.

Data controllers should undertake effective efforts to safeguard the privacy of individuals and others who provide their own data. Data controllers may satisfy their obligations with regard to accuracy by providing individuals with a reasonable opportunity to review, correct or request deletion of personal information they have provided to the data controller. The requirement may be subject to a reasonable time limitation.

In taking measures to determine the accuracy of individuals' personal data ("data quality"), the data controller may consider the sensitivity of the personal data that they collect or maintain and the likelihood it may expose individuals to material harm, consistent with the requirements of the Ninth Principle.

As mentioned under the Third and Fourth Principles above, as per the 'minimization' and limited use and retention criteria, personal data handled should correspond to the minimum required for the stated purpose and should not be kept for longer than necessary for the purposes stated. In many situations, the application of this Principle will require the deletion of personal data which is no longer necessary for the purposes which initially justified its collection.

In limited circumstances (for example, the investigation of or protection against fraud), data processors may need to retain and process some inaccurate or fraudulent data.

EIGHTH PRINCIPLE: ACCESS, RECTIFICATION, ERASURE, OBJECTION AND PORTABILITY

Reasonable methods should be available to permit individuals whose personal data has been collected the rights to access, obtain rectification, and obtain erasure of personal data regarding them, as well as the right to object to its processing and, where applicable, the right to data portability thereof. As a general rule, the exercise of such rights should be free of cost. Should it be necessary to curtail the scope of these rights, the specific grounds for any such restrictions should be specified in domestic law.

[NOTE: Based on Chapter III of the Ibero-American Standards]

Individuals should have the right to discover whether data controllers have personal data relating to those individuals, to have access to that data so that they may challenge the accuracy of that data, and to ask the data controller to amend, revise, correct or delete the data in question. This right of access and rectification is one the most important safeguards in the field of privacy protection. They should also have the right to obtain erasure of the personal data and to object to its processing. Where applicable, they also have the right to data portability.

The essential elements are the individual's ability to obtain data relating to him or her within a reasonable time, and in a reasonable and intelligible manner; to know whether a request for such data has been denied and why; and to challenge such a denial. As a general rule, the exercise of these rights should be free of cost; exceptionally, costs should be only those naturally inherent to the reproduction, delivery or certification of the data.

[NOTE: Based on preambular paragraph 19 of the Ibero-American Standards; paragraph 1798.100(d) of the CCPA]

Within the Western Hemisphere, some (but not all) national legal systems recognize a right of *habeas data*, by which individuals are able to file a judicial proceeding to prevent or terminate an alleged abuse of their personal data. That right may provide the individual access to public or private data bases, the right to correct the data in question, to ensure that sensitive

personal data remains confidential, and to rectify or remove damaging data. Because the specific contours of this right vary between Member States, these Principles address the issues it raises in terms of its separate elements.

The national legislation of each State should establish the requirements, periods, deadlines, terms and conditions under which data subjects may exercise their rights of access, rectification, erasure,—objection and portability. These rights are not absolute and national legislation should clearly state the causes and reasons for which the exercise of such rights may be impeded. These may include, among others, 1) when processing is necessary in order to pursue an important objective in the public interest or for the exercise of their specific functions by public authorities; 2) when the controller believes that it has lawful reason for the processing to prevail over the interests, rights and freedoms of the subject; 3) when processing is needed in order to comply with a legal provision; or 4) when the personal data is needed to ensure compliance with a legal or contractual relationship.

Should the data subject be deceased or have disappeared, the national legislation of each State may allow natural persons who are their legal representatives or relatives to exercise these rights regarding the personal data of such subjects.

National legislation of each State may also recognize the right of the data subject to disagree with or contest the controller's response or lack of response to a request to exercise the rights addressed in this Principle before the control authority and, as applicable, before a judicial court in accordance with the domestic law of each State.

[NOTE: Based on N's 32.3 and 32.4 of the Ibero-American Standards]

Data controllers and data processors should not discriminate against data subjects because they exercised any of these rights, including but not limited by denying goods or services to the subject, charging different prices or rates for them or providing them a different level or quality of goods.

[NOTE: Based on §1798.125 of the CCPA]

The Right of Access

The right to access personal data held by a data controller should be simple to exercise. For example, the mechanisms for access should be part of the routine activities of the data controller and should not require any special measures or legal process (including, for instance, presenting a formal judicial claim). Every individual should have the ability to access his or her own data. In some situations, even third parties may also be entitled (for example, representatives on behalf of those suffering mental incapacity, or parents on behalf of minor children).

The ability of an individual to seek access to his or her data is sometimes referred to as the right of "individual participation." Under this concept, access should be afforded within a reasonable time period, a reasonable manner and in a reasonably intelligible form. As mentioned, access should be afforded free of cost; exceptionally, costs should be only those naturally inherent to the reproduction, delivery or certification of the data. The burden and expense of producing the data should never be unreasonable or disproportionate.

[NOTE: Based on preambular paragraph 19 of the Ibero-American Standards; paragraph 1798.100(d) of the CCPA]

Any data to be furnished to the data subject should be provided in an intelligible form, using a clear and simple language. The information may be delivered by mail or electronically, and if provided electronically it should be portable as described below (*cf.* section 'Right to Personal Data Portability', *infra*).

[NOTE: Based on preambular paragraph 19 and paragraph 25 of the Ibero-American Standards; article 15 of GDPR; paragraph 1798.100(d) of the CCPA]

Exceptions and Limitations

The right of access is not absolute, however. Some exceptional situations exist in every national scheme which may require certain data to be kept confidential. These circumstances

should be clearly set out in the appropriate legislation or other guidance and should be available to the public.

Such situations may arise, for example, where the individual concerned is suspected of wrongdoing and is the subject of an ongoing law enforcement or similar investigation, or where that individual's records are intermingled with those of a third party who also has privacy interests, or where granting the data subject access would compromise trade secrets or confidential testing or examination material. The rules regarding such situations should be as narrow and restrictive as possible.

In addition, for practical reasons, a data controller may impose reasonable conditions, for example by specifying the method by which requests should be made and by requiring the individuals making such requests to authenticate their identity through reasonable means. Data controllers need not accede to requests that would impose disproportionate burdens or expenses, violate the privacy rights of other individuals, infringe on proprietary data or business secrets, contravene the data controllers' legal obligations, or otherwise prevent the company from protecting the rights, safety or property of the company, another user, an affiliate, or a third party.

The Right to Challenge Denial of Access

In the event that an individual's request for access is denied, there should be an effective method by which the individual (or her representative) can learn the reasons for the denial and challenge that denial. Allowing the individual to learn the reasons for an adverse decision is necessary for the exercise of the right to challenge the decision and to prevent arbitrary denials.

As indicated above, it may well be appropriate, or even necessary, in some situations to withhold certain data. Such situations should however be the exception, not the rule, and the reasons for the denial should be clearly communicated to the individual making the request, in order to prevent arbitrary denial of the fundamental right to correct errors and mistakes.

The Right to Rectify Errors and Omissions

The individual should be able to exercise the right to request the correction of (or an addition to) personal data about himself or herself that is incomplete, inaccurate, unnecessary, excessive or not up-to-date. This is sometimes referred to as the right of "rectification." When the data in question is incomplete or inaccurate, the individual should be permitted to provide additional information to correct those errors or omissions.

Where the data in question is clearly inaccurate, the data controller should generally correct the inaccuracy when the data subject so requests. Even where data has been found to be inaccurate, such as in the course of an investigation involving the data subject, it may be more appropriate in some situations for the data controller to add additional material to the record rather than deleting it, so as to accurately reflect the entire investigative history.

The data subject should not be allowed to inject inaccurate or erroneous data into the data controller's records. The data subject also does not necessarily have a right to compel the data controller to delete data that is accurate but embarrassing.

The right of correction or rectification is not absolute. For example, amendment of personal data – even erroneous or misleading information – may not be authorized where that data is legally required or should be retained for the performance of an obligation imposed on the responsible person by the applicable national legislation, or possibly by the contractual relations between the responsible person and the data subject.

Accordingly, national legislation should clearly indicate the conditions under which access and correction should be provided and the restrictions that apply. It should specify the limited situations in which personal data may not be accessible and cannot be corrected. The specific grounds for such restrictions should be clearly specified.

Right to erasure

Some national and regional regulatory schemes provide individuals with a right to request that data controllers delete (or erase) specific personal data which, although publicly available, the individuals contend is no longer necessary or relevant or regarding which the

data subject withdraws its consent or objects to its processing. This right is sometimes described as the right to omit or suppress specific information, to “de-identification” or “anonymization.” Where the right to erasure is recognized, and upon receipt of a request thereto, data controllers should proceed to delete the personal data from their records and should also direct any data processors to delete the subject’s personal data from their records.

[Note: Based on art. 17 of GDPR, No. 27 of the Ibero-American Standards and §1798.105 of the CCPA]

The right is not absolute but rather contingent and contextual, and it requires a difficult and delicate balancing of interests and principles. Exercise of the right necessarily presents fundamental issues not just about privacy, honor and dignity, but also about the rights of access to truth, freedom of information and speech, and proportionality. Exceptions to the exercise of the right of erasure should be clearly established in domestic laws, and may include, for example, cases where the data is necessary to complete the transaction for which the personal data was collected, fulfill the terms of a written warranty or product recall conducted in accordance with law, perform a contract, detect security incidents, protect against malicious, deceptive, fraudulent or illegal activity, debug to identify and repair errors, exercise free speech or engage in scientific, historical or statistical research in the public interest, among others.

[Note: Based on §1798.105 of the CCPA]

In some States, the “right to erasure or deletion” remains contentious and subject to differing definitions and views regarding personal data which (while true or factually accurate) is considered personally embarrassing, excessive or merely irrelevant by the individual concerned.

Right to Object

Data subjects should have the right to object, on grounds relating to his or her particular situation, at any time to processing of personal data concerning him or her when endowed with a legitimate interest thereto or when the processing thereof is for direct marketing purposes, which includes profiling to the extent that is related to such direct marketing. When the data subject objects to processing for direct marketing purposes, the personal data should no longer be processed for such purposes.

[Note: Based on article 21 of GDPR and No. 28 of the Ibero-American Standards]

Right to Personal Data Portability

When personal data is processed electronically or through automated means, the data subject should have the right to receive the personal data concerning him or her, which he or she has provided to a controller-in a structured, commonly used and machine-readable format, and which allows the ongoing use and transfer thereof to another controller without hindrance, if desired.

[NOTE: Based on preambular paragraph 19 of the Ibero-American Standards; article 20 of GDPR; paragraph 1798.100(d) of the CCPA;]

The subject may ask for his/her personal data to be transferred directly from controller to controller, when this is technically possible. The right to personal data portability should have no negative effects on the rights and freedoms of others.

Without adversely affecting other rights of the subject, the right to data portability should not be justified when involving information that is inferred, derived, created, generated or obtained from processing or analyses conducted by the controller on the basis of the personal data provided by said subject, as occurs ,for example, with the personal data that has been run through a personalization, recommendation, categorization or profile creation process.

[Note: based on article 30.4 of the Ibero-American Standards and article 20 of GDPR]

NINTH PRINCIPLE: SENSITIVE PERSONAL DATA

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

The term “sensitive personal data” refers to data regarding the most intimate aspects of individuals. Depending on the specific cultural, social or political context, it might include, for example, data related to an individual’s personal health, sex life or sexual preferences, religious, philosophical or moral beliefs, trade union membership, genetic data, biometric data for the purpose of uniquely identifying a natural person, political opinion or racial or ethnic origins.

[NOTE: Based on N° 2.1 (d) of the Ibero-American Standards, article 9 of GDPR and article 4.2 of the OECD Decision]

In certain circumstances, this data might be considered worthy of special protection because its improper handling or disclosure would intrude deeply upon the personal dignity and honor of the individual concerned and could trigger unlawful or arbitrary discrimination against the individual or result in risk of serious harm to the individual.

Accordingly, appropriate guarantees should be established within the context of national law and rules to ensure that the privacy interests of individuals are sufficiently protected. Member States should identify clearly the categories of personal data which are considered especially “sensitive” and therefore require enhanced protection, as well as the scope of the prohibition of their processing and the exceptions thereto. As a general rule, sensitive personal data should not be processed except, for example, when the data subject has provided explicit consent thereto or when processing is strictly necessary for the purposes of carrying out the obligations and exercising specific rights of the data controller, or is necessary to comply with a legal mandate, or is necessary for reasons of national security, public safety, public order, public health or the safeguard of rights and freedoms of third parties. The context in which a person provides such data should be taken into account when determining any applicable regulatory obligations.

[Note: Based on No. 9 of the Ibero-American Standards and article 9 of GDPR]

The burden should be placed on data controllers to assess the material risks to data subjects as part of the overall process of risk management and privacy impact assessment. Holding data controllers accountable will result in more meaningful protection of data subjects from material harm across a wide range of cultural contexts.

[Note: Based on No 9 of the Ibero-American Standards]

TENTH PRINCIPLE: ACCOUNTABILITY

Data controllers should adopt and implement appropriate technical and organizational measures to ensure and to be able to demonstrate that processing is performed in accordance with these Principles. The data controller and processor and, where applicable, their representatives, should cooperate, on request, with the data processing authority in the performance of their tasks.

[NOTE: Based on N° 20.1 of the Ibero-American Standards and articles 24 and 31 of GDPR].

The effective protection of individual rights of privacy and data protection rests on responsible conduct by the data controllers as much as it does on the individuals and government authorities concerned. Privacy protection schemes should reflect an appropriate balance between government regulation and effective implementation by those with direct responsibility for the collection, use, retention and dissemination of personal data.

These Principles depend on the ability of those who collect, process and retain personal data to make responsible, ethical, and disciplined decisions about that data and its use through the data's "lifecycle." These "data managers" should serve as "good stewards" of the data provided or entrusted to them.

Accountability

The principle of accountability requires establishing and adhering to appropriate privacy protection goals for data controllers (organizations and other entities), permitting them to determine the most appropriate measures to reach those goals, and monitoring their compliance. It enables data controllers to achieve those privacy protection goals in a manner that best serves their business models, technologies, and the requirements of their customers.

Data controllers should implement appropriate technical and organizational measures to ensure and to be able to demonstrate, upon request, that processing is performed in accordance with these Principles. When processing is to be carried out on behalf of a controller, the controller should use only processors providing sufficient guarantees to implement technical and organizational measures in such a manner that processing will meet these Principles and ensure the protection of the rights of the data subject.

[Note: Based on articles 24 and 28 of the GDPR and No. 20 of the Ibero-American Standards, and article 6.1 of the OECD Decision]

Specific programs and procedures should take into account the nature of the personal data at issue, the size and complexity of the organization which collects, stores and processes that data, and the risk of violations. Privacy protection depends upon a credible assessment of the risks the use of personal data may raise for individuals and responsible mitigation of those risks. Appropriate resources should be destined for the implementation of data protection programs, policies and procedures, which should include, among others, risk management systems, training on data protection obligations, periodic review of security programs, a system of supervision and surveillance, including audits, to assess the compliance of data protection policies, as well as procedures to receive and respond to questions and complaints by data subjects. Adherence to codes of conduct or certification mechanisms, among others, may be used as elements by which to demonstrate compliance with these Principles.

[Based on No. 20.1 to 20.3 of the Ibero-American Standards and article 24 of GDPR]

National privacy legislation and regulation should therefore provide clearly articulated and well-defined guidance for use by data controllers. It should encourage the development of self-regulatory codes of conduct that keep pace with technological developments and that account for privacy principles and regulations in other jurisdictions.

Data controllers should ensure that employees who handle personal data are appropriately trained about the purposes and procedures for the protection of that data. They should adopt effective privacy management programs and conduct internal reviews designed to promote the privacy of individuals. In many cases, the designation of a "chief information and privacy official" will assist in achieving this goal.

Above all, national privacy legislation should hold data controllers accountable for compliance with these Principles. In addition to whatever enforcement mechanism may be available to governmental authorities, domestic law should provide individuals with appropriate mechanisms for holding data controllers liable for violations (for example, through civil damages).

Privacy by Design

One effective contemporary approach is to require data controllers to build privacy protection into the design and architecture of their information technology systems and business practices. Privacy and security considerations should be incorporated into every stage of product design.

Data controllers should be prepared to demonstrate their privacy management programs when asked, in particular at the request of a competent data protection authority or another entity responsible for promoting adherence to a code of conduct.

Based on No. 20 of the Ibero-American Standards, articles 24 and 31 of GDPR and article 6.1 of the OECD Decision]

Sharing Personal Data with Third Parties

Data sharing and retransmission is a growing practice among data controllers. It presents some difficult issues. At a minimum, however, an individual's consent to the initial collection of personal data does not automatically authorize the sharing (or retransmission) of that data to other data controllers or data processors. Individuals should be informed about, and given appropriate opportunities to consent to, such additional sharing.

These Principles indicate that data controllers should be held responsible for ensuring that their requirements are observed by any third party to whom the personal data is communicated. This obligation to ensure adequate security safeguards applies whether or not it is another person in charge or a different data controller handling personal data on behalf of the responsible (accountable) authority. It also applies in the case of international or trans-border transfers of personal data (see Principle Eleven).

ELEVENTH PRINCIPLE: TRANS-BORDER FLOW OF DATA AND ACCOUNTABILITY

Member States should cooperate with one another in developing mechanisms and procedures to ensure that data controllers and processors operating in more than one jurisdiction can be effectively held accountable for their adherence to these Principles.

In the modern world of rapid data flows and cross-border commerce, personal data is increasingly likely to be transferred across national boundaries. However, the rules and regulations in various national jurisdictions today differ in substance and procedure. In consequence, the possibility exists for confusion, conflict and contradictions.

One central challenge for effective data protection policy and practice is to reconcile (i) the differences in national approaches to privacy protection with the modern realities of global data flow, (ii) the rights of individuals to access data in a transnational context, and (iii) the fundamental fact that data and data processing drive development and innovation. All international data protection instruments strive towards achieving the proper balance between these goals.

These Principles articulate a common standard for evaluating privacy protections within OAS Member States. The fundamental goal is harmonization of regulatory approaches that provide more effective privacy protection while promoting safe data flows for economic growth and development. In point of fact, not every OAS Member State today provides precisely the same protections.

In common with other international standards in this field, these Principles adopt a standard of reasonableness with respect to cross-border transfers. On the one hand, international transfers of personal data should be permitted between Member States which afford the levels of protection reflected in these Principles or which otherwise provide sufficient protection for personal data, including effective enforcement mechanisms. At the same time, transfers should also be permitted when data controllers themselves take appropriate measures to ensure that transferred data is effectively protected in accordance with these Principles. Member States should take the necessary measures to ensure that data controllers and processors are held accountable for providing such protection.

Trans-Border Personal Data Flows

Transfer of personal data across national borders is a fact of contemporary life. Our global community is more inter-connected than ever. In most countries, information from all parts of the world is readily available to anyone with a keyboard and internet connection. International law recognizes the right of individuals to privacy and the protection of personal data aligned with the free flow of information. Equally important, domestic economies are

increasingly dependent on trans-border trade and commerce, and the transfer of data (including personal data) is a fundamental aspect of that trade and commerce.

As new technologies emerge, storage of data is becoming geographically indeterminate. So-called “cloud” computing and storage, and the increasing prevalence of mobile services, necessarily involve the exchange and remote storage of data across national boundaries. A progressive approach to privacy and security should permit domestic enterprises and industries to grow and compete internationally. Unnecessary or unreasonable national restrictions on cross-border data flows have the potential to create barriers to trade in services and to hinder development of products and services that are innovative, efficient and cost effective. They can easily become obstacles to exports and do considerable harm to service providers as well as to individuals and business customers. Restrictions to transborder flows of personal data should be proportionate to the risks presented, taking into account the sensitivity of the data, and the purpose and context of the processing. Any such restrictions should be non-discriminatory.

OAS Member States are encouraged to consider the recognition of interoperable standards for trans-border transfers in order to facilitate the unrestricted flow of data between Member States with disparate scopes and stages of development of their domestic data privacy laws. This would enable shared accountability and cooperation between these States in the event of unauthorized transfers, and would contribute to increase trade, investment and economic outcomes for Member States’ economies, as well as spur innovation and lower barriers to entry to the global economy.

[Based on APEC CBPR framework, USMCA art. 19.3]

National Restrictions Based on Differing Levels of Protection

Within the OAS, all Member States share the overall goal of protecting privacy as well as a commitment to the free flow of information within certain criteria. Member States should refrain from restricting data flows to other States that are substantially observing these Principles, or where appropriate safeguards are present. A majority of countries around the globe do likewise. Nonetheless, in some countries, authorities have imposed restrictions on the trans-border communication of data by individuals and entities subject to their jurisdiction when, in the opinion of those authorities, the data protection rules in the other countries falls short of the specific requirements of the authorities’ own law. For example, an entity in country A may be prevented from communicating data to an entity in country B if, in the opinion of A’s authorities, the privacy or data protection laws in B fails to meet A’s standards – even if both entities are part of the same commercial organization.

In particular (limited) circumstances, national law may justifiably restrict the trans-national data flow and may require data to be stored and processed locally. The reasons for restricting or preventing data flows should always be compelling. Some reasons for such restrictions may be more compelling than others. As a general matter, however, “data localization” requirements are inherently counter-productive and should be avoided, in favor of cooperative measures. .

While motivated by privacy protection concerns, such restrictions can amount to an extraterritorial application of domestic law and (if unduly rigorous) may impose unnecessary and counterproductive barriers to commerce and development, harmful to the interests of the jurisdictions concerned.

International cooperation

For these reasons, the principles and mechanisms of international cooperation should work to limit and reduce friction and conflict between different domestic legal approaches governing the use and transfer of personal data. Mutual respect for the requirements of other countries’ rules (including their privacy safeguards) will foster cross-border trade in services. In turn, such respect should rest on a concept of transparency between Member countries in respect of requirements and procedures for the protection of personal data.

Member States should work towards mutual recognition of accountability rules and practices, in order to avoid and resolve conflicts. Member States should promote the cross-border transfer of data (subject to appropriate safeguards) and they should not impose burdens

that limit the free flow of information or economic activity between jurisdictions, such as requiring service providers to operate locally or to locate their infrastructure or data within a country's borders. National legislation should not inhibit access by data controllers or individuals to information that is stored outside of the country as long as that information is given levels of protection that meet the standards provided herein.

Accountability of Data Controllers

Data controllers should of course be expected to comply with legal obligations in the jurisdiction where they maintain their principal place of business and where they operate.

At the same time, data controllers transferring personal data across borders should themselves assume responsibility for assuring a continuing level of protection consistent with these Principles.

Data controllers should take reasonable measures to ensure personal data is effectively protected in accordance with these Principles, whether the data is transferred to third parties domestically or across international boundaries. They should also provide the individuals concerned with appropriate notice of such transfers, specifying the purposes for which the data will be used by those third parties. In general, such obligations should be recognized in appropriate agreements or contractual provisions or through technical and organizational security safeguards, complaint handling processes, audits, and similar measures. The idea is to facilitate the necessary flow of personal data between Member States while, at the same time, guaranteeing the fundamental right of individuals to protection of their personal data.

These Principles may serve as an agreed-upon framework for enhanced cooperation and capacity-building efforts between privacy enforcement authorities in the OAS Member States based upon common standards for assuring the basic requirements of trans-border accountability.

TWELFTH PRINCIPLE: EXCEPTIONS

When national authorities make exceptions to these Principles for reasons relating to national sovereignty, national security, public security, protection of public health, the fight against criminality, regulatory compliance or other public order policies, the protection of rights and freedoms of others, or public interest, they should establish them specifically by law or norm and make those exceptions known to the public.

[NOTE: Based on N° 6 of the Ibero-American Standards and article 23 of GDPR]

Protecting the privacy interests of individuals (citizens and others) is increasingly important in a world in which data about individuals is widely collected, rapidly disseminated, and stored for long periods of time. These Principles aim at providing individuals with the basic rights needed to safeguard their interests.

Yet privacy is not the only interest which Member States and their governments should take into account in the field of data collection, retention and dissemination. On occasion, other responsibilities of the State will inevitably need to be taken into account and may operate to limit the privacy rights of individuals.

In some situations, authorities in OAS Member States may be required to derogate from, or make exceptions to, these Principles for reasons related to overriding concerns of national security and public safety, the protection of public health, the administration of justice, regulatory compliance, the protection of rights and freedoms of others, or other essential public policy prerogatives or objectives of general public interest. For example, in responding to the threats posed by international crime, terrorism and corruption, and certain severe human rights violations, the competent authorities of OAS Member States have already made special arrangements for international cooperation regarding the detection, investigation, punishment and prevention of criminal offenses.

[NOTE: Based on N° 6 of the Ibero-American Standards and article 23 of GDPR]

Such exceptions and derogations should be the exception, not the rule. They should only be implemented after the most careful consideration of the importance of protecting individual privacy, dignity and honor. National authorities should maintain sensible limitations on their ability to compel data controllers to disclose personal data, balancing the need for the data in limited circumstances and due respect for the privacy interests of individuals.

Member States should, by public legislation or regulation, clearly identify these exceptions and derogations, indicating the specific situations in which data controllers may be required to disclose personal data and the reasons therefore. They should permit data controllers to publish relevant statistical information in the aggregate (for instance, the number and nature of government demands for personal data) as part of the overall effort to promote effective protection of privacy. They should also disclose this data promptly and publicly.

THIRTEENTH PRINCIPLE DATA PROTECTION AUTHORITIES

Member States should establish independent supervisory bodies, in accordance with each State's constitutional, organizational and administrative structure, to monitor and promote the protection of personal data in consistency with these Principles.

Most of the OAS Member States have established national autonomous regulatory bodies for setting and enforcing the laws, regulations, and requirements relating to the protection of personal data to ensure consistency across the country. In other Member States, various governmental levels (national, regional, municipal) have each created their own data protection rules and authorities. In still others, the regulatory schemes might differ according to the sector or field of activity (banking, medical, educational, etc.), and responsibility might be shared between regulatory bodies and private entities which are subject to specific legal responsibilities.

Because no uniform approach is reflected in the region, each of the OAS Member States should individually address the specific nature, structure, authorities and responsibilities of these "data protection authorities."

Member States are encouraged to establish appropriate and effective legal, administrative and other provisions, procedures or institutions to ensure the protection of privacy and individual liberties in respect of personal data. They should create reasonable means for individuals to exercise their rights and should encourage and support self-regulation (in the form of codes of conduct or otherwise) for data controllers and data processors. They should also provide for adequate sanctions and remedies in case of failures to comply and ensure that there is no unfair discrimination against data subjects.

Member States should also set the minimum requirements for the kind of data protection authorities they may choose to establish, in order to provide the necessary resources, funding and technical expertise that will enable said agency to discharge their functions effectively.

* * *

4. Electronic Warehouse Receipts for Agricultural Products

In June 2018, the General Assembly of the OAS requested the Committee to update its 2016 report on principles for electronic warehouse receipts for agricultural products “in light of the new developments...in connection with access to credit in the agricultural sector”, resolution AG/RES. 2926 (XLVIII-O/18).

During the 93rd Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, August, 2018), Dr. Jeannette Tramhel provided some contextual background on the issue. She reviewed how the topic originated in the Committee out of concerns over the lack of credit in the agricultural sector, the work carried out from 2012-2016 under the direction of the rapporteur and former member, Dr. David Stewart and the legal challenges encountered during the course of the project. She noted the need not only for a potentially productive bio-physical eco-system, but also the need for a supportive financial eco-system that regulates and enables the business of agriculture. Dr. Tramhel provided a brief overview of the functions and operation of warehouse receipts financing and its advantages, particularly for small-scale producers, which include improved access to credit and reduced price volatility. She also noted the advantages of an electronic system over one that is paper-based. It would appear that few OAS member states have updated legislation on warehouse receipts; Mexico is currently in the process of developing new legislation to encompass electronic receipts. Among the legal challenges that had been faced previously, two are key: to develop “medium-neutral” language that would accommodate both paper-based and electronic format, and to identify principles that would bridge differences in approach under the civil and common law systems. Among the new developments since 2016, Dr. Jeannette Tramhel noted that the UNCITRAL secretariat has been instructed to begin its technical study of warehouse receipts and that the topic is most likely to be under possible consideration by UNCITRAL member states at the next annual commission session in 2019. In conclusion, Dr. Tramhel suggested two possible approaches in order to fulfill the mandate from the OAS General Assembly. One approach would be further technical development of the 2016 Draft Principles and in that regard she explained that the secretariat had been in communication with the National Law Center for Inter-American Free trade, which had agreed to provide technical support. Another approach would be to consider warehouse receipts financing as one component within the larger scope of the financial eco-system and the need to strengthen overall support to this important sector.

Dr. José Moreno thanked Dr. Tramhel for her presentation and the important support to the Committee. He referred to the work done by the Committee in secured transactions and underlined the support that can be obtained by institutions such as the National Law Center. He considered it worthy to join strength with other specialized institutions in the matter, such as UNCITRAL, UNIDROIT, FAO, etc. In regard to the options presented by Dr. Tramhel, his preference was to follow the second option.

The Chair considered that first it was necessary to appoint a rapporteur, who in turn, could present options for consideration by the Committee. He said that the mandate of the General Assembly was very clear – to update the work the Committee had done in 2016.

Dr. Duncan Hollis agreed with the President and requested the Secretariat to explain the motivation by member states behind such a mandate.

Dr. Dante Negro explained that the motivation of the political organs of the OAS was in part in response to the various presentations made by former member Dr. David Stewart, who was able to identify a list of challenges or serious problems that had not been resolved by the work done by the Committee. Furthermore, as stated by Dr. Tramhel there have been developments and it would be a good opportunity to take into account the options provided by Dr. Tramhel.

Dr. Carlos Mata expressed his congratulations to Dr. Tramhel for her fantastic report. He noted that in order to comply with the mandate received by the Committee, it would be necessary to take

into account new developments since 2016 and to answer this request within the limited time allotted.

Dr. Joel Hernández suggested that the challenge imposed by this topic may prompt reflection on the working methods of the Committee. He explained that during his tenure, he had been able to undertake two topics: one by mandate of the General Assembly (cultural heritage) that required completion within a specific period of time and another at his own initiative (immunity of international organizations) that he was able to follow at his own rhythm. He suggested requesting Dr. Tramhel to prepare a draft paper for comment by the Committee so that the work could be completed on time for submission to the General Assembly.

The Chair asked the Department of International Law about the feasibility of such tasks to support the work of the Committee and Dr. Negro replied that it would be possible. Considering this would be in response to a mandate imposed by the General Assembly, a document could be presented by March 2019.

Dr. Ruth Stella Correa Palacio thought this could be achieved on time in light of the knowledge of Dr. Tramhel. She also suggested a joint rapporteurship and said she was pleased to see the continuation of the work by Dr. David Stewart.

The Chair considered some ethical issues were at stake because the mandate was given to the Committee; the Department of International Law is called upon to provide assistance, but not to do the work. He felt it necessary to have a rapporteur responsible who will take on the topic with the technical assistance of the Department.

Dr. Carlos Mata clarified his position that the Committee should always have a rapporteur who can work with the support of the Department.

Dr. Duncan Hollis agreed on the need for some ownership on the part of the Committee. In this regard, he proposed a working group composed of 5-6 members that would be supported by the Technical Secretariat.

Dr. Baena Soares expressed his support of the Chair's position and the need for a rapporteur to be appointed from among the members of the Committee.

Dr. Joel Hernández clarified that he did not intend to impose on the secretariat work that belongs to the Committee. Considering the technical aspect of the issue, he supported the proposal of Dr. Hollis in creating a working group. In regard to his proposed review of the methodology of the work process of the Committee, he considered it important to reflect on deadlines and creation of working groups.

Dr. José Moreno said it was clear that the work ought to be done by the Committee and queried whether there was any precedent regarding the composition of a working group.

The Chair was firm on the need for a rapporteur responsible for the theme and expressed his disagreement with joint rapporteurship. Although the topic is very complex, given that members are all lawyers, he was certain the work could be accomplished with the support of the Department of International Law. In concluding the discussions, he invited Committee members to consider the matter and consult with the Department as necessary to undertake ownership of the topic.

At the end of the debate, the Committee designating Dr. José Antonio Moreno Rodríguez as its rapporteur, following up the mandate of the General Assembly.

During the 94th Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, 18 – 22 February, 2019), the rapporteur for this topic, Dr. José Moreno, presented his proposal to move ahead with this topic, which is supported by the Department of International Law, and particularly Jeannette Tramhel. Support is also expected from the National Law Center in the USA.

Although addressed by a mandate from the General Assembly, there is no firm deadline, which is why he advised evaluating the definition of this topic on the basis of developments in other fora.

On this aspect, he explained that its inclusion on the UNCITRAL and UNIDROIT agenda will be assessed in the course of this year.

Dr. Rodrigo Galindo supported the proposal to seek input from other institutions, as there are no hard timelines.

The Chair asked the rapporteur to keep the Committee informed on these developments.

During the 95th Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, July 31 to August 9, 2019) the rapporteur for the topic, Dr. José Moreno explained the Committee's interest in continuing the previous work done within the OAS, taking into account initiatives in other forums. Noting the decision of UNCITRAL not to move forward on the issue for the time being, he asked the plenary if it was pertinent to keep it on the Committee's agenda.

Dr. Dante Negro announced the interest of the National Law Center in the United States to continue advancing the topic. In that connection, he proposed inviting a representative of that think tank to the next session of the Committee in order to move this highly technical subject forward. He therefore suggested that the issue be kept on the agenda until the visit of the experts.

Dr. Duncan Hollis expressed his support for keeping the topic on the agenda, as it would allow them to know what the universal agency does and learn the proposals of the National Law Center.

At the end of the discussion of the topic, the Chair asked Dr. Moreno to continue to report on the subject and invited anyone interested to participate as a co-rapporteur. She also asked the Secretariat to issue a formal invitation to the National Law Center to make a presentation to the Committee.

During the 96th Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, March, 2020), the rapporteur Dr. José Antonio Moreno invited Marek Dubuvec, the Executive Director of the National Law Center, to participate in a video-conference from the United States. In his presentation, Dr. Dubuvec referred to the situation in the area of electronic receipts for warehouse agricultural products at UNCITRAL and UNIDROIT, as both entities are working together on a project requiring the approval of the respective Boards of Directors. If the project is confirmed, it would take a couple of years to develop.

He also mentioned the efforts made by his organization in various States and international organizations, among which he highlighted work under way on the registration and use of electronic media for receipts in African and Middle East countries. He confirmed that the World Bank rate measuring the production of electronic receipts in the work ranks the American Continent at a relatively high level.

He then proposed three ways in which the OAS could contribute to these ongoing international processes exploring this issue:

- Conducting studies and research based on fieldwork, allowing improvements to the implementation of national norms; laws are well known but there are some system enforcement gaps.
- Considering the use of the technology in order to encourage regional initiatives, instead of working with the States individually.
- Finally, involvement with UNCITRAL and UNIDROIT in order to contribute the OAS experience in this area. In this regard, he made reference to the presence of Dr. Jeannette Tramhel in the panel on this issue that will be held in Italy later on this year.

The Chair thanked Mr. Dubuvec and the rapporteur asked Dr. Dante Negro how the OAS perceives the follow-up of the topic. Dr. Dante Negro mentioned several aspects in the matter. He referred first to the principles approved by the IAJC in 2016, as well as the request made by the General Assembly a couple of years ago to update these principles. A working group has been set up

under the aegis of UNIDROIT, which will support the efforts of UNCITRAL, together with organizations such as the National Law Center. Due to storage operation difficulties in different countries, it is necessary to study how each product is stored. He confirmed the presence of the DIL at the Conference in March this year, where this Department will be represented by Dr. Jeannette Tramhel. He concluded by stating that the Department will take the steps needed to accompany the work of the Committee based on this decision.

As the rapporteur for the topic, Dr. Moreno proposed waiting for a decision from the UNCITRAL Commission, which would be known by the end of the first semester. He proposed to continue monitoring and following – for the time being – efforts under way at the international level. Should this topic be pursued by these global organizations, then the Committee should remove it from the agenda.

Dr. Eric Rudge asked about successes and failures in the warehousing area among the Caribbean countries, and urged the plenary to keep this topic on the agenda.

The Chair then resolved to keep the topic on the agenda, while awaiting decisions from the referred organizations on this issue.

During the 97th Regular Session of the Inter-American Juridical Committee (Virtual Session, August, 2020), this issue was not considered.

* * *

5 Cyber-Security

Documents

CJI/doc. 603/20 rev.1 corr.1 Improving transparency. International law and state cyber operations: Fourth report
(presented by professor Duncan B. Hollis)

CJI/RES. 260 (XCVII-O/20) International law and State cyber operations

CJI/doc. 615/20 rev.1 Improving transparency. International law and state cyber operations: Fifth report
(presented by professor Duncan B. Hollis)

* * *

During the 93rd Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, August, 2018), Dr. Duncan Hollis presented a report under the title *International Law and State Cyber Operations: Improving Transparency*, (document CJI/doc. 570/18), which might serve as a proposal for a new theme to be considered by the Committee. He explained that the global impact of cyber-attacks that affect many countries has now become common and may have economic consequences, in the form of considerable amounts of money, the theft of personal information and treats to infrastructure and national security. Cyber operations may adopt defense themes, but also an offensive viewpoint. In this regard it would be relevant to know the view of international law. He referred to the work of a group of UN experts that have met at least twice but were unable to agree in 2017 on the way in which international law should be applied. Moreover, mentioned efforts deployed outside UN grounds, that is, independent experts funded by NATO who have produced two manuals so far (The Tallin Manuals), which have also failed to agree on the norms to be applied in the case of violation of sovereignty in the area of all cybercrimes. They have pointed out differences in terms of interpretation, and studied the different consequences of the acts perpetrated. Finally, there seems to be a problem in relation to the difficulty in establishing liabilities for acts perpetrated, especially in view of the lack of understanding at a collective level. This is a topic that concerns all parties, even those States that cannot determine the norm that has been infringed. In this regard, Dr. Duncan Hollis presented a preliminary proposal in terms of asking authorization from the plenary to send a questionnaire to States so as to know their positions regarding how international law applies in cyberspace operations. The purpose is not codification itself, but instead to provide an opportunity for States to present their opinions.

Dr. Espeche-Gil thanked Dr. Hollis for his brilliant description of a severe problem. In order to facilitate the understanding of the question, he proposed using the decision of the Committee in a report approved in the year 1965 on differences between “intervention and collective action”. He then proposed distributing the document as an additional element in order to define the phenomenon of modern cyber-attacks, especially in the case of armed attacks. He concluded saying that the topic deserves the attention of the Committee.

Dr. Carlos Mata Prates congratulated Dr. Duncan Hollis on his initiative to bring this new theme for discussion by the Committee. The appearance of a new phenomenon does not necessarily create a new right, and for that reasons the topic must be analyzed from the viewpoint of international law, in order to include it within a certain context, so the Committee must be part of the solution. Might a cyber-operation be considered as a use of force? The attack of a cyber-operation could cause spectacular damage. This is a topic on which the Committee can provide a great contribution. He endorsed the proposal of sending a questionnaire to member states, and also to legal advisors, but paying special attention to the questions posed.

Dr. Alix Richard asked Dr. Duncan Hollis if there was any responsibility on the part of the State in relation to the conduct of nationals involved in cyber-crimes

Dr. Baena Soares expressed his agreement with the manner in which the topic was to be addressed, that is, by means of a questionnaire. In view of how the issue impacts daily life, he proposed considering the impacts of the topic on persons, and suggested working on a short term, in view of the emergency of the theme.

Dr. José Moreno congratulated Dr. Duncan Hollis and asked him about the reasons for the failure of the initiatives at the UN, and invited him to include in his report the intention of his work.

In turn, the Chair noted that the current situation calls for drafting a questionnaire, and urged endorsing treating the questionnaire taken into account the suggestions of all members. In agreement with Dr. Mata's opinion, she recommended the rapporteur to be careful with the questions to be included, because of the dissuasive effects that highly complex questions may contain.

Dr. Duncan Hollis thanked the plenary for the enthusiasm shown regarding the topic. He said that matters relating to non-intervention are essential to the issue. In the case of an armed attack, international law already provides a response regarding how to address this. In relation to the suggestions by Dr. Mata to proceed with care, he recognized the importance of knowing the current rules about this behavior. He added that the purpose is not to seek proposing new rules, but rather to make the existing rules transparent. In relation to the questions, he urged separating the topic of the use of traditional force from cyber-attacks, and discovering when a cyberattack could constitute a use of force. In the topic of the attribution that Dr. Richard had highlighted, he referred to the difficulty to identify the source of a cyber operation, but that for the time being he would not speak about it. He is also aware that there is some urgency due to the type of attack that is carried out lately if a hospital is attacked, such an attack would also be against people, and also against the stability of a structure that defends people's lives. In response to Dr. José Moreno's remarks, he said that the UN experts meetings were confidential, but public reports show that some States considered that certain norms of international law would not apply to cyber-attacks such as international humanitarian law (China, Cuba, etc.). Dr. Duncan Hollis proposed maintaining a sophisticated level of questions, urging States to respond as much they can, with the support of the Department of International Law.

The Committee decided to add this topic to its agenda and elected Dr. Duncan Hollis as its rapporteur.

During the 94th Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, 18 – 22 February, 2019), the rapporteur for this topic, Dr. Duncan Hollis, presented his new report on “International Law and State Cyber Operations: Improving Transparency”, (document CJI/doc. 578/19), through a video conference since he could not travel to meetings of the Committee. On that occasion he provided information on new developments in the areas addressed in his first report, which had led him to ascertain the “scant international legal responsibility for the conduct of States in cyberspace.” He noted that discussions reached an impasse in the United Nations Group of Experts in 2017, stalled over the idea that international law applies to cyber-operations. Even when States accept the application of international law, there would be disagreements linked to issues regarding the sovereignty of States or the obligation of non-intervention: issues regarding which handbooks have been written by the ICRC and NATO. He referred, in that context, to a lack of transparency regarding the opinions of States on the requirements of international law.

He then explained the purpose of his work as a rapporteur, striving to ascertain the opinions of OAS member states on the most important aspects of international law related to cyberspace. To that end, the Permanent Missions to the OAS would be asked to fill in a questionnaire. Based on the information provided, he would then publish the opinions of the States.

He referred to recent developments within regional organizations, such as the Association of Southeast Asian Nations (ASEAN) and the European Union, which support the idea that

international law applies to cyberspace. That opinion had also been endorsed by the United Nations General Assembly, which gave its support to the conclusion reached by the Group of Government Experts. In that sense, the work of the Committee provides an opportunity for the OAS to let its voice be heard internationally, as not all its member states are represented in that Group of Experts.

Finally, he presented his proposed questionnaire, which would be sent to the States with the following ten questions:

- Question 1 responds to a suggestion made by one of the legal advisers of the Ministry of Foreign Affairs, who asked the Committee to request and compile existing statements on international law and cyberspace.
- Question 2 addresses existential issues: asking the States to confirm or deny whether certain current norms of international law do or do not apply to cyberspace issues.
- Question 3 refers to the use of force (*jus ad bellum*), with particular attention to the criteria used by a State to determine whether a cybernetic operation is a use of force or an armed attack.
- Questions 4 and 5 explore what States think about the adjudication of international legal responsibility for the behavior of non-state actors.
- Questions 6 and 7 address international humanitarian law and two of the most crucial aspects, namely, the definition of an "attack" in the cybernetic context and the question of whether cybernetic operations targeting only data would constitute an attack (Note: these questions were substantively revised in the light of suggestions and comments made by the International Committee of the Red Cross).
- Question 8 asks for the opinions of States on whether sovereignty comprises its own distinct rule for a State's behavior in cyberspace or whether it is rather a substantial principle underpinning the content of other norms.
- Question 9 conducts a similar investigation with respect to due diligence.
- Finally, question 10 invites States to identify additional areas of international law on which the Committee should focus with a view to enhancing transparency on cyber issues.

Dr. Mariana Salazar stressed the importance of the question on the responsibility of non-state actors and its implications in the field of protection.

Dr. George Galindo asked whether the issue of extraterritorial application of the law would be considered, in view of the amount of space devoted to the applicability of international law.

The Chair thanked the rapporteur and invited him to include the aspects relating to extraterritorial application of the law and the issue of State responsibility.

The rapporteur thanked the Committee members and reaffirmed the importance of ascertaining the opinion of States on the aforementioned issues of responsibility, extraterritorial status, and due diligence, via their respective responses.

During the 95th Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, July 31 to August 9, 2019), the rapporteur for the topic, Dr. Duncan B. Hollis, presented his third report on the subject, (document CJI/doc. 594/19). Dr. Hollis clarified that in addition to his academic activities he was then working as a consultant for the Microsoft.

He noted the lack of agreement on the application of international law in the field and the reluctance of certain States to explain their position in that regard. Only a small group of States had issued general statements, and in some cases inferences could be drawn from State practice or *opinio juris*. He noted the complexity and variety of elements that the issued involved, such as measures relating to the use of force and self-defense, issues of international humanitarian law, matters relating to sovereignty, and due diligence.

He announced that a meeting of the UN Working Group would be held in Washington, D.C., with the collaboration of the OAS, in which four OAS member states that belonged to the UN working group would participate: Brazil, United States, Mexico, and Uruguay. With regard to the questionnaire sent to States, he explained that he had received replies from seven countries: Bolivia, Brazil, Costa Rica, Ecuador, Guatemala, Peru, and Guyana. He noted that some stressed the importance of legal training to help better understand relevant issues. As follow-up, the rapporteur suggested sending the questionnaire again to those States that had not responded to it before preparing a new report by March the following year, at which point he hoped to be able to present States' perceptions of the application of international law to the cyber environment and ICTs (information and communication technologies).

Dr. George Galindo welcomed the perspective of the rapporteur which aimed to determine state practice.

Dr. Mariana Salazar appreciated the contribution and the intention of obtaining more answers. She asked the rapporteur whether the OAS could contribute on the areas not covered by the Budapest Convention.

Dr. Carlos Mata stressed the novelty of the topic and urged clarification of what was expected of the study from the point of view of international law in order for it to be a practical contribution for States.

The Chair reiterated the rapporteur's request to make efforts in their countries to encourage more responses.

The rapporteur reiterated his interest in revealing the perceptions of States, without trying to impose positions. He also clarified that the aim of the exercise was to go beyond the work of the UN, which was limited to the issues of peace and security, whereas his would include issues of human rights and cybersecurity, among others.

In response to Dr. Mariana Salazar, the rapporteur explained that the first Tallinn Manual covered a broad variety of elements but did not elaborate much on the human rights aspect. He noted that the terrorist attacks in New Zealand and the United States had brought up issues of freedom of expression. The essence of the rapporteur's proposal was to present the position of States in the field of international law.

During the 96th Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, March, 2020), the rapporteur for this topic, Dr. Duncan Hollis, presented a new report, (document CJI/doc. 603/20 rev. 1 corr.1), that strives to give more transparency in the ways that States understand the application of international law to their cyber operations. At present, States and international organizations have issued statements in favor of applying international law for cyber security matters, although pointing out that the OAS has not done so. In the absence of details from States, non-governmental organizations and the ICRC have tried to explain how international law is applicable to cyber security.

Regarding answers to the questionnaire, he said that nine responses had been received (Bolivia, Chile, Costa Rica, Ecuador, Guatemala, Guiana, Peru, the United States, and Brazil). Looking over these responses, the project's intention is to identify areas of convergence and divergence among the States in this field. The Project is not intended to code or engage in the development of international law, nor to identify good practices. Based on the replies received, the rapporteur confirmed that:

- They all agree that international law applies in this field;
- The replies are heterogeneous in terms of the level of understanding of those who answered the technical questions as well as the international legal aspects; and,
- The number of replies was very low.

The rapporteur then offered a brief overview of the replies:

1.- Regarding the existence of any public statement on the enforcement of international law on this topic, only the USA indicated it had adopted a stance.

2.- In relation to the application of international law to cyberspace, the replies reflect widespread support. However, Guyana and Guatemala are questioning the possible application of certain areas, in view of the innovative nature of this matter.

3.- In terms of the use of force by a cyber operation, five States felt that a cyber-operation alone could constitute an armed attack (Bolivia, Chile, Guatemala, Peru, and the USA) triggering a right of self-defense.

4.- and 5.- are questions exploring the responsibility of the States. In this regard, the replies demonstrate attribution is a stumbling block for the topic. The group that did reply to these questions invoked the ILC articles on State responsibility as a benchmark for assigning responsibility to States for the acts of non-State actors over which they exercise control.

6(a).- Regarding the definition of an “attack” under international humanitarian law, the replies support its application of the existing definition on this issue. However, there are differences when classifying cyber operations on whether deaths or physical damage must result for an operation to qualify as an “attack”.

6(b) - There is also a lack of clarity among the Replying States in the definition of “objects” in cyberspace in the IHL area and, in particular, whether data can constitute a civilian object that is protected from attack.

7.- There were no clear consensus on whether sovereignty operated as a rule or a background principle when it comes to a State cyber-operations. Most States basically restricted their responses to reaffirming the principle of sovereignty, and no more.

8.- Most States were in favor of applying due diligence in cyberspace.

9.- Among the additional remarks presented by the States, the rapporteur highlighted the following: protection of human rights, cyber-crimes and the need for new rules at the international level.

Regarding the path to follow, the rapporteur asked members whether it was worth sending out the questionnaire again to countries that did not respond, or send this report directly to all member States?

Dr. Milenko Bertrand referred to the demonstrated lack of expertise in this field and suggested ranking this report as an informative document. The report would thus serve as an initial step, helping build up awareness in the Hemisphere in order to developing a specific normative framework.

Dr. Mariana Salazar congratulated the rapporteur on the relevance of the topic, which is being examined at the universal level, where it is useful for OAS States to have a position and an understanding. She mentioned that in International Humanitarian Law the universality of the Geneva Conventions sometimes generates mistrust among those adopting new treaties, due to the risk of not achieving the same level of ratifications. She also explained that the inclusion of *jus ad bellum* and *jus in bello* is positive considering that the central issue is precisely determining what constitutes an armed attack or use of force; she also noted that new issues impose challenges, in light of the fact that cyber-attacks may not directly cause deaths, but might do so over the long term or indirectly. She expressed Mexico's intention of replying to the questionnaire and supported the rapporteur's proposal to forward the questionnaire again, together with the report, to those who have not responded, with a view to obtaining more replies and reviewing an updated document at the next session.

Dr. Eric Rudge asked about the government agencies that replied to the questionnaire and suggested pursuing the path of providing technical assistance to countries requesting this. The negligible number of replies requires an examination of the possibility of resending the questionnaire.

Dr. George Galindo noted that countries are unable to provide quick replies on this topic, as it is new. He urged that the questionnaire be sent out to the States again.

Dr. Espeche proposed that the State consultation should be handled in parallel with an academic institution, not necessarily public universities. In this regard, Dr. Rudge explained that he had seen similar situations in the past, during his professional activities in his country.

Dr. José Moreno felt that it was important to include this topic in the next meeting with the legal advisors. He explained that, when preparing the Guide to International Contracts, working with international organization and academic institutions in the region was essential, contributing to a better response capacity. In this context, Dr. Hollis mentioned that the questionnaire could be sent to the International Law Societies in each country.

The Chair warned that the work of the Committee on this topic is laying foundations in a new domain. She supported Dr. Moreno's suggestion to include it in the meeting with the legal advisors, and also Dr. Espeche's proposal to provide input for the work of the Committee to other institutions.

The rapporteur for this topic felt that it was pertinent to question the national entity that replied to the questionnaire. At some point, he considered developing a proposal on the rule of law for this matter (similar to a restatement of law), but did not consider this the right approach, as the Tallinn Manual already has offered a set of expert answers in both IHL and general international law. He suggested sending the questionnaire to academic institutions, as proposed by Dr. Espeche, although it would be difficult to select or identify the most appropriate institutions. He agreed with Dr. Salazar regarding the effects of cyber-attacks in relation to the use of force. He also supported Dr. Rudge's proposal for more training on this matter. The Inter-American Committee against Terrorism (CICTE) offers courses with experts who worked on the Manual. He supported Dr. José Moreno's suggestion of discussing this topic with the legal advisors, in private if necessary. He noted an interest in the developments of the IAJC among several actors, such as the ICRC and scholars in this field.

The Chair requested that States be contacted again, and that the questionnaire also be forwarded to associations specializing in this area in order to obtain more inputs. In this regard, the rapporteur suggested including the report with the questionnaire as a way to help improve their understanding. The topic will also be included with the legal advisors.

Dr. Eric Rudge asked the Committee Secretariat about the issue of training. In this regard, Dr. Negro explained the efforts of the GS in this field, particularly CICTE, and proposed that a list of these training activities be presented at the next session.

During the 97th Regular Session of the Inter-American Juridical Committee (virtual session, August 2020), the rapporteur for the item, Dr. Duncan Hollis, presented the fifth report on the topic, (document CJI/doc. 615/20), aimed at improving transparency and helping the member states identify areas of convergence applicable to cyberspace, and at assisting the States with areas of divergence and convergence; reducing the risk of escalating conflicts; and giving the OAS a place in the global conversation. Dr. Hollis stated that the application of international law to cyberspace is widely recognized, noting that a basic problem is the lack of specific conventions in this area on issues connected with international peace and security.

He explained that he had used two mechanisms to obtain the opinion of the governments: a questionnaire and a discussion with experts.

The questionnaire provided insight into the status of issues related to the basic application of existing international legal standards, prohibition of the use of force, the right to a legitimate defense, State responsibility for non-state actors, sovereignty, due diligence, and the application of

international humanitarian law. Responses were received from Bolivia, Chile, Costa Rica, Ecuador, Guatemala, Guyana, and Peru. The United States sent previous public declarations, and Brazil aligned its position with that of the UN Group of Governmental Experts (GGE).

Given the reluctance of States to respond to the questionnaire, the rapporteur held a virtual discussion with assistance from the Department of International Law, following the Chatham House rules to keep the States' positions confidential. The event drew 18 States and one representative from the International Committee of the Red Cross and shed light on important aspects, given the extensive knowledge of the experts present. Both the questionnaire and the discussion enabled the rapporteur to identify a significant lack of technical capacity with respect to important legal matters in several member states.

Dr. Hollis then presented three concrete proposals: (i) that the Committee submit a formal recommendation to the OAS General Assembly supporting the application of international law to State cyber operations through a declaration; (ii) that the Committee keep this topic on its agenda and broaden its scope; and (iii) that the Committee support legal capacity building or work toward that end. On concluding his presentation, the rapporteur expressed his desire to continue giving greater visibility to the application of international law to cyberspace in the OAS.

Dr. George Bandeira asked the rapporteur about the treatment of effective control in relation to State authority in cyberspace (use of the *lex specialis* could contribute in this area) and suggested exploring diplomatic law, including the inviolability of diplomatic documents, as an additional activity.

Dr. Mariana Salazar asked the rapporteur how the OAS can contribute to ongoing initiatives in the United Nations, which has two groups working on this issue, to ensure that the efforts complement, rather than duplicate, each other. She also agreed with the proposal to keep this item on the agenda

Dr. Iñigo Salvador endorsed the rapporteur's proposals and requested that both the OAS and UN Charters be included in the draft declaration. He also asked the rapporteur why specific references to basic principles already found in the two Charters had been included.

Dr. Eric Rudge endorsed the recommendation to keep the topic on the Committee's agenda and asked the rapporteur to include a reference to the "misuse" of ICTs, adding that States should be considered internationally responsible when they cause harm.

Dr. Milenko Bertrand endorsed the motion to continue the discussion of this issue. He described some of the challenges confronting States that lack institutional coordination, a situation in which democracy can even be undermined by the manipulation of information and digital hacking. In light of this, Dr. Eric Rudge invited the Committee to explore the issue of electronic fraud and supported the proposal to include the instruments of the OAS in the resolution to be drafted.

Dr. Espeche supported the motion to continue exploring the topic and keep it on the Committee's agenda.

Dr. Alix Richard commented on election interference through cyber attacks, which constituted a threat to the sovereignty of States, democracy, and peace, as Dr. Bertrand had stated. He also suggested keeping this topic on the agenda.

Dr. Luis García Corrochano observed that the report complied with the mandate, since it addressed fundamental aspects of an issue that offers opportunities but at the same time poses threats. Under international law, this is a domain in which States must find ways to respond to real concrete problems while guaranteeing respect for that law.

Dr. Ruth Correa congratulated the rapporteur for his comprehensive and expert report, indicating her satisfaction with its three proposals. She mentioned the issue of State responsibility for

the harm that could be caused by non-state agents, an area in which clear guidelines should be established.

In response to Dr. George Bandeira's comment about State responsibility, the rapporteur pointed out that the majority of sophisticated States are still searching for an answer to the question of how to apply international law to this issue – a domain in which respect for sovereignty must be considered.

Responding to Dr. Mariana Salazar's question, the rapporteur stated that no institution should be competing. He had observed through conversations with the Chairs of the UN groups that the OAS proposal was viewed positively.

The rapporteur thanked Dr. Iñigo Salvador for his suggestion to include the OAS Charter in the resolution. He also explained that particular issues such as sovereignty and non-intervention had been mentioned to combat the resistance of certain countries that oppose its application to cyberspace. The rapporteur was also amenable to Dr. Eric Rudge's proposal to mention the "misuse" of ICTs.

Dr. Hollis urged Dr. Milenko Bertrand to include developments related to digital aspects and the right to the Internet in the Committee's agenda – matters that have become especially important in this pandemic period. He also invited Dr. Espeche to determine what other topics could be covered in the field of cybernetics, as Dr. Alix Richards had done in relation to electoral fraud and lack of information.

Finalizing the item, the rapporteur concurred with Dr. Luis García about the threats that could involve the behavior of the State and non-state actors; in all cases, the State was responsible for these actions. He therefore stressed the importance of Dr. Correa's comments about the responsibility of States and respect for due diligence.

Dr. Ruth Correa took note of the plenary's clear support for submitting this resolution to the OAS General Assembly, adding a reference to the OAS Charter to the declaration. Concerning the second proposal to keep this topic on the agenda, she asked if there was any interest among the members to serve as rapporteur, to which Dr. Mariana Salazar responded in the affirmative, not ruling out the possibility that one of the new members might wish to participate as co-rapporteur for the item. Finally, regarding the third proposal on additional efforts in capacity building, the Chair indicated the need to implement it through specific measures. On this last point, Dr. Hollis added that this was a situation that would require resources for courses and would depend on the available capacity as well as the support from the Committee's Technical Secretariat, the Department of International Law.

Dr. Negro expressed interest in taking all the necessary steps conceive or design training activities to implement the third proposal. He requested additional time to draw up a plan of action with the contents of that training and to determine who could serve as the trainers, hoping to rely on the presence of Dr. Duncan Hollis and the new rapporteur, Dr. Mariana Salazar. The Department could potentially work with the CICTE, which had a great deal of experience with such training, and submit a proposal to the members of the Committee.

Dr. Ruth Correa proposed approving the proposals and asked the rapporteur to make the requested changes to the first proposal, based on the discussions. Second, the item would remain on the Committee's agenda, with Dr. Mariana Salazar serving as the new rapporteur; and third, the Committee would await support from the Secretariat to develop training activities for the States, in the event they could be undertaken.

The following documents were presented by the rapporteur for the topic, Dr. Duncan B. Hollis, in February and August 2020 and the resolución adopted by the Committee:

CJI/doc. 603/20 rev.1 corr.1

IMPROVING TRANSPARENCY. INTERNATIONAL LAW AND STATE CYBER OPERATIONS: FOURTH REPORT

(presented by professor Duncan B. Hollis)

1. This is my fourth report on the topic of improving transparency with respect to how Member States understand the application of international law to State cyber operations. It reviews responses received to date from the Committee’s questionnaire to Member States on international law and State cyber-operations. In doing so, it aims to contribute to a broader trend in international relations seeking more transparency on how nation States understand international law’s application to cyberspace.

2. My first report highlighted how little visibility international law has had in regulating State cyber-operations, despite their increasing number and economic, humanitarian, and national security implications.¹ Many States *have* confirmed the applicability of international law to their behavior in cyberspace.² And, although the OAS has not, other international organizations—ASEAN, the European Union, and the United Nations—have done so as well.³ To date, however, efforts to delineate *how* States understand international law’s application to cyberspace have had limited success.

3. As my second report highlighted, there is outstanding controversy and confusion on whether certain existing international legal regimes apply to cyber-operations, including self-defense, international humanitarian law, countermeasures, sovereignty (as a standalone rule), and due diligence.⁴ More importantly, States appear reluctant to invoke the language of international law in making accusations about other State’s cyber-operations.⁵ In one notable exception, in 2018 five states (Australia, Canada, the Netherlands, New Zealand, and the United Kingdom) accused the GRU—Russia’s military intelligence arm—of responsibility for a series of cyber operations, including those targeting the Organization for the Prohibition of Chemical Weapons (OPCW) and the

¹ See Duncan B. Hollis, *International Law and State Cyber Operations: Improving Transparency*, OEA/Ser.Q, CJI/doc 570/18 (August 9, 2018) (“Hollis, First Report”).

² See U.N. Secretary-General, *Report of the Group of Governmental Experts on Developments in the Field of Information and Telecommunications in the Context of International Security*, ¶19, U.N. Doc. A/68/98 (June 24, 2013) (“[i]nternational law, and in particular the Charter of the United Nations, is applicable” to cyberspace); U.N. Secretary-General, *Report of the Group of Governmental Experts on Developments in the Field of Information and Telecommunications in the Context of International Security*, ¶24, U.N. Doc. A/70/174 (July 22, 2015) (same).

³ See UNGA Res. 266, U.N. Doc. A/RES/73/266 (2 Jan. 2019); ASEAN-United States Leaders’ Statement on Cybersecurity Cooperation (Nov. 18, 2018), at <https://asean.org/storage/2018/11/ASEAN-US-Leaders-Statement-on-Cybersecurity-Cooperation-Final.pdf> ; EU Statement – United Nations 1st Committee, Thematic Discussion on Other Disarmament Measures and International Security (October 26, 2018), at https://eeas.europa.eu/delegations/un-new-york/52894/eu-statement-%E2%80%93-united-nations-1st-committee-thematic-discussion-other-disarmament-measures-and_en. Both the G7 and G20 have made similar affirmations. See, e.g., G7 Declaration on Responsible States Behavior in Cyberspace (Luca, April 11, 2017) at <https://www.mofa.go.jp/files/000246367.pdf>; G20 Antalya Summit Leader’s Communique (Nov. 15-16, 2015) 26, at <http://g20.org.tr/g20-leaders-commenced-the-antalya-summit/>.

⁴ Duncan B. Hollis, *International Law and State Cyber Operations: Improving Transparency*, OEA/Ser.Q, CJI/doc 578/19 (Jan. 21, 2019) (“Hollis, Second Report”).

⁵ See Dan Efrony and Yuval Shany, *A Rule Book on the Shelf? Tallinn Manual 2.0 on Cyber-Operations and Subsequent State Practice*, 112 AJIL 583, 594 (2018); Duncan B. Hollis & Martha Finnemore, *Beyond Naming and Shaming: Accusations and International Law in Global Cybersecurity*, EURO. J. INT’L L. (forthcoming 2020).

World Anti-Doping Agency (WADA). The U.K. Foreign Secretary suggested that Russia had a “*desire to operate without regard to international law or established norms*” while the Netherlands suggested, more broadly, that these Russian activities “undermine the international rule of law.”⁶ Unfortunately, these accusations did not delineate whether all of the GRU’s alleged operations violated international law or if only some did; nor did they elaborate which international laws the accusers believed were violated.

4. In recent years, a number of States have begun to offer *some* elaborations on how international law applies in cyberspace. Beginning in 2012, the United States began to offer its views in a series of speeches and statements.⁷ In 2018, the United Kingdom’s Attorney General made an important statement of U.K. views.⁸ In the ensuing years, a number of other States have begun to offer their own detailed perspectives, including Australia,⁹ Estonia,¹⁰ France,¹¹ and the

⁶ Press Release, Foreign Commonwealth Office, *UK exposes Russian cyber-attacks* (Oct. 4, 2018); NCSC, *Reckless campaign of cyber attacks by Russian military intelligence service exposed* (Oct. 4, 2018), at <https://www.ncsc.gov.uk/news/reckless-campaign-cyber-attacks-russian-military-intelligence-service-exposed>; Netherlands Ministry of Defense, *Netherlands Defence Intelligence and Security Service disrupts Russian cyber operation targeting OPCW* (Oct. 4, 2018), at <https://english.defensie.nl/latest/news/2018/10/04/netherlands-defence-intelligence-and-security-service-disrupts-russian-cyber-operation-targeting-opcw>.

Canada’s accusation incorporated both formulations. Press Release, Global Affairs Canada, *Canada Identifies Malicious Cyber-Activity by Russia* (Oct. 4, 2018) at <https://www.canada.ca/en/global-affairs/news/2018/10/canada-identifies-malicious-cyber-activity-by-russia.html> (Russian activity demonstrates “a disregard for international law and undermine[s] the rules-based international order.”). In contrast, Australia and New Zealand accused Russia of “malicious cyber activity” without referencing international law at all. See, e.g., Press Release, New Zealand Government Communications Security Bureau, *Malicious Cyber Activity Attributed to Russia* (October 4, 2018), at <https://www.gcsb.govt.nz/news/malicious-cyber-activity-attributed-to-russia/>; Media Release, Prime Minister of Australia, *Attribution of a Pattern of Malicious Cyber Activity to Russia* (Oct. 4, 2018), at <https://www.pm.gov.au/media/attribution-pattern-malicious-cyber-activity-russia>.

⁷ See, e.g., Brian Egan, *Remarks on International Law and Stability in Cyberspace* (Nov. 10, 2016), in DIGEST OF U.S. PRACTICE IN INT’L LAW. 815 (2016); U.S. Submission to Group of Governmental Experts on Developments in the Field of Information and Telecommunications in the Context of International Security (Oct. 2016), in DIGEST OF U.S. PRACTICE IN INT’L LAW. 823 (2016); U.S. Submission to Group of Governmental Experts on Developments in the Field of Information and Telecommunications in the Context of International Security (Oct. 2014), in DIGEST OF U.S. PRACTICE IN INT’L LAW. 732 (2014); Harold Koh, *International Law in Cyberspace* (Sept. 18, 2012), in DIGEST OF U.S. PRACTICE IN INT’L LAW. 593 (2012).

⁸ Jeremy Wright, QC, MP, *Cyber and International Law in the 21st Century* (May 23, 2018) <https://www.gov.uk/government/speeches/cyber-and-international-law-in-the-21st-century> (“U.K. Views”).

⁹ *Australian Mission to the United Nations, Australian Paper—Open Ended Working Group on Developments in the Field of Information and Telecommunications in the context of International Security* (Sept. 2019) <https://s3.amazonaws.com/unoda-web/wp-content/uploads/2019/09/fin-australian-oewg-national-paper-Sept-2019.pdf> (“Australian Views”).

¹⁰ Kersti Kaljulaid, President of Estonia, *Speech at the opening of CyCon 2019* (May 29, 2019) <https://www.president.ee/en/official-duties/speeches/15241-president-of-the-republic-at-the-opening-of-cycon-2019/index.html> (“Estonian Views”).

¹¹ Ministère des Armées, *Droit international appliqué aux opérations dans le cyberspace* (9 Sept 2019) https://www.defense.gouv.fr/salle-de-presse/communiqués/communiqués-du-ministère-des-armées/communiqué_la-france-s-engage-a-promouvoir-un-cyberspace-stable-fonde-sur-la-confiance-et-le-respect-du-droit-international (“French Ministry of Defense Views”). I have not labeled these as “French views” as at least one scholar has pointed out that the document is authored by the French Ministry of Defense and its contents may not be attributable to the French State as a whole. See Gary Corn, *Punching on the Edges of the Gray Zone, Iranian Cyber Threats and State Cyber Responses*, JUST SECURITY (Feb. 11, 2020) (“it should be noted that despite numerous assertions to the contrary, the French document does not claim to be the official position of the French government. It was written and published by the French Ministère des Armées (Mda), in the

Netherlands.¹² Although a welcome development, the number and specificity of these statements has not (yet) been sufficient to rely on them as evidence of general state practice or *opinio juris*.¹³

5. Several non-State actors have sought to fill in this information deficit by offering their own views on how customary international law regulates State cyber-operations. The two most prominent sets of voices are undoubtedly those of the International Committee of the Red Cross (ICRC) and the Independent Group of Experts who authored the *Tallinn Manuals*.¹⁴ It is clear, however, that not all States regard their contents as reflecting international law.¹⁵

6. With the Committee's support, my second report detailed a plan to focus on *transparency* with respect to how States understand international law's application to cyber operations. Specifically, I proposed—and the Committee approved—circulating a questionnaire to OAS Member States on some of the most relevant international legal questions. The project has three discrete goals:

- a. To identify areas of convergence in how States understand which international legal rules apply and how they do so. When combined with existing statements from States outside the region, their uniformity of views may provide further evidence for delineating the relevant customary international law rules.
- b. To identify divergent views on what international laws apply and how they do so. This may help set a baseline for further dialogue, whether to reconcile conflicting positions, clarify the law's contents, or, perhaps even, pursue changes to it. In addition, providing more transparency on a State's views can inform other States' behavior to limit risks of inadvertent escalation or conflict.
- c. To afford OAS Member States an appropriate voice in global conversations about international law's application. Last year, the UN General Assembly tasked a new U.N. Group of Governmental Experts to invite national views on international law.¹⁶ With only four OAS Member States participating in the GGE (Brazil, Mexico, the United States and Uruguay), the Committee's work offers an opportunity to other Member States to provide a fuller range of views from across the region. This aligns with a European Union call that *all* UN Member States “should submit national contributions on the subject of how

same vain as the DoD Law of War Manual which does not necessarily reflect the views of the U.S. Government as a whole.”).

¹² *Letter from Minister of Foreign Affairs to President of the House of Representatives on the international legal order in cyberspace*, July 5, 2019, Appendix 1, at <https://www.government.nl/ministries/ministry-of-foreign-affairs/documents/parliamentary-documents/2019/09/26/letter-to-the-parliament-on-the-international-legal-order-in-cyberspace> (“The Netherlands Views”).

¹³ *See, e.g.*, Egan, *supra* note 7, at 817.

¹⁴ *See, e.g.*, ICRC, *Position Paper on International Humanitarian Law and Cyber Operations during Armed Conflicts* (Nov. 2019) (“ICRC Position Paper”); MICHAEL N. SCHMITT (ED.), *TALLINN MANUAL 2.0 ON THE INTERNATIONAL LAW APPLICABLE TO CYBER OPERATIONS* (2017) (“*Tallinn 2.0*”); *see also* ICRC, *Report on International Humanitarian Law and the Challenges of Contemporary Armed Conflict, 70th Anniversary of the Geneva Conventions* (Nov. 2019) (“2019 ICRC Report”); ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, 32nd International Conference of the Red Cross and Red Crescent (Oct. 2015) 39-43 (“2015 ICRC Report”).

¹⁵ Egan, *supra* note 7, at 817 (“Interpretations or applications of international law proposed by non-governmental groups may not reflect the practice or legal views of many or most States. States' relative silence could lead to unpredictability in the cyber realm, where States may be left guessing about each other's views on the applicable legal framework. In the context of a specific cyber incident, this uncertainty could give rise to misperceptions and miscalculations by States, potentially leading to escalation and, in the worst case, conflict.”).

¹⁶ *See* UNGA Res. 266, *supra* note 3, ¶3 (on the GGE's mandate). In addition, to the new GGE, there is also a UN-sponsored Open Ended Working Group (OEWG) that looks to operationalize the work of prior GGEs, and in some cases revisit or even revise the outcomes of that work. *See* U.N. Doc. A/RES/73/27.

international law applies to the use of [information and communication technologies] by States.”¹⁷

At the same time, it is important to reiterate what this project is *not* designed to do. It does not aim to codify or progressively develop international law (nor even to identify best practices or general guidance). Nor does it aim to offer a comprehensive or overarching perspective on international legal issues in the cyber context. The goal is more modest. These questions were designed to elicit State views on how international law applies to cyberspace in areas where the most discussion (and discord) has appeared to date. It thus aims to afford OAS Member States a platform to be more transparent on how they understand international law’s relationship to cyberspace and the information and communication technologies (ICTs) from which it derives.

7. With the Committee’s approval, I prepared a questionnaire on these issues with input from the OAS Department of International Law and the International Committee of the Red Cross. The questionnaire was circulated to Member States in January 2019. My third report provided an update on the questionnaire’s contents and asked for an extension to the response deadline.¹⁸

8. Subsequent to my third report, I had the opportunity to participate in consultations held by the OAS Secretariat of the Inter-American Committee against Terrorism (CICTE) with the UN Office for Disarmament Affairs on August 15-16, 2019, during which time I addressed participants on the Committee’s work on this topic. In December, I participated (in my academic capacity) in the informal inter-sessional meeting of the Open Ended Working Group on Developments in the Field of Information and Telecommunications in the Context of International Security. There, I had a number of informal consultations with States and other stakeholders to describe the Committee’s interest in promoting transparency in how States understand international law’s application to cyberspace. In both contexts, I received uniformly positive feedback and encouragement, suggesting that there is widespread interest in affording States one or more fora for expressing their opinions and further strengthening the rule of law in cyberspace.

9. In this report, I briefly survey the responses to the Committee’s ten questions on international law and cyberspace. To date, the Committee has received nine responses. Eight of these are substantive as Bolivia, Chile, Costa Rica, Ecuador, Guatemala, Guyana, Peru provided specific responses¹⁹ while the United States directed the Committee to its prior statements issued between 2012 and 2016.²⁰ The ninth response—from Brazil—was non-substantive; it highlighted Brazil’s pending work at the UN GGE (where its expert serves as Chair) as the forum where it planned to address issues of international law’s application to cyberspace.²¹

¹⁷ EU Statement, *supra* note 3.

¹⁸ See Duncan B. Hollis, *International Law and State Cyber Operations: Improving Transparency: Third Report*, OEA/Ser.Q, CJI/doc 594/19 (July 24, 2019) (“Hollis, Third Report”).

¹⁹ *Note from the Plurilateral State of Bolivia, Ministry of Foreign Affairs, OAS Permanent Mission to the OAS Inter-American Juridical Committee*, MPB-OEA-NV104-19 (July 17, 2019) (containing responses to IAJC Questionnaire from Bolivia’s Office of the Commander-in-Chief of the State Inspector General of the Armed Forces) (“Bolivia Response”); *Response submitted by Chile to the OAS Inter-American Juridical Committee Questionnaire* (Jan.14, 2020) (“Chile Response”); *Communication from Carole Arce Echeverria, Costa Rica, International Organizations, Department of Foreign Policy, Minister of Foreign Affairs and Worship to OAS*, (April 3, 2019) (including letter no. 163-OCRI2019 from Yonathan Alfaro Aguero, Office of International Cooperation and Relations to Carole Arce Echeverria, which includes a reply from the “relevant authority”—the Costa Rica Criminal Court of Appeals) (“Costa Rica Response”); *Verbal Note 4-2 186/2019 from the Permanent Mission of Ecuador to the OAS* (June 28, 2019) (“Ecuador Response”); *Note Of. 4VM.200-2019/GJL/lr/bm*, from Mr. Gabriel Juárez Lucas, Fourth Vice Minister of the Interior Ministry of the Republic of Guatemala to Luis Toro Utillano, Technical Secretariat, Inter-American Juridical Committee (June 14, 2019) (“Guatemala Response”); *Note No. 105/2019 from the Permanent Mission of Guyana to the OAS* (July 30, 2019) (“Guyana Response”); *Response Submitted by Peru to the Questionnaire on the Application of International Law in OAS Member States in the Cyber Context* (June 2019) (“Peru Response”).

²⁰ See note 7.

²¹ Response by Brazil to CJI OEA Note 2.2/14/19 (July 1, 2019).

10. Before reviewing the responses, question-by-question, I must emphasize three overall reactions. *First* and foremost, it is apparent that all the responding States have an abiding interest in the rule of law, including the role international law can play in regulating State behavior in cyberspace. This is an undoubtedly welcome development and bodes well for Member State cooperation and coordination on international legal issues in this context going forward.

11. At the same time, however, I must highlight a *second*, less positive, reaction to the questionnaire responses. When considered collectively, they reveal just how *uneven* Member State capacities are distributed at present. By “capacity” I am not just referring to variations in what operational capabilities States have to deploy cyber operations, although that variation is very real. Rather, I am also referring to how much OAS Member States appear to understand the relevant technical and legal issues that have garnered so much attention in other geopolitical contexts like the United Nations. To be sure, several States’ responses evince a deep knowledge of the various ways States may employ cyber-operations, both as a substitute for things States have done in the past as well as a novel tool to achieve objectives, scales or effects not seen previously. At the same time, however, other States appear more limited in their understanding of what States may achieve in cyberspace. Their understanding is further complicated by a lack of a shared language; States employ very different terms and definitions in their responses.²² Similarly, when it comes to international law, several States are clearly familiar with the various dividing lines that have dominated conversations for the last several years, while other States demonstrate much less familiarity with the underlying international legal rules and the particular questions their applications generate in the cyber context.

12. Such disparities suggest that the Committee might consider whether, in addition to surveying State views, the OAS should engage in more legal and technical capacity building. OAS’s CICTE already has an excellent track record in assisting Member States on building capacity, whether by helping them devise “national” cybersecurity strategies or standing up computer security incident response teams (CSIRTs).²³ There have also been several programs in the region designed to educate Member State foreign ministries on the relevant legal questions and the terms of ongoing debates.²⁴ Nevertheless, the current responses suggest that more can—and should—be done. This is, moreover, a view that comes across in several of the Member States’ own responses. Costa Rica’s response was particularly eloquent in this respect. It cited –

the urgent need for opportunities for study and analysis to be able to address successfully and effectively all problems that cyber operations might generate, not only to address attacks and how they should be countered, prevented, and punished, but also for study and analysis of the responsibility of States, even vis-à-vis non-state actors.

In that regard, we wish very respectfully to indicate the need to join forces to create appropriate opportunities so that countries like Costa Rica and others become involved in the study of this subject and make proposals, not only for international but also for domestic law, that can take a step towards dealing with a virtual reality with cross-border implications and the capacity to impact fundamental rights of the world’s citizens.²⁵

Given such views, I would invite the Committee’s input on whether and how the OAS might engage in more international legal capacity building in this space. I am particularly interested in ways to ensure Member States have the necessary legal and technical background knowledge necessary to engage in ongoing discussions and debates—and to reach their own conclusions on them—in an informed manner.

²² For example, States employ different definitions for cyberspace. *Compare* Guyana Response, *supra* note 19, at 2 (using a definition drawn from U.S. Naval Academy web-site) with Peru Response, *supra* note 19, at 2 (using a definition drawn from Kristen Eichensehr, *The Cyber-Law of Nations*, 103 GEORGETOWN L. J. 323, 324 (2015) which draws, in turn, from the *Oxford English Dictionary*).

²³ For more on CICTE’s activities see <http://www.oas.org/en/sms/cicte/prog-cybersecurity.asp>.

²⁴ Canada and Mexico, for example, co-hosted a workshop with the OAS on May 30, 2019 that targeted OAS countries for a discussion of international law’s application to cyberspace.

²⁵ Costa Rica Response, *supra* note 19, at 2

13. *Third*, the response rate to the Committee’s questionnaire remains under-representative of the region as a whole. The time and effort States put into substantive responses is appreciated (and tremendously valuable). And yet, the responses received so far represent less than 25% of the OAS’s Membership. To acquire a more accurate reflection of how the region understands international law’s application to cyberspace suggests a need for more Member State responses. I invite the Committee’s ideas on whether further efforts seeking (and obtaining) such responses would be useful or feasible.

14. With these caveats in mind, I reproduce below each of the Committee’s questions, accompanied by a short summary of the responses received to date.

Question 1: Has your Government previously issued an official paper, speech, or similar statement summarizing how it understands international law applies to cyber operations? Please provide copies or links to any such statements.

15. This first question solicited existing national statements on international law and cyberspace. The idea was to make sure the Committee was aware of any prior views of Member States. It also allowed States to avoid having to respond to the questions if they had already taken relevant substantive positions. Of the eight responses, however, only the United States indicated that it had previously made statements and speeches on how international law applies to cyberspace, including 2012 and 2016 speeches by the then-Legal Advisers to the U.S. Department of State and the 2014 and 2016 U.S. Submissions to meetings of U.N. Group of Governmental Experts (GGE) on Developments in the Field of Information and Telecommunications in the Context of International Security.²⁶

16. Other States indicated that they were unaware of any prior positions on their views on international law’s application in the cyber context.²⁷ Several States took the opportunity, however, to highlight their internal efforts to establish relevant organizations or regulatory regimes for addressing ICT issues.²⁸

17. The dearth of prior official statements confirms the hypothesis on which this project rests – that States have said relatively little to date about how international law applies to State behavior in cyberspace. It also confirms that most domestic efforts relating to cybersecurity to date have centered on national cybersecurity strategies or policies as well as domestic cybercrime and other ICT regulatory efforts.

Question 2: Do existing fields of international law (including the prohibition on the use of force, the right of self-defense, international humanitarian law, and human rights) apply to cyberspace? Are there areas where the novelty of cyberspace excludes the application of a particular set of international legal rights or obligations?

18. Although a recent U.N. General Assembly Resolution²⁹ suggests that there is now widespread support for international law’s application to cyberspace, earlier efforts at the United Nations revealed that certain States have deep reservations about the applicability of certain international legal regimes. Indeed, these reservations reportedly led the 2016-2017 U.N. GGE to fail to produce any final report.³⁰ Thus, there is a continuing need to identify whether the existence of

²⁶ For citations, *see supra* note 7. Note, however, that the U.S. Response indicated that these were only “some of” the documents indicating U.S. views. Thus, there may be others that warrant attention. In particular, it might be useful to know how much the U.S. Department of Defense *Laws of War Manual* reflects the views of the United States as a whole. *See* Office of General Counsel, U.S. Department of Defense, *Department of Defense Law of War Manual* (June 2015, updated December 2016) (“DOD Manual”).

²⁷ *See, e.g.*, Ecuador Response, *supra* note 19, at 1 (“We are not aware of any official paper the Government of Ecuador has issued on cyber operations.”); *see also* Guyana Response, *supra* note 19, at 1 (same).

²⁸ Bolivia Response, *supra* note 19, at 1 (citing a new 2015 law); Chile Response, *supra* note 19, at 1 (listing the Ministry of Defense’s March 2018 “cyber-defense policy”); Guatemala Response, *supra* note 19, at 1 (emphasizing its “national cybersecurity strategy” and new cybercrime law); *see also* Costa Rica Response, *supra* note 19, at 1.

²⁹ *See* UNGA Res. 266, *supra* note 3.

³⁰ *See, e.g.*, Arun M. Sukumar, *The UN GGE Failed. Is International Law in Cyberspace Doomed As Well?*, LAWFARE (July 4, 2017).

certain areas of international law in cyberspace is contested, and, if so, which ones. This second question was designed to solicit each State's views on any extant international law that it considered inapplicable (or where the application might at least be problematic) in the cyber context.

19. Overall, the questionnaire responses reflected extensive support for the application of existing fields of international law to cyberspace. As Chile's Response summarized, "current international law provides the applicable legal framework ... including rules relating to *jus ad bellum*, international humanitarian law, human rights, and those governing the international responsibility of States."³¹ Other States affirming international law's application included Ecuador, Peru, and the United States.³² Along with the *jus ad bellum* and the *jus in bello*, Peru's response emphasized the validity in cyberspace of various human rights, including "the right to privacy, freedom of information, freedom of expression, free and equal access to information, elimination of the digital divide, intellectual property rights, free flow of information, the right to confidentiality of communications, etc."³³ The U.S. echoed the application of international human rights law, while touting the overall application of existing international law as the "cornerstone" of U.S. cyberspace policy.³⁴

20. Bolivia also offered a positive response. But its answer focused on the international law "to be applied in armed conflicts," offering views on how to differentiate when international humanitarian law (IHL) would (and would not) apply.³⁵ As such, it is not clear whether Bolivia's positive response extends to the application of other sub-fields of international law beyond the *jus ad bellum* and the *jus in bello*.

21. Guatemala and Guyana both expressed positive support for international law's application. Yet, both offered caveats about how universally the extant law might apply. Without offering any examples, Guatemala noted that there could be areas where "the novelty of cyberspace does preclude the application of certain international rights or obligations."³⁶ Guyana, meanwhile, noted that "cyber operations do not fit into traditional concepts" and pointed out that "a raging debate as to whether existing fields of international law apply to cyberspace"³⁷ Acknowledging the prior work of the GGE, Guyana "respectfully submitted that while it is acknowledged that international law should or ought to apply to cyberspace, it is difficult to easily apply existing principles" such as the use of force which "traditionally implies some physical element and armed attacks which traditionally imply some sort of weapon."³⁸

³¹ Chile Response, *supra* note 19, at 1 (As a result, Chile notes that the "planning, conduct, and execution of operations in cyberspace must adhere strictly to respect for public international law, with particular consideration to international human rights law and international humanitarian law").

³² Ecuador Response, *supra* note 19, at 1 ("The fields of international law do apply to cyberspace"); Peru Response, *supra* note 19, at 1 ("bearing in mind the fundamental role of the Charter in terms of how it relates to other international instruments ... it would be reasonable to conclude that no area of international relations lies outside the scope of the aforesaid principles... Bearing in mind that cyberspace is becoming an everyday setting for international interaction, the actors in such interactions are required to observe their higher obligations under international law, including the prohibition on the use of force, the right of self-defense, and respect for human rights and international humanitarian law."); Koh, *supra* note 7, at 594 ("Yes, international law principles do apply in cyberspace ... Cyberspace is not a 'law-free' zone where anyone can conduct hostile activities without rules or restraint.").

³³ Peru Response, *supra* note 19, at 1.

³⁴ 2014 US GGE Submission, *supra* note 7, at 733 (application of international law comprises the "cornerstone" of US view, taking into account its distinctive characteristics); Egan, *supra* note 7, at 815 (same); on the application of human rights, *see* Koh, *supra* note 7, at 598; Egan, *supra* note 7, at 820; 2016 US GGE Submission, *supra* note 7, at 824.

³⁵ Bolivia Response, *supra* note 19, at 2-7. Thus, Bolivia suggested that IHL would not govern cyber-operations involving national security, propaganda, espionage, manipulation of strategic critical infrastructure, cyber operations with political objectives, or those hacking into private systems putting at risk the state's economic and social operations. *Id.* at 3-7.

³⁶ Guatemala Response, *supra* note 19, at 1-2.

³⁷ Guyana Response, *supra* note 19, at 1-2

³⁸ *Id.*

22. Thus, even as the overall application of international law to cyber-operations appears well entrenched, these last two responses suggest the need for further dialogue and discussion. It would be useful to identify *which* particular areas of international law's application give certain States pause and why. Doing so would help illuminate just how much convergence (or divergence) of views exist on how international legal regimes govern State and State-sponsored cyber operations.

Question 3: Can a cyber operation by itself constitute a use of force? Can it constitute an armed attack that triggers a right of self-defense under Article 51 of the UN Charter? Can a cyber operation qualify as a use of force or armed attack without causing the violent effects that have been used to mark such thresholds in past kinetic conflicts?

23. Most (but not all) States appear to accept the application of international law on the use of force (e.g., the *jus ad bellum*) to their cyber operations. This question sought to identify which States in the region adhere to this dominant view versus alternative positions. At the same time, additional application questions have arisen among States who accept the *jus ad bellum* in cyberspace, most notably the extent to which thresholds for the “use of force” or “armed attacks” require analogous “violent” effects to those deemed to pass those thresholds in the past. The issue is how to handle novelties in the scale or effects of cyber operations (i.e., those operations that are not akin to *either* past kinetic operations—which surpassed the use of force threshold—nor economic or political sanctions—which did not). How should international law regard such cyber operations? Should they be placed, by default, below the use of force threshold or above it? Or, is further investigation and analysis needed to bifurcate cyber operations in this new “grey zone,” treating some of these novel operations as above, and others below, relevant thresholds?³⁹ Thus, this question sought to acquire State perspectives on whether to define cyber operations as uses of force (or armed attacks) entirely by analogy to previous cases or to devise some new standard for doing so.

24. Bolivia, Chile, Guatemala, Peru, and the United States are all clear that both the prohibition on the use of force and the inherent right of self-defense in response to an “armed attack” may be triggered by cyber operations alone.⁴⁰ As Guatemala explained:

[A] cyber operation in and of itself can qualify as a use of force, since “use of force” does not exclusively mean physical force; it also covers threats to and violations of the security and protection of third parties ... there is a right of legitimate defense against a cyber attack or operation against a country’s sovereignty.⁴¹

The 2014 U.S. Submission to the GGE emphasized its understanding that the “inherent right of self-defense potentially applies against any illegal use of force” suggesting a single threshold for both rules.⁴² This stands in contrast to States that view all armed attacks as uses of force but not all uses of force as armed attacks (the latter are said to involve only the “most grave” forms of a use of

³⁹ See Michael N. Schmitt, *Grey Zones in the International Law of Cyberspace*, 42 YALE J. INT’ L. 1 (2017).

⁴⁰ Bolivia Response, *supra* note 19, at 2-7 Chile Response, *supra* note 19, at 1 (Chile will refrain from using force “through cyberspace” in a manner that is against international law and will exercise “its right to self-defense against any armed attack carried out through cyberspace”); Guatemala, *supra* note 19, at 2; Peru Response, *supra* note 19, at 1-3; Koh, *supra* note 7, at 595 (Stating the U.S. view that (a) “Cyber activities may in certain circumstances constitute uses of force within the meaning of Article 2(4) of the UN Charter and customary international law”; and (b) “a State’s national right of self-defense, recognized in Article 51 of the UN Charter, may be triggered by computer network activities that amount to an armed attack or imminent threat thereof.”); 2014 US GGE Submission, *supra* note 7, at 734; Egan, *supra* note 7, at 816 (suggesting 2015 UN GGE also endorsed the right of self-defense). Ecuador also responded to the question affirmatively, but cited the definition of “armed attack” used in Article 92 of *Tallinn 2.0*, which defines that term in the context of an armed conflict (i.e., the *jus in bello*) – a distinct usage of the term from its expression in UN Charter Article 51 and the *jus ad bellum*. See Ecuador Response, *supra* note 19, at 1.

⁴¹ Guatemala, *supra* note 19, at 2. Accord Peru Response, *supra* note 19, at 3 (citing the ICRC and Michael Schmitt for the idea that uses of force are not limited to kinetic force).

⁴² Koh, *supra* note 7, at 597.

force).⁴³ The United States also emphasized that its inherent right of self-defense can be triggered by cyber activities that “amount to an actual or imminent armed attack” and “regardless if the attacker is a State or non-State actor.”⁴⁴

25. In contrast, Guyana’s response expressed doubts about the applicability of the *jus ad bellum* to cyber operations alone. Relying on *Black’s Law Dictionary* for a definition of force as “power dynamically considered,” Guyana indicated that a cyber operation “by itself may not constitute a use of force.”⁴⁵ Similarly, it defined an armed attack as involving “weaponry” and to the extent “no physical weaponry is involved” in a cyber operation, it may not be considered an armed attack triggering self-defense.⁴⁶ At the same time, Guyana did emphasize that cyber operations could be used in armed conflicts and governed international humanitarian law (IHL).⁴⁷

26. With respect to whether a cyber operation could cross the use-of-force threshold (or that for an armed-attack⁴⁸) without having violent effects, State views were mixed. Most responding States continue to find power in drawing the relevant thresholds by analogizing cyber operations to kinetic or other past operations that did (or did not) qualify as a use of force or armed attack. Some States, however, hinted at the potential to move beyond such analogies. Chile, for example, suggested that cyber operations analogous to the threshold of severity necessary to satisfy the requirements established by international law to be an armed attack” can give rise to a right of self-defense.⁴⁹ At the same time, however, Chile’s response may have left room for defining armed attacks more broadly, suggesting that “cyberattacks directed against its sovereignty, its inhabitants, its physical or information infrastructure” could qualify as such.⁵⁰

27. Peru more openly admitted the “possibility of a cyber operation that does not cause violent effects being classed as a use of force or an armed attack.”⁵¹ It did so, however, based on the idea that kinetic weaponry in the past might have also been employed without causing violent effects and yet still constituted a use of force (*i.e.*, firing a missile across another State’s territory even if it does not land in that State).⁵² Overall, Peru emphasized the need to differentiate “cyber-attacks” (which “cause damage to a militarily significant target, resulting in its total or partial destruction, capture, or neutralization”) from “cyber disruptions” that “cause inconvenience, even extreme inconvenience, but no direct injury or death, and no destruction of property.”⁵³ As such, the specifics of Peru’s response emphasized evaluating the legality of cyber operations in the use of force context based on whether they “cause death or injury to persons or property.”⁵⁴

28. Guatemala’s response adopted a different approach, suggesting a willingness to rethink what qualifies as “violent effects” because a cyber operation’s consequences “can be greater and more lasting, in that they threaten such sectors as health, security, and others.”⁵⁵ It suggested that in the cyber context, consequences that produce “death, anxiety, and poverty” should be considered violent.⁵⁶

⁴³ See *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. U.S.)* [1986] ICJ Rep. 14, ¶¶176, 191 (June 27) (describing armed attacks as “the most grave forms of the use of force.”).

⁴⁴ 2014 US GGE Submission, *supra* note 7, at 734-5. The submission also reiterates the “unwilling or unable” test for engaging in self-defense against a State without its consent where “a territorial State is unwilling or unable to stop or prevent the actual or imminent attack launched in or through cyberspace.” *Id.* at 735.

⁴⁵ Guyana Response, *supra* note 19, at 2.

⁴⁶ *Id.*

⁴⁷ See *id.* at 3, 5.

⁴⁸ This assumes, contra the U.S. view, that there may be two different thresholds. See *supra* notes 42-43, and accompanying text.

⁴⁹ Chile Response, *supra* note 19, at 2.

⁵⁰ *Id.* at 2.

⁵¹ Peru Response, *supra* note 19, at 3.

⁵² *Id.*

⁵³ *Id.* at 2.

⁵⁴ *Id.* at 3.

⁵⁵ Guatemala, *supra* note 19, at 2.

⁵⁶ *Id.*

29. Bolivia's response suggested that the threshold might be difficult to apply in practice since the "effects of cyber-attacks will not always be immediately known" making it hard to check if there's been a use of force. At the same time, Bolivia indicated that it would evaluate the threshold based on analogies to the kinetic context, *i.e.*, an "armed attack" arises where "the cyber virtual attack uses unconventional means that have the same impact [as] an armed attack."⁵⁷

30. Finally, the United States did not respond to the questionnaire itself. Nonetheless, its previous statements shed some light on its views. In his seminal 2012 speech, Harold Koh indicated the U.S. preference for a contextual approach to identifying uses of force (albeit with the aforementioned caveat that the U.S. definition also would identify armed attacks):

In assessing whether an event constituted a use of force in or through cyberspace, we must evaluate factors including the context of the event, the actor perpetrating the action (recognizing challenges of attribution in cyberspace), the target and location, effects and intent, among other possible issues.⁵⁸

At the same time, Koh clearly viewed the test as requiring an analogy, asking "whether the direct physical injury and property damage resulting from the cyber event looks like that which would be considered a use of force if produced by kinetic weapons."⁵⁹ He also has cited specific examples of cyber operations that would constitute uses of force: (i) a nuclear plant meltdown caused by cyber activity; (ii) cyber operations that "open a dam above a populated area causing destruction"; and (iii) a cyber operation that disables "air traffic control resulting in airplane crashes."⁶⁰ To the extent all these examples involve some form of "violence" it would appear that the United States favors a use of force threshold analogous to the one applied in the kinetic context.

Question 4: Outside of armed conflicts, when would a State be responsible for the cyber operations of a non-State actor? What levels of control or involvement must a State have with respect to the non-State actor's operations to trigger the international legal responsibility of that State?

Question 5: Are the standards of State responsibility the same or different in the context of an armed conflict as that term is defined in Articles 2 and 3 common to the 1949 Geneva Conventions?

31. States are responsible not only for the behavior of their own organs and agencies in cyberspace, but also for any non-state actor that they endorse or control.⁶¹ The fourth and fifth questions ask about how States understand the assignment of international legal responsibility for non-State actor behavior, in particular the extent of State "control" required. As is well known, cyber threats may be authored not just by States directly but also by a range of non-state actors, including hacktivist groups and cybercriminal organizations. In some cases, States may seek to employ these non-State actors as proxies for conducting various cyber operations.

32. Tying a proxy back to a principal in cyberspace can be technically quite challenging (although perhaps not as difficult as some supposed in the past). At the same time, a factual linkage is not enough, there must be legal attribution as well – *i.e.*, a sufficient connection between a State and a non-State actor for the former to assume legal responsibility for the latter's behavior. A State may, for example, endorse a non-state actor's behavior after the fact, thereby assuming legal

⁵⁷ Bolivia Response, *supra* note 19, at 2-7 (Bolivia emphasized that the right of self-defense also encompasses "pre-emptive self-defense," which is only available when the threat is imminent and the need for self-defense is immediate (rather than retaliatory)).

⁵⁸ Koh, *supra* note 7, at 595 (Cyber activities that proximately result in death, injury, or significant destruction would likely be viewed as a use of force⁷⁰). The U.S. has maintained this view subsequently. 2014 US GGE Submission, note 7, at 734. The 2014 US GGE Submission was also appended to the 2016 US GGE Submission, suggesting continued support for its contents.

⁵⁹ Koh, *supra* note 7, at 595.

⁶⁰ *Id.*

⁶¹ See ILC, "Draft Articles on the Responsibility of States for Internationally Wrongful Acts" in *Report on the Work of its Fifty-first Session* (May 3-July 23, 1999), UN Doc A/56/10 55 [3] ('ASR'); accord Tallinn 2.0, *supra* note 14, Rule 15.

responsibility for it.⁶² Alternatively, States are legally responsible for non-State actor behavior that they control. Precisely how much control is, however, often unclear. In the *Nicaragua* case, the ICJ indicated that international law contains a rule imposing responsibility on a State for acts of those non-State actors over which it has “effective control” (e.g., ordering the behavior or directing an operation).⁶³ But, a few years later, the International Criminal Tribunal for the Former Yugoslavia (ICTY) adopted a looser standard of “overall control” for the purposes of IHL. As the ICTY put it, this test requires “more than the mere provision of financial assistance or military equipment or training” but not going so far as to insist on the “issuing of specific orders by the State or its direction of individual operations.”⁶⁴ The ICC later endorsed the “overall control” standard.⁶⁵

33. The ICJ, however, has continued to insist on its “effective control” formulation in the use of force context. At the same time, it signaled that the “overall control” test might be appropriate in the IHL context, raising the possibility of a consensus on “overall control” in the IHL context and “effective control” in other contexts.⁶⁶ Given this possibility, the questionnaire asked about state responsibility both generally and in the IHL context based on the existence of some armed conflict as that term is used in the Geneva Conventions.

34. In terms of their responses, several Member States emphasized the difficulty of attribution in cyberspace.⁶⁷ Others focused less on the question of liability for proxy behavior and more on the State’s responsibility to take care its territory was not used by non-State actors to launch attacks.⁶⁸ Thus, Peru commented that “if there is inertia on the part of a State in controlling a nonstate actor that unleashed a cyber attack against another State, despite having the capacity to control them, then that could give rise to their conduct being attributable to the State.”⁶⁹ For its part, Bolivia emphasized that States should not bear responsibility where they lack the technological infrastructure to control non-State actors.⁷⁰ And the United States emphasized that the “mere fact that a cyber activity was launched from, or otherwise originates from, another State’s territory or from the cyber infrastructure of another State is insufficient, without more, to attribute that activity to that State.”⁷¹

35. For those States whose responses focused on the question of proxy actors, the Articles of State Responsibility (“ASR”) loomed large. Chile, Guyana, and Peru all based their response on ASR Article 8:

⁶² ASR, *supra* note 61, Art. 11; HEATHER HARRISON DINNISS, CYBER WARFARE AND THE LAWS OF WAR 52 (2012).

⁶³ *Nicaragua Case*, *supra* note 43, at ¶115.

⁶⁴ *Prosecutor v. Dusko Tadić aka ‘Dule’* (Judgment) ICTY-94-1-A (15 July 1999) ¶¶131-145, 162.

⁶⁵ *Prosecutor v. Lubanga*, Case No. ICC-01/04-01/06, Trial Chamber, Judgement (Int’l Crim. Court, March 14, 2012).

⁶⁶ *Case concerning application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* (Judgment) [1997] ICJ Rep. 43, 208–09, ¶¶402-407 (indicating that the overall control test “may well be ... applicable and suitable” for IHL sorts of classifications).

⁶⁷ Guatemala, *supra* note 19, at 3 (finding “clear responsibility” for a cyber attack is “by no means an easy task”); Peru, *supra* note 19, at 4 (noting great “uncertainty in attribution, and levels of attribution, of cyber attacks” making it harder “to control those who use cyberspace to unleash attacks over the Internet”).

⁶⁸ Ecuador, *supra* note 19, at 1 (“States cannot be held liable for an attack by a non-state actor, but there should be some way [for them] to collaborate to find the perpetrators. Furthermore, a state is responsible for regulating/setting standards for services to prevent territory belonging to a state from being launch [sic.] an attack.”); Guatemala, *supra* note 19, at 3 (answering in terms of due diligence of the host State rather than the amount of control over proxy actors).

⁶⁹ Peru Response, *supra* note 19, at 4 (citing ASR Article 11).

⁷⁰ Bolivia *supra* note 19, at 3-7. On the question of proxies, Bolivia’s response was indirect, although it did suggest a link between a State and non-State actors associated with its defense policy objectives and/or strategies of a State in a situation of armed conflict. *Id.*

⁷¹ 2014 US GGE Submission, *supra* note 7, at 738.

The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.⁷²

The ASR, however, did not offer an opinion on which type of “control” the State needs to exhibit, suggesting it is “a matter for appreciation in each case.”⁷³ This tracks U.S. views, which endorse State responsibility for “activities undertaken through ‘proxy actors’ who act on the State’s instructions or under its direction or control” while only saying that the degree of control exhibited must be “sufficient.”⁷⁴ The United States has also acknowledged that a State may later acknowledge or adopt a non-State actor’s cyber operation as its own.⁷⁵

36. However, one State, Chile, did offer its views on the level of control required to trigger legal responsibility. Citing the *Nicaragua* and *Genocide* cases, Chile opined that the “The degree or level of control or involvement of a state in the operations of a non-state actor, required to trigger its international responsibility is that of effective control.”⁷⁶ Chile, moreover, took the view that the standards of State responsibility are the same in the context of armed conflicts.⁷⁷

37. With respect to IHL, Peru took a similar stance, favoring a uniform rule of State responsibility both in and outside of armed conflicts. While recognizing the ASR contemplates being supplanted by *lex specialis*, it indicated that doing so requires an integrated analysis. And in this case, “[a]n examination of the Geneva Conventions does not disclose any difference with respect to the provisions on international responsibility set down in the Draft Articles on Responsibility of States for Internationally Wrongful Acts; therefore, it cannot be argued that the draft articles have a different scope of application.”⁷⁸ As noted, however, the ASR standard of responsibility only references “control” generally, without differentiating whether it must be “effective” or “overall.”

38. Other States had more trouble answering the fifth question. Guatemala suggested that “international forums must continue their discussions on the uniquely different aspects that a conflict in cyberspace would entail, particularly regarding such issues as attribution and territorial considerations.”⁷⁹ Other States read this question to ask about differing standards of responsibility between international and non-international armed conflicts.⁸⁰

Question 6: Under international humanitarian law, can a cyber operation qualify as an “attack” for the rules governing the conduct of hostilities if it does not cause death, injury or direct physical harm to the targeted computer system or the infrastructure it supports? Could a cyber operation that produces only a loss of functionality, for example, qualify as an attack? If so, in which cases?

39. The sixth question is the first of two addressing how international humanitarian law (IHL or the *jus in bello*) applies to cyber-operations. It focuses on an issue that has divided States and scholars to date – how to define an “attack” for IHL purposes. Much of IHL, including its fundamental principles of distinction, proportionality, and precautions, are largely framed in terms of

⁷² ASR, *supra* note 61, Art. 8; Chile Response, *supra* note 19, at 2; Guyana Response, *supra* note 19, at 3; Peru Response, *supra* note 19, at 4. Chile and Peru’s responses also appear based on ASR Article 5 assigning State responsibility to “[t]he conduct of a person or entity which ... is empowered by the law of [a] State to exercise elements of the governmental authority ... provided the person or entity is acting in that capacity in the particular instance.” See Chile Response, *supra* note 19, at 2; Peru Response, *supra* note 19, at 4.

⁷³ ASR, *supra* note 61, at 48 (Commentary to Art. 8).

⁷⁴ Koh, *supra* note 7, at 595; 2014 US GGE Submission, *supra* note 7, at 738 (same); Egan *supra* note 7, at 821; 2016 US GGE Submission, *supra* note 7, at 826.

⁷⁵ Egan *supra* note 7, at 821; 2016 US GGE Submission, *supra* note 7, at 826.

⁷⁶ Chile Response, *supra* note 19, at 2.

⁷⁷ *Id.* at 3.

⁷⁸ Peru Response, *supra* note 19, at 4-5.

⁷⁹ Guatemala Response, *supra* note 19, at 3.

⁸⁰ See, e.g., Bolivia Response, *supra* note 19, at 4-7; Guyana Response, *supra* note 19, at 3. Ecuador’s Response simply emphasized that States “are responsible for complying with the rules in armed conflicts, even where there are parties that are not party” to those Conventions. Ecuador Response, *supra* note 19, at 2.

prohibiting certain types of “attacks” (e.g., those targeting civilians or civilian objects) while permitting others (e.g., those targeting military objects).⁸¹ As the ICRC recently noted, “[t]he question of how widely or narrowly the notion of ‘attack’ is interpreted with regard to cyber operations is therefore essential for the applicability of these rules and the protection they afford to civilians and civilian infrastructure.⁸² Indeed, to the extent an operation *does not* constitute an “attack,” it may be conducted in an armed conflict without regard to most IHL rules.⁸³

40. Under IHL, an “attack” is defined by customary international law (as codified in Article 49 of Additional Protocol I to the Geneva Conventions (API)) as “acts of violence against the adversary, whether in offence or defense.”⁸⁴ As *Tallinn Manual 2.0* explains, moreover, “the consequences, not its nature, are what generally determine the scope of the term ‘attack’; ‘violence’ must be considered in the sense of violent consequences and is not limited to violent acts.”⁸⁵ The ICRC has noted, moreover, “[i]t is widely accepted that cyber operations expected to cause death, injury or physical damage constitute attacks under IHL.”⁸⁶ As is well known, however, some cyber operations (e.g., ransomware) are novel in that they offer an opportunity to “render objects dysfunctional without physically damaging them.”⁸⁷ This raises the question whether cyber-operations that do not produce such effects (e.g., disrupting the functionality of a water treatment facility without necessarily causing physical damage) can constitute an attack? Diverging views have emerged to date including among the *Tallinn Manual 2.0*’s Independent Group of Experts.⁸⁸

41. A majority of the *Tallinn Manual 2.0*’s experts took the view that violence required some physical damage, including “replacement of physical components” such as a control system.⁸⁹ Others interpreted damage to include cases where no physical components require replacing and functionality can be restored by reinstalling the operating system, while a few other experts believed an attack could occur via the “loss of usability of cyber infrastructure” itself.⁹⁰ For its part, the ICRC has argued that during an armed conflict an operation designed to disable a computer or a computer network constitutes an attack under IHL, whether the object is disabled through kinetic or cyber means.⁹¹

42. The sixth question was thus designed to see if Member States likewise view IHL’s attack threshold in terms of violence (or violent effects) of if they would consider that the “attack” label

⁸¹ For example, the principle of distinction is regularly framed as a prohibition on making civilians the object of an attack. *See, e.g.*, Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Armed Conflict (Protocol I) (June 8, 1977), 1125 UNTS 3, Art. 51(2) (“API”); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Dec. 12, 1977), 1125 UNTS 609, Art. 13(2); Rome Statute of the International Criminal Court (July 17, 1998), Art. 8(2)(b)(f); Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulations concerning the Laws and Customs of war on Land (Oct. 18, 1907), 36 Stat. 2277, Art. 8(2)(b)(i)-(ii); JEAN MARIE HENCKAERTS & LOUISE DOSWALD-BECK, 1 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW (ICRC, 2005) Rules 1, 7, 9, and 10.

⁸² ICRC Position Paper, *supra* note 14, at 7.

⁸³ Even outside of attacks, States must still exercise “constant care” in an international armed conflict to avoid “unnecessary effects” on civilians and their objects. AP I, *supra* note 81, Art. 57(1); *Tallinn 2.0*, *supra* note 14, at 476.

⁸⁴ AP I, *supra* note 81, Art. 49.

⁸⁵ *Tallinn 2.0*, *supra* note 14, at 415.

⁸⁶ *See* ICRC Position Paper, *supra* note 14, at 7.

⁸⁷ 2015 ICRC Report, *supra* note 14, at 41.

⁸⁸ *Id.*

⁸⁹ *Tallinn 2.0*, *supra* note 14, at 417.

⁹⁰ 2015 ICRC Report, *supra* note 14, at 43; *see also* 2019 ICRC Report, *supra* note 14, at 21 (“IHL rules protecting civilian objects can, however, provide the full scope of legal protection only if States recognize that cyber operations that impair the functionality of civilian infrastructure are subject to the rules governing attacks under IHL.”)

⁹¹ *See* ICRC Position Paper, *supra* note 14, at 7; 2015 ICRC Report, *supra* note 14, at 43 (arguing that international law must treat as attacks those cyber operations that disable objects since the definition of a military objective includes neutralization (suggesting that neutralizing objects falls within the ambit of IHL)).

applicable to cyber operations based on loss of functionality rather than more traditional concepts of physical damage or destruction.

43. The questionnaire responses reveal support for the applicability of IHL generally and the idea that cyber operations can constitute an attack in that context.⁹² Responses were more mixed, however, with respect to whether a cyber operation could qualify as an “attack” under IHL if it fails to cause death, injury, or direct physical harm. Chile, Peru, and the United States all gave negative responses.⁹³ Chile cited Article 49 of Additional Protocol 1 to the Geneva Conventions (API) to insist that IHL attacks must involve “effects or consequences arising from the act itself” that are “violent.”⁹⁴ In particular, it suggested that to qualify as an attack, its result must require the affected State to “take action to repair or restore the affected infrastructure or computer systems, since in those cases the consequences of the attack are similar to those described above, in particular physical damage to property.”⁹⁵ Peru’s response suggests for there to be an “attack” there must be “people” or “public or private property” that is “physically harmed.”⁹⁶ The United States, meanwhile, has emphasized that the IHL “attack” threshold requires looking at “*inter alia*, whether a cyber activity results in kinetic and irreversible effects on civilians, civilian objects, or civilian infrastructure, or non-kinetic and reversible effects on the same.”⁹⁷ The implication is that if a cyber operation produces non-kinetic or reversible effects, it will not “rise to the level of an armed attack.”⁹⁸ This would seem to exclude, for example, ransomware exploits that are not kinetic themselves or where the data they interrupt can be restored.

44. In contrast, Guatemala and Ecuador both responded positively to the idea of delimiting attacks based on functionality losses rather than death, injury or destruction of property. Guatemala indicated that among cyber operations that can be considered an attack are those “that only produce a loss of functionality.”⁹⁹ Ecuador opined that “[a] cyber operation can qualify as an attack if it renders inoperable a state’s critical infrastructure or others that endanger the security of the state.”¹⁰⁰

45. Bolivia and Guyana’s responses were more equivocal. On the one hand, Bolivia emphasized that IHL would define attacks to include those cyber operations “intended to be able to cause loss of human life, injury to people, and damage or destruction of property.”¹⁰¹ On the other hand, it suggested that a cyber operation “could be considered an attack when its objective is to disable a state’s basic services (water, electricity, telecommunications, or the financial system”).¹⁰² Guyana noted that “[w]hen a cyber operation produces a loss of functionality, it may or may not constitute an attack.”¹⁰³ Like Chile, it referenced API Article 49, tying the attack concept to a need for violence (whether in terms of means or consequences): “a cyber operation which does not result in death, injury, or physical harm cannot constitute an attack” under IHL.¹⁰⁴ On the other hand, it also suggested that “cyber operations that undermine the functioning of computer systems and infrastructure needed for the provision of services and resources to the civilian population constitute an attack” among which it included “nuclear plants, hospitals, banks, and air traffic control

⁹² See, e.g., Bolivia Response, *supra* note 19, at 3-7; *id.* at 4-7 (noting two views on whether a cyber operation alone can give rise to an armed conflict subject to IHL); Chile Response, *supra* note 19, at 3. Guyana Response, *supra* note 19, at 3; Peru Response, *supra* note 19, at 1; Koh, *supra* note 7, at 595 (U.S. view).

⁹³ Guyana Response, *supra* note 19, at 4.

⁹⁴ Chile Response, *supra* note 19, at 3.

⁹⁵ *Id.*

⁹⁶ Peru’s response is, however, a bit ambiguous, as it appears to rely on *jus ad bellum* materials to identify the standards for an IHL attack, including citing the U.S. contextual approach favored by Harold Koh. Peru Response, *supra* note 19, at 6.

⁹⁷ 2014 US GGE Submission, *supra* note 7, at 736.

⁹⁸ Egan, *supra* note 7, at 818. Egan’s speech did not mention the reversible/irreversible criterion but emphasized instead “the nature and scope of those effects, as well as the nature of the connection, if any, between cyber activity and the particular armed conflict in question.” *Id.*

⁹⁹ Guatemala Response, *supra* note 19, at 3.

¹⁰⁰ Ecuador Response, *supra* note 19, at 3.

¹⁰¹ Bolivia Response, *supra* note 19, at 4-7.

¹⁰² *Id.*

¹⁰³ Guyana, *supra* note 19, at 3.

¹⁰⁴ *Id.*

systems.”¹⁰⁵ Such responses suggest a need for further dialogue on how proximate the death or destruction must be to the loss of functionality. In other words, does the loss of functionality to an essential service alone constitute an attack or must there be some attendant (or reasonably foreseeable) death or injury to people or property?

Question 7: Is a cyber operation that only targets data governed by the international humanitarian law obligation to direct attacks only against military objectives and not against civilian objects?

46. IHL clearly requires “attacking” States to distinguish between civilian and military objects, permitting attacks on military objectives while prohibiting those against civilians and civilian objects.¹⁰⁶ When it comes to cyberspace, however, it is not always clear what constitutes an “object” to which this principle applies. The primary debate has centered on “data.” Does the non-physical nature of “data” mean it will not constitute an object so that militaries need not distinguish it and exclude it as a target in their cyber operations? Or should at least some “data” qualify as an “object” to which the principle of distinction and relevant IHL rules apply?

47. A majority of the *Tallinn Manual 2.0*’s Independent Group of Experts adopted the former view: the “armed conflict notion of ‘object’ is not to be interpreted as including data, at least in the current state of the law.”¹⁰⁷ That said, the experts did agree that a cyber operation against data could trigger IHL’s rules where it “foreseeably results in the injury or death of individuals or damage or destruction of physical objects” since the latter individuals and objects would be protected by relevant IHL rules like distinction.¹⁰⁸ The ICRC has, in contrast, suggested a more expansive definition of data via the term “essential civilian data” (e.g., medical data, biometric data, social security data, tax records, bank accounts, companies’ client files or election lists and records). It has pointed out that “[d]eleting or tampering with essential civilian data can “cause more harm to civilians than the destruction of physical objects.”¹⁰⁹ Although it recognizes that the question of whether data can constitute a civilian object remains unresolved, the ICRC has suggested that IHL should do so or otherwise face a large “protection gap” inconsistent with IHL’s object and purpose. The seventh question sought Member State views on this important issue.

48. None of the States that responded to this question took the position that civilian data is directly subject to the principle of distinction in armed conflict. Indeed, several States emphasized the principle of distinction without offering an opinion on the status of data as an object.¹¹⁰ Chile’s response suggested, however, that the principle of distinction could apply to cyber operations against data indirectly based on the knock-on effects of such operations. It cited the Commentary to API for the idea that objects must be “visible and tangible” which means that “under current international humanitarian law the aforementioned data would not qualify as objects, in principle, because they are essentially intangible, without prejudice to the physical elements containing the data—hardware, for example.”¹¹¹ At the same time, Chile emphasized that “an attack directed exclusively at computer data could well produce adverse consequences affecting the civilian population,” citing as an

¹⁰⁵ *Id.* (citing API Art. 54(2)).

¹⁰⁶ When a particular object is used for both civilian and military purposes (so-called “dual-use objects”), it becomes a military objective (except for separable parts thereof). For sources codifying this principle of “distinction” see *supra* note 81.

¹⁰⁷ *Tallinn 2.0*, *supra* note 14, at 437.

¹⁰⁸ *Id.* at 416.

¹⁰⁹ ICRC Position Paper, *supra* note 14, at 8; *accord* 2019 ICRC Report, *supra* note 14, at 21 (“Moreover, data have become an essential component of the digital domain and a cornerstone of life in many societies. However, different views exist on whether civilian data should be considered as civilian objects and therefore be protected under IHL principles and rules governing the conduct of hostilities. In the ICRC’s view, the conclusion that deleting or tampering with essential civilian data would not be prohibited by IHL in today’s ever more data-reliant world seems difficult to reconcile with the object and purpose of this body of law. Put simply, the replacement of paper files and documents with digital files in the form of data should not decrease the protection that IHL affords to them.”); 2015 ICRC Report, *supra* note 14, at 43.

¹¹⁰ See Bolivia Response, *supra* note 19, at 5-7; Ecuador Response, *supra* note 19, at 2; Guatemala Response, *supra* note 19, at 3.

¹¹¹ Chile Response, *supra* note 19, at 4.

example the possibility of a cyber operation eliminating a State's social security database.¹¹² It concluded that "[t]he principle of distinction must therefore be taken into consideration in the context of cyber operations, whereby a state should refrain from attacking data in case it could affect the civilian population, unless such data are being used for military purposes."¹¹³ Guyana's response adopted a similar lens. Noting that "the deletion, suppression, corruption of data may have far reaching consequences," it focused on the effects of the cyber operation rather than whether the data targeted qualified as an object or not.¹¹⁴

49. Peru's response did not address the potential of data to qualify as a civilian object, but focused (affirmatively) on its potential to qualify as a military objective. It characterized certain "data" (e.g., software allowing troop communications in the field, synchronization of a missile arsenal or location of enemy aircraft) as lawful "military objectives" while suggesting other data systems used in conflicts (e.g., "a data system that enabled the operating room of a field hospital treating war wounded or civilians to function") were not subject to attack.¹¹⁵

Question 8: Is sovereignty a discrete rule of international law that prohibits States from engaging in specific cyber operations? If so, does that prohibition cover cyber operations that fall below the use of force threshold and which do not otherwise violate the duty of non-intervention?

50. Sovereignty is undoubtedly the core architectural feature of the current international legal order, providing States with both rights and responsibilities.¹¹⁶ Sovereignty serves as a foundational principle for some of the international legal rules already mentioned (e.g., the prohibition on the use of force, the right of self-defense, State responsibility). Moreover, in certain contexts, sovereignty exists as more than a background principle, as an independent rule directly regulating State behavior (i.e., a foreign aircraft entering another State's airspace without permission violates its sovereignty).¹¹⁷ It is not yet clear, however, whether sovereignty operates as a rule in cyberspace. *Tallinn Manual 2.0* indicated that it constitutes a rule that operates to constrain a State's cyber operations that do not rise to the level of a use of force or constitute a prohibited intervention.¹¹⁸ In 2018, however, the U.K. Attorney General took the view that sovereignty was a principle that

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ Guyana Response, *supra* note 19, at 4 ("As it relates to data...regard should be had to whether the cyber operation that targets data has produced such a loss of functionality that it may constitute an attack").

¹¹⁵ Peru Response, *supra* note 19, at 6. Peru explained that attacks in the first case could cause significant military harm to opposing forces while an attack on the data in the field hospital would "not create a legitimate military advantage." *Id.*

¹¹⁶ *Island of Palmas (Netherlands v. United States of America)*, 2 R.I.A.A. 829, 839 (1928) ("Sovereignty in the relations between States signifies independence. Independence in regard to the portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State ... Territorial sovereignty, as has already been said, involves the exclusive right to display the activities of a State. This right has as corollary a duty: the obligation to protect within the territory the rights of other States, in particular their right to integrity and inviolability in peace and in war.").

¹¹⁷ See, e.g., Michael N. Schmitt and Liis Vihul, *Respect for Sovereignty in Cyberspace*, 95 TEXAS L. REV. 1639, 1640 (2017). In addition to Article 2(4)'s prohibition on the use of force, there is widespread agreement on a duty of non-intervention in international law that is applicable to cyberspace. See, e.g., *Case Concerning Armed Activities in the Territory of the Congo (Democratic Republic of the Congo v. Uganda)* (Jurisdiction and Admissibility) [2006] ICJ Rep. 6, [46]-[48]; *Nicaragua Case*, *supra* note 43, at ¶205; Declaration on Principles of International Law concerning Friendly Relations & Co-operation among States, UNGA Res. 2625 (XXV), U.N. Doc. A/RES/25/2625 (Oct. 23, 1970). The 2015 UN GGE endorsed it among the applicable rules of international law in cyberspace. 2015 GGE Report, *supra* note 2, ¶¶26, 28(b). And Rule 66 of *Tallinn 2.0* posits that "A State may not intervene, including by cyber means, in the internal or external affairs of another State." *Tallinn 2.0*, *supra* note 14, at 312. As with the use of force, however, questions remain about how this duty operates in cyberspace and what cyber operations it prohibits or otherwise regulates.

¹¹⁸ *Tallinn 2.0*, *supra* note 14, Rule 4 ("A State must not conduct cyber operations that violate the sovereignty of another State.").

informed other rules not a rule of international law itself.¹¹⁹ Since then, the French Ministry of Defense and the Dutch government have both expressed support for sovereignty as a stand-alone rule.¹²⁰

51. The eighth question sought to solicit Member State views on the question of sovereignty-as-principle versus sovereignty-as-rule. It was focused on the constraining function of sovereignty, *i.e.*, whether and how it limits a State’s ability to conduct cyber operations outside of its territory. Interestingly, many of the responding States took the question as an invitation to reaffirm sovereignty’s enabling function – *i.e.*, according State’s authority to regulate ICTs within their own territorial jurisdiction. Bolivia and Guyana, for example, both cited sovereignty as authorizing States to exercise jurisdiction over cyber infrastructure or activities in their territory.¹²¹ Ecuador, in contrast, cast doubt on the ability of States to exercise their sovereignty in cyberspace given its “intangible” characteristics, while affirming States do have sovereignty over “Cyber infrastructure” and activity related to that infrastructure in their territory.¹²² Chile and the United States also echoed the power sovereignty accords States over ICTs in their territory, but noted that this power must operate within limits. Both cited the need for States to exercise their sovereignty consistent with international human rights law.¹²³

52. On the question of whether sovereignty operates as a stand-alone rule in cyberspace, three States—Bolivia, Guatemala, and Guyana—affirmed its status as such.¹²⁴ Guyana, for example, indicated that sovereignty protections are “not limited to activities amounting to an unjustified use of force, to an armed attack, or to a prohibited intervention.”¹²⁵ Thus, it took the view that a State “must not conduct cyber operations that violate the sovereignty of another State” with the existence of such violations depending on “the degree of infringement and whether there has been an interference with

¹¹⁹ See, *e.g.*, U.K. View, *supra* note 8 (“Some have sought to argue for the existence of a cyber-specific rule of a ‘violation of territorial sovereignty’ ... Sovereignty is of course fundamental to the international rules-based system. But I am not persuaded that we can currently extrapolate from that general principle a specific rule or additional prohibition for cyber activity beyond that of a prohibited intervention. The UK Government’s position is therefore that there is no such rule as a matter of current international law.”).

¹²⁰ See French Ministry of Defense Views, *supra* note 11, at 6 (“Any unauthorised penetration by a State of French systems or any production of effects on French territory via a digital vector may constitute, at the least, a breach of sovereignty”); the Netherlands Views, *supra* note 12, Appendix, at 2 (“According to some countries and legal scholars, the sovereignty principle does not constitute an independently binding rule of international law that is separate from the other rules derived from it. The Netherlands does not share this view. It believes that respect for the sovereignty of other countries is an obligation in its own right, the violation of which may in turn constitute an internationally wrongful act.”). A recent scholarly treatment questions if France clearly falls in the sovereignty-as-rule camp. See Corn, *supra* note 11 (“although the MdA does state that cyberattacks, as it defines that term, against French digital systems or any effects produced on French territory by digital means may constitute a breach of sovereignty in the general sense, at no point does it assert unequivocally that a violation of the principle of sovereignty constitutes a breach of an international obligation. To the contrary, obviously aware of the debate, the document is deliberately vague on this point and simply asserts France’s right to respond to cyberattacks with the full range of options available under international law...”).

¹²¹ Bolivia Response, *supra* note 19, at 5-7; Guyana Response, *supra* note 19, at 5.

¹²² Ecuador Response, *supra* note 19, at 2.

¹²³ Chile Response, *supra* note 19, at 4-5 (recognizing sovereignty authorizes protection and defense of a State’s “critical information infrastructure” as long as those sovereignty based measures “do not violate the rule of international law – for example, those contained in international human rights law or international humanitarian law.”); 2014 US GGE Submission, *supra* note 7, at 737-8 (noting that the exercise of jurisdiction of a territorial State “is not unlimited; it must be consistent with applicable international law, including international human rights obligations” and citing, in particular freedom of expression and freedom of opinion).

¹²⁴ Bolivia Response, *supra* note 19, at 5-7; Guatemala Response, *supra* note 19, at 3; Guyana Response, *supra* note 19, at 5.

¹²⁵ Guyana Response, *supra* note 19, at 5.

government functions.”¹²⁶ Guatemala adopted a similar stance, indicating that “a State participating in a specific cyber operations violates a country’s sovereignty if, in the course of a cyber attack, it takes certain information from another State’s cyber realm, even when no harm that could affect equipment or the human rights of a person or persons is caused.”¹²⁷

53. Other State’s responses were quite equivocal. Peru simply cited sovereignty as “one of the fundamental pillars of international society” without opining on its status as an independent rule.¹²⁸ Ecuador suggested that the “rule” authorizing States to control their own cyber infrastructure “does not prevent a state from engaging in cyber operations” without offering an opinion on whether it might regulate how they do so vis-à-vis other sovereign States.¹²⁹

54. Chile’s response described sovereignty as a “principle” that “States carrying out cyber operations must always take ... into account.”¹³⁰ Thus, “every time a state considers carrying out a cyber-operation, it must consider ensuring it does not affect the sovereignty of another.”¹³¹ The use of “principle” may suggest something other than a concrete rule, although the use of “must” creates more obligatory expectation. Moreover, Chile did suggest that:

every state has an obligation to respect the territorial integrity and independence of other states and must faithfully discharge its international obligations, including as regards the principle of nonintervention. Cyber operations that hinder another state from exercising its sovereignty therefore constitute a violation of that sovereignty and are prohibited under international law.¹³²

The last sentence suggests sovereignty might constitute a stand-alone rule unless one reads the reference to intervention with another State’s exercise of sovereignty as equivalent to the *domaine réservé* protected by the duty of non-intervention.¹³³

55. The U.S. position is murkier. In 2014, then-legal adviser Harold Koh indicated that “State sovereignty ... must be taken into account in the conduct of activities in cyberspace, including outside of the context of armed conflict.”¹³⁴ It’s not clear, however, whether taking “State sovereignty ... into account” signals U.S. recognition of sovereignty as a standalone rule. In his own speech in 2016, then-Legal Adviser Brian Egan made clear that “remote cyber operations involving computers or other networked devices located on another State’s territory do not constitute a per se violation of international law.”¹³⁵ At the same time, he conceded that “[i]n certain circumstances, one State’s non-consensual cyber operation in another State’s territory could violate international law, even if it falls below the threshold for the use of force.” In any case, Egan indicated that “[p]recisely when a non-consensual cyber-operation violates the sovereignty of another State is a question lawyers within the U.S. government continue to study carefully, and it is one that ultimately will be resolved through the practice and opinio juris.”¹³⁶ Most recentl recently, however, the General Counsel for the U.S. Department of Defense indicated that “[f]or cyber operations that would not constitute a prohibited intervention or use-of-force [i.e., those that might be covered by a rule of sovereignty], the Department believes there is not sufficiently widespread and consistent State practice resulting from a sense of legal obligation to conclude that customary international law generally prohibits such non-

¹²⁶ *Id.*

¹²⁷ Guatemala Response, *supra* note 19, at 3.

¹²⁸ Peru Response, *supra* note 19, at 6-7.

¹²⁹ Ecuador Response, *supra* note 19, at 2.

¹³⁰ Chile Response, *supra* note 19, at 5.

¹³¹ *Id.*

¹³² *Id.*

¹³³ See note 117.

¹³⁴ Koh, *supra* note 7, at 596; Accord 2014 US GGE Submission, *supra* note 7, at 737; 2016 US GGE Submission, *supra* note 7, at 825.

¹³⁵ Egan, *supra* note 7, at 818. Among other things, Egan indicated that the United States does engage in intelligence collection activities overseas and that such activities may violate the domestic laws of other States, but that there is no “per se prohibition on such activities under customary international law.” *Id.*

¹³⁶ *Id.* at 819.

consensual cyber operations in another State's territory."¹³⁷ It is unclear, however, how widely shared this view is across the U.S. government as a whole.

Question 9: Does due diligence qualify as a rule of international law that States must follow in exercising sovereignty over the information and communication technologies in their territory or under the control of their nationals?

56. Due diligence is a principle of international law that requires a State to respond to activities that it knows (or reasonably should know) have originated in its territory or other areas under its control and that violate the right(s) of another State.¹³⁸ It is an obligation of effort, not result – where a State knows or should know of the conduct, it must employ “all means reasonably available” to redress it.¹³⁹ As a principle, due diligence currently regulates State behavior in a number of contexts, most notably international environmental law, where it is the basis for requiring States to stop pollution in their territory that serves as a source for transboundary harm to other States' territories.

57. Like sovereignty, there are competing views on whether due diligence is a requirement of international law in cyberspace. The 2015 UN GGE report listed it among the “voluntary” norms of responsible State behavior rather than listing it under applicable international law principles.¹⁴⁰ Several States, including France and the Netherlands, have characterized it as a legal rule in cyberspace.¹⁴¹ In doing so, however, the Netherlands noted that “not all countries agree that the due diligence principle constitutes an obligation in its own right under international law” and the United States is widely thought to be among those contesting its status as such.¹⁴² The ninth question thus sought to obtain Member State views on the status of due diligence with respect to a State's obligations under international law in cyberspace.

58. Chile, Ecuador, Guatemala, Guyana, and Peru all took the position that the due diligence principle is a part of the international law that States must apply in cyberspace.¹⁴³ As Chile explained, “[f]rom a cyber-operations standpoint, a state must exercise due diligence to prevent its sovereign territory, including the cyber infrastructure under its control, from being used to carry out

¹³⁷ See Paul C. Ney, “DOD General Counsel Remarks at U.S. Cyber Command Legal Conference, March 2, 2020, at <https://www.defense.gov/Newsroom/Speeches/Speech/Article/2099378/dod-general-counsel-remarks-at-us-cyber-command-legal-conference/>.

¹³⁸ See, e.g., *Corfu Channel Case; Assessment of Compensation (United Kingdom v. Albania)* [1949] ICJ Rep. ¶22 (April 9). *Trail Smelter Case (United States-Canada)*, UNRIIAA, vol. III, 1905 (1938, 1941).

¹³⁹ See *Application of the Convention on the Protection and Punishment of the Crime of Genocide (Bosnia v. Serbia)* (Judgment) [2007] ICJ Rep. 1, ¶430.

¹⁴⁰ 2015 UNGGE, *supra* note 2, ¶¶13, 26-28.

¹⁴¹ French Ministry of Defense Views, *supra* note 11, at 10 (“Under the due diligence obligation, States should ensure that their sovereign domain in cyberspace is not used to commit internationally unlawful acts. A State's failure to comply with this obligation is not a ground for an exception to the prohibition of the use of force, contrary to the opinion of the majority of the Tallinn Manual Group of Experts.”); The Netherlands Views, *supra* note 12, Appendix, at 4 (“the due diligence principle requires that states take action in respect of cyber activities: - carried out by persons in their territory or where use is made of items or networks that are in their territory or which they otherwise control; - that violate a right of another state; and - whose existence they are, or should be, aware of”). Although it did not describe due diligence as a specific rule of international law, Estonia has catalogued its contents as a requirement for State behaviour. Estonia Views, *supra* note 10 (“states have to make reasonable efforts to ensure that their territory is not used to adversely affect the rights of other states. They should strive to develop means to offer support when requested by the injured state in order to identify, attribute or investigate malicious cyber operations. This expectation depends on national capacity as well as availability, and accessibility of information.”).

¹⁴² The Netherlands Views, *supra* note 12, Appendix, at 4.

¹⁴³ Chile Response, *supra* note 19, at 6-7; Ecuador Response, *supra* note 19, at 2; Guatemala Response, *supra* note 19, at 4; Guyana Response, *supra* note 19, at 5; Peru Response, *supra* note 19, at 7.

cyber operations that affect another state's rights or could have adverse consequences for them."¹⁴⁴ Guatemala adopted a similar stance, while noting that since "cyberspace" is such a broad term, performing due diligence can be extremely complicated.¹⁴⁵ Still, to the extent due diligence "derives from the principle of sovereignty," Guatemala opined that "each State should exert the control necessary to halt all harmful activities within its territory and be obliged to take preventive measures, establish a CERT, adopt information security policies, and raise awareness about information security."¹⁴⁶

59. Bolivia offered a more equivocal response. Without opining one way or another on the legal status of due diligence, it did opine that a State may not be held responsible for a cyber-attack when it lacks technological infrastructure to control a non-State actor.¹⁴⁷ This view could be consistent with having due diligence as an international legal rule for cyber operations as due diligence generally has required States to "know" about the activities in question, which may not be possible for States lacking the requisite technical infrastructure.¹⁴⁸ On the other hand, the inability to "control" cyber activities of which it has knowledge might suggest Bolivia does not accede to the due diligence doctrine in cyberspace. Without further clarification of Bolivia's response, it is difficult to reach a conclusion one way or another.

60. Similarly, prior public U.S. statements have not addressed the international legal status of due diligence directly. It is notable, however, that the United States has tended to describe any obligations to respond to requests for assistance in non-binding terms.¹⁴⁹ The lack of any public U.S. endorsement of due diligence as a legal rule in either the GGE context or elsewhere may be indicative of U.S. doubts as to its legal status.

Question 10: Are there other rules of international law that your government believes are important to highlight in assessing the regulation of cyber operations by States or actors for which a State is internationally responsible?

61. The final, tenth, question invited States to identify additional areas of international law on which the Committee should focus improving transparency in the cyber context. Responses focused on different issues. Bolivia called for more attention to protecting people's "fundamental rights" wherever they operate, including in cyberspace.¹⁵⁰ Several other responses focused on cybercrime, particularly the Council of Europe's Budapest Convention.¹⁵¹ Others emphasized the contributions of the *Tallinn Manuals*.¹⁵²

62. Two States – Ecuador and Guyana indicated that there may be a need for new international law in the cyber context. Ecuador emphasized establishing how "to regulate attacks against military and/or civilian targets that affect the huge sections of the population, such as the case of critical infrastructure, hospitals, public transportation, and other infrastructure affecting state security."¹⁵³ Guyana suggested that "it might be prudent to have a set of international law principles

¹⁴⁴ Chile Response, *supra* note 19, at 6-7. Ecuador simply stated: "due diligence is applicable to what happens with technological resources within national territory." Ecuador Response, *supra* note 19, at 2.

¹⁴⁵ Guatemala Response, *supra* note 19, at 4.

¹⁴⁶ *Id.* at 2, 4.

¹⁴⁷ Bolivia Response, *supra* note 19, at 3-7.

¹⁴⁸ See *Tallinn 2.0*, *supra* note 14, at 40.

¹⁴⁹ 2014 US GGE Submission, *supra* note 7, at 739 ("A State *should* cooperate, in a manner consistent with domestic law and International obligations, with requests for assistance from other States in investigating cybercrimes, collecting electronic evidence, and mitigating malicious cyber activity from its territory.").

¹⁵⁰ Bolivia Response, *supra* note 19, at 6-7.

¹⁵¹ Guatemala Response, *supra* note 19, at 4; Bolivia Response, *supra* note 19, at 6-7.

¹⁵² Costa Rica Response, *supra* note 19, at 2 (emphasizing Costa Rican interest in joining the Budapest Convention); Guatemala Response, *supra* note 19, at 4 (citing the Budapest Convention).

¹⁵³ Ecuador Response, *supra* note 19, at 3.

that are tailored to the special nature of cyberspace,” noting that existing legal principles were developed for a different time and context.¹⁵⁴

* * *

63. With the Committee’s approval, I would propose publication of my report (and the responses) so that States, both inside the region and across the globe may benefit from the positions and views expressed herein. It would also be an opportunity to seek additional views from States that have yet to respond to the questionnaire.

64. As always, I would also welcome the Committee’s views and reactions to the responses received to date and whether it would be worthwhile to seek additional responses. I would further welcome Committee feedback on how we might address the uneven technical and legal capacities this project has identified.

65. Finally, I would value Committee input on the next steps, if any, for this project. On the one hand, I could simply receive feedback from Member States on this report and revise it as necessary prior to its final approval. Alternatively, I could attempt in my next report to expand the analysis, whether by adding in additional Member State responses, or (if none of those are forthcoming), comparing Member State views with the views of States outside the region. Increasingly, there is greater evidence of State views than in the past and it could be useful to compare those views to the responses surveyed here. Or, should the project retain its original focus and attend only to the transparency of OAS Member States on questions of international law’s application to cyber operations?

* * *

¹⁵⁴ Guyana Response, *supra* note 19, at 5-6 (emphasizing anonymity as a particular challenge to applying existing law).

**IMPROVING TRANSPARENCY. INTERNATIONAL LAW AND STATE CYBER
OPERATIONS: FIFTH REPORT**

(presented by professor Duncan B. Hollis)

1. This is my fifth—and final—report on the topic of improving transparency with respect to how Member States understand the application of international law to State cyber operations. This project aims to contribute to a broader trend in international relations seeking more transparency on how nation States understand international law’s application to cyberspace. In doing so it aims to accomplish four goals:

a. to identify areas of convergence in how States understand what international legal rules apply and how they do so. When combined with existing statements from States outside the region, a uniformity of views may provide further evidence for delineating the relevant customary international law rules;

b. to identify divergent views on what international laws apply or how they do so. This may help set a baseline for further dialogue, whether to reconcile conflicting positions, clarify the law’s contents, or, perhaps even, pursue changes to it;

c. to limit risks of inadvertent escalation or conflict due to States having different understandings of international law’s application *and* not knowing or understanding how others view the issue; and

d. to afford the OAS and its Member States an appropriate voice in global conversations about international law’s application.

At the same time, it is important to reiterate what this project is *not* designed to do. It does not aim to codify or progressively develop international law (nor even to identify best practices or general guidance). Nor does it aim to offer a comprehensive or overarching perspective on international legal issues in the cyber context.

2. Rather, this project is intended—and should be read—as a modest, first step. The Juridical Committee (and the OAS more broadly) may use the materials provided here to evaluate what, if any, further activities might be pursued to add more transparency to how international law applies to States in the region, their cyber-operations, and their reactions to cyber threats by others. The Committee might also consider ramping up existing capacity building efforts to improve the knowledge and experience of relevant officials on the questions of international law’s application to cyberspace. This may involve gathering (and publicizing) additional national views and/or establishing platforms or other processes for information sharing and dialogue on international law’s relationship to cyberspace and the information and communication technologies (ICTs) from which it derives.

3. My first report highlighted international law’s limited visibility in regulating State cyber operations despite the increasing number of such operations and their economic, humanitarian, and national security implications.¹ It is true that many States have confirmed the applicability of international law to their behavior in cyberspace.² And, although the OAS has not, other international organizations—ASEAN, the European Union, and the United Nations—have

¹ See Duncan B. Hollis, *International Law and State Cyber Operations: Improving Transparency*, OEA/Ser.Q, CJI/doc. 570/18 (August 9, 2018) (“Hollis, First Report”), at http://www.oas.org/en/sla/iajc/docs/CJI_doc_570-18.pdf.

² See U.N. Secretary-General, *Report of the Group of Governmental Experts on Developments in the Field of Information and Telecommunications in the Context of International Security*, ¶19, U.N. Doc. A/68/98 (June 24, 2013) (“[i]nternational law, and in particular the Charter of the United Nations, is applicable” to cyberspace); see also U.N. Secretary-General, *Report of the Group of Governmental Experts on Developments in the Field of Information and Telecommunications in the Context of International Security*, ¶24, U.N. Doc. A/70/174 (July 22, 2015).

done so as well.³ To date, however, efforts to delineate *how* States understand international law’s application to cyberspace have had limited success.

4. Part of the problem in applying international law to cyberspace derives from the lack of tailor-made rules or standards. When it comes to international peace and security, for example, there are no cyber-specific treaties. And those conventions that deal with cybercrime – the Budapest Convention and (if it ever enters into force) the African Union Convention – only target, by definition, non-State actor behavior with support from a minority of nation States.⁴ Thus, international law’s application to cyberspace depends on analogizing to more general multilateral treaties (e.g., the U.N. Charter) or customary international law.

5. However, as my second report highlighted, at the global level there is no universal consensus among States on what existing general international laws apply to cyber operations, let alone how they do so.⁵ For various international legal regimes (e.g., self-defense, international humanitarian law, countermeasures, sovereignty (as a standalone rule), and due diligence) one or more States contest their application *in toto* to cyberspace, while others differ (sometimes dramatically) on how they interpret the application of those rules to State and state-sponsored cyber operations.

6. States appear just as reluctant to invoke the language of international law in making accusations about other State’s cyber operations.⁶ In one notable exception, in 2018 five states (Australia, Canada, the Netherlands, New Zealand, and the United Kingdom) accused the GRU—Russia’s military intelligence arm—of responsibility for a series of cyber operations, including those targeting the Organization for the Prohibition of Chemical Weapons (OPCW) and the World Anti-Doping Agency (WADA). The U.K. Foreign Secretary suggested that Russia had a “*desire to operate without regard to international law or established norms*” while the Netherlands suggested, more broadly, that these Russian activities “undermine the international rule of law.”⁷

³ See UNGA Res. 266, U.N. Doc. A/RES/73/266 (Jan. 2, 2019); ASEAN-United States Leaders’ Statement on Cybersecurity Cooperation (Nov. 18, 2018), at

<https://asean.org/storage/2018/11/ASEAN-US-Leaders-Statement-on-Cybersecurity-Cooperation-Final.pdf>; EU Statement – United Nations 1st Committee, Thematic Discussion on Other Disarmament Measures and International Security (Oct. 26, 2018) (“EU Statement”), at https://eeas.europa.eu/delegations/un-new-york/52894/eu-statement-%E2%80%93-united-nations-1st-committee-thematic-discussion-other-disarmament-measures-and_en. Both the G7 and G20 have made similar affirmations. See, e.g., G7 Declaration on Responsible States Behavior in Cyberspace (April 11, 2017) at <https://www.mofa.go.jp/files/000246367.pdf>; G20 Antalya Summit Leader’s Communique (Nov. 15-16, 2015) ¶26, at <http://www.gpfi.org/sites/gpfi/files/documents/G20-Antalya-Leaders-Summit-Communiq--.pdf>.

⁴ Council of Europe, Convention on Cybercrime (Budapest, 23 Nov 2001) CETS No 185; AU Convention on Cyber Security & Personal Data Protection, June 27, 2014, AU Doc. EX.CL/846(XXV). The Budapest Convention now has 65 parties, although several other States view it with some hostility. See Convention on Cybercrime, at <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=185&CL=ENG>.

⁵ Duncan B. Hollis, *International Law and State Cyber Operations: Improving Transparency*, OEA/Ser.Q, CJI/doc 578/19 (Jan. 21, 2019) (“Hollis, Second Report”), at http://www.oas.org/en/sla/iajc/docs/CJI_doc_578-19.pdf.

⁶ See Dan Efrony and Yuval Shany, *A Rule Book on the Shelf? Tallinn Manual 2.0 on Cyber-Operations and Subsequent State Practice*, 112 AJIL 583, 586 (2018); Duncan B. Hollis & Martha Finnemore, *Beyond Naming and Shaming: Accusations and International Law in Global Cybersecurity*, 33 EURO. J. INT’L L. (forthcoming 2020).

⁷ Press Release, Foreign Commonwealth Office, *UK exposes Russian cyber-attacks* (Oct. 4, 2018), at <https://www.gov.uk/government/news/uk-exposes-russian-cyber-attacks>; National Cyber Security Centre (NCSC), *Reckless campaign of cyber attacks by Russian military intelligence service exposed* (Oct. 4, 2018), at <https://www.ncsc.gov.uk/news/reckless-campaign-cyber-attacks-russian-military-intelligence-service-exposed>; Netherlands Ministry of Defense, *Netherlands Defence Intelligence and Security Service disrupts Russian cyber operation targeting OPCW* (Oct. 4, 2018), at <https://english.defensie.nl/latest/news/2018/10/04/netherlands-defence-intelligence-and-security-service-disrupts-russian-cyber-operation-targeting-opcw>. Canada’s accusation incorporated both formulations. Press Release, Global Affairs Canada, *Canada identifies*

Unfortunately, these accusations did not delineate whether all of the GRU's alleged operations violated international law or if only some did; nor did they elaborate which international laws the accusers believed were violated. Most cases, however, are like the recent Canadian, U.S. and U.K. accusations that the GRU has targeted COVID-19 vaccine research – there is no mention of international law whatsoever.⁸

7. In recent years, a number of States have begun to offer *some* elaborations on how they understand international law applies in cyberspace. Beginning in 2012, the United States began to offer its views in a series of official speeches and statements.⁹ In 2018, the United Kingdom's Attorney General made an important statement of U.K. views.¹⁰ In the ensuing years, other (mostly European) States have begun to offer their own detailed perspectives, including Australia,¹¹ Estonia,¹² France,¹³ Germany,¹⁴ and the Netherlands.¹⁵ Although a welcome

malicious cyber-activity by Russia (Oct. 4, 2018) at <https://www.canada.ca/en/global-affairs/news/2018/10/canada-identifies-malicious-cyber-activity-by-russia.html> (Russian activity demonstrates “a disregard for international law and undermine[s] the rules-based international order.”). In contrast, Australia and New Zealand accused Russia of “malicious cyber activity” without referencing international law at all. *See, e.g.*, Press Release, New Zealand Government Communications Security Bureau, *Malicious cyber activity attributed to Russia* (October 4, 2018), at <https://www.gcsb.govt.nz/news/malicious-cyber-activity-attributed-to-russia/>; Media Release, Prime Minister of Australia, *Attribution of a Pattern of Malicious Cyber Activity to Russia* (Oct. 4, 2018), at <https://www.pm.gov.au/media/attribution-pattern-malicious-cyber-activity-russia>.

⁸ *See, e.g.*, NCSC (United Kingdom), *Press Release: UK and allies expose Russian attacks on coronavirus vaccine development* (16 July 2020), at <https://www.ncsc.gov.uk/news/uk-and-allies-expose-russian-attacks-on-coronavirus-vaccine-development>; Communication Security Establishment (Canada), *Statement on Threat Activity Targeting COVID-19 Vaccine Development* (16 July 2020), at <https://cse-cst.gc.ca/en/media/2020-07-16>; National Security Agency Central Security Service (United States), *NSA Teams with NCSC, CSE, DHS CISA to Expose Russian Intelligence Services Targeting COVID-19 Researchers* (16 July 2020), at <https://www.nsa.gov/news-features/press-room/Article/2275378/nsa-teams-with-ncsc-cse-dhs-cisa-to-expose-russian-intelligence-services-target/>.

⁹ *See, e.g.*, Brian Egan, *Remarks on International Law and Stability in Cyberspace* (Nov. 10, 2016), in DIGEST OF U.S. PRACTICE IN INT'L LAW 815 (2016); *U.S. Submission to Group of Governmental Experts on Developments in the Field of Information and Telecommunications in the Context of International Security* (Oct. 2016), in DIGEST OF U.S. PRACTICE IN INT'L LAW 823 (2016) (“2016 US GGE Submission”); *U.S. Submission to Group of Governmental Experts on Developments in the Field of Information and Telecommunications in the Context of International Security* (Oct. 2014), in DIGEST OF U.S. PRACTICE IN INT'L LAW 732 (2014) (“2014 US GGE Submission”); Harold Koh, *International Law in Cyberspace* (Sept. 18, 2012), in DIGEST OF U.S. PRACTICE IN INT'L LAW 593 (2012). In 2020, the General Counsel of the U.S. Department of Defense offered views on several key questions of international law's application to cyberspace. It is not yet clear, however, whether his views reflect those of the whole United States or only the U.S. Department of Defense. *See* Paul C. Ney, *DOD General Counsel Remarks at U.S. Cyber Command Legal Conference* (March 2, 2020), at <https://www.defense.gov/Newsroom/Speeches/Speech/Article/2099378/dod-general-counsel-remarks-at-us-cyber-command-legal-conference/>;

¹⁰ Jeremy Wright, QC, MP, *Cyber and International Law in the 21st Century* (May 23, 2018), at <https://www.gov.uk/government/speeches/cyber-and-international-law-in-the-21st-century> (“U.K. Views”).

¹¹ Australian Mission to the United Nations, *Australian Paper—Open Ended Working Group on Developments in the Field of Information and Telecommunications in the Context of International Security* (Sept. 2019), at <https://s3.amazonaws.com/unoda-web/wp-content/uploads/2019/09/fin-australian-oewg-national-paper-Sept-2019.pdf> (“Australian Views”); Commonwealth of Australia, Department of Foreign Affairs and Trade, *Annex A: Australia's position on how international law applies to State conduct in cyberspace*, in AUSTRALIA'S INT'L CYBER ENGAGEMENT STRATEGY (2017) at https://www.dfat.gov.au/sites/default/files/DFAT%20AICES_AccPDF.pdf.

development, the number and specificity of these statements has not (yet) been sufficient to rely on them as evidence of general state practice or *opinio juris*.¹⁶

8. Several non-State actors have sought to fill in this information deficit by offering their own views on how customary international law regulates State cyber operations. The two most prominent sets of voices are undoubtedly those of the International Committee of the Red Cross (ICRC) and the Independent Group of Experts who authored the *Tallinn Manuals*.¹⁷ It is clear, however, that not all States regard their contents as reflecting international law.¹⁸

9. Last year, the U.N. General Assembly tasked a new U.N. Group of Governmental Experts (“GGE”) to invite national views on international law.¹⁹ In addition, to the new GGE, there is also a U.N.-sponsored Open Ended Working Group on Developments in the Field of Information and Telecommunications in the context of International Security (“OEWG”) that has afforded participants an opportunity to make statements, some of which reference international law.²⁰ The GGE, however, only has four OAS Member States participating (Brazil, Mexico, the

¹² Kersti Kaljulaid, President of Estonia, *President of the Republic at the opening of CyCon 2019* (May 29, 2019), at <https://www.president.ee/en/official-duties/speeches/15241-president-of-the-republic-at-the-opening-of-cycon-2019/index.html> (“Estonian Views”).

¹³ Ministère des Armées, *Droit international appliqué aux opérations dans le cyberspace* (Sept. 9, 2019), https://www.defense.gouv.fr/salle-de-presse/communiqués/communiqués-du-ministère-des-armées/communiqué_la-france-s-engage-a-promouvoir-un-cyberspace-stable-fonde-sur-la-confiance-et-le-respect-du-droit-international (“French Ministry of Defense Views”). I have not labeled these as “French views” as at least one scholar has pointed out that the document is authored by the French Ministry of Defense and its contents may not be attributable to the French State as a whole. See Gary Corn, *Punching on the Edges of the Gray Zone: Iranian Cyber Threats and State Cyber Responses*, JUST SECURITY (Feb. 11, 2020) (“it should be noted that despite numerous assertions to the contrary, the French document does not claim to be the official position of the French government. It was written and published by the French Ministère des Armées (MdA), in the same vain as the DoD Law of War Manual which does not necessarily reflect the views of the U.S. Government as a whole.”).

¹⁴ Speech by Amb. Norbert Riedel, Commissioner for Int’l Cyber Policy, Federal Foreign Office of Germany (May 18, 2015), at <https://www.auswaertiges-amt.de/en/newsroom/news/150518-ca-b-chatham-house/271832>.

¹⁵ *Letter to the parliament on the international legal order in cyberspace*, July 5, 2019, Appendix 1, at <https://www.government.nl/ministries/ministry-of-foreign-affairs/documents/parliamentary-documents/2019/09/26/letter-to-the-parliament-on-the-international-legal-order-in-cyberspace> (“The Netherlands Views”).

¹⁶ See, e.g., Egan, *supra* note 7, at 817.

¹⁷ See, e.g., ICRC, *Position Paper on International Humanitarian Law and Cyber Operations during Armed Conflicts* (Nov. 2019); MICHAEL N. SCHMITT (ED.), *TALLINN MANUAL 2.0 ON THE INTERNATIONAL LAW APPLICABLE TO CYBER OPERATIONS* (2017) (“*Tallinn 2.0*”); see also ICRC, *Report on International Humanitarian Law and the Challenges of Contemporary Armed Conflict* (Nov. 2019); ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, (Oct. 2015) 39-44.

¹⁸ Egan, *supra* note 7, at 817 (“Interpretations or applications of international law proposed by non-governmental groups may not reflect the practice or legal views of many or most States. States’ relative silence could lead to unpredictability in the cyber realm, where States may be left guessing about each other’s views on the applicable legal framework. In the context of a specific cyber incident, this uncertainty could give rise to misperceptions and miscalculations by States, potentially leading to escalation and, in the worst case, conflict.”).

¹⁹ See UNGA Res. 266, *supra* note 3, ¶3 (on the GGE’s mandate).

²⁰ See U.N. Doc. A/RES/73/27, ¶5 (Dec. 5, 2018). A number of (still mostly European) States have used their comments on draft OEWG reports to elaborate views on how international law applies to cyberspace. See, e.g., Austria, *Comments on Pre-Draft Report of the OEWG - ICT* (March 31, 2020); Ministry of Foreign Affairs of the Czech Republic, *Comments submitted by the Czech Republic in reaction to the initial “pre-draft” report of the Open-Ended Working Group on developments in the field of information and telecommunications in the context of international*

United States and Uruguay). In contrast, the OEWG is open to all OAS Member States. But most contributions there relating to international law have remained highly generalized. And, like the GGE, the OEWG focuses exclusively on international security issues, cabinating State views on international law's application accordingly.

10. Thus, there is a need for additional fora where Member States can be encouraged—and afforded opportunities—to express their own views on the application of international law. This project marks a first (and somewhat cautious) attempt to meet that need in the region. It is not designed to substitute for—or compete with—the ongoing U.N. processes. Rather, it aims to supplement those efforts by allowing all the voices in this region to participate and explore the full panoply of international law's application to State behavior in cyberspace. In this sense, the Committee's work aligns with the European Union's call that *all* U.N. Member States “should submit national contributions on the subject of how international law applies to the use of [information and communication technologies] by States.”²¹

11. The current project has sought to meet the need for greater regional transparency through two different methods: (i) a questionnaire prepared in concert with the OAS Department of International Law (with input from the ICRC) and first circulated to Member States in February 2019; and (ii) an informal discussion with legal representatives of Member States under “Chatham House” rules (i.e., statements made during the meeting can be repeated but the identities of speakers and other participants remain confidential). A copy of the questionnaire is included at Annex A to this report.

12. My third report provided an update on the questionnaire's contents and asked for an extension to the response deadline, an extension with which the Committee concurred.²² My fourth report surveyed the responses received from nine States: Bolivia, Brazil, Chile, Costa Rica, Ecuador, Guatemala, Guyana, Peru, and the United States.²³ Of these, seven were substantive, while the United States directed the Committee to its prior public statements.²⁴ Brazil highlighted its pending work in the GGE (which its Ambassador chairs) as the forum where it would address issues of international law's application.²⁵ All seven substantive responses are enclosed with this report at Annex B.

13. In addition to surveying the questionnaire responses, my fourth report cataloged additional informal conversations about it in concert with consultations held by the OAS

security. These, and all other submissions to the OEWG, can be viewed at <https://www.un.org/disarmament/open-ended-working-group/>.

²¹ EU Statement, *supra* note 3.

²² See Duncan B. Hollis, *International Law and State Cyber Operations: Improving Transparency: Third Report*, OEA/Ser.Q, CJI/doc 594/19 (July 24, 2019) (“Hollis, Third Report”), at http://www.oas.org/en/sla/iajc/docs/CJI_doc_594-19.pdf.

²³ See Note from the Plurilateral State of Bolivia, Ministry of Foreign Affairs, *OAS Permanent Mission to the OAS Inter-American Juridical Committee*, MPB-OEA-NV104-19 (July 17, 2019) (containing responses to IAJC Questionnaire from Bolivia's Office of the Commander-in-Chief of the State Inspector General of the Armed Forces) (“Bolivia Response”); *Response submitted by Chile to the OAS Inter-American Juridical Committee Questionnaire* (Jan. 14, 2020) (“Chile Response”); *Communication from Carole Arce Echeverria, Costa Rica, International Organizations, Department of Foreign Policy, Minister of Foreign Affairs and Worship to OAS* (April 3, 2019) (including letter no. 163-OCRI2019 from Yonathan Alfaro Aguero, Office of International Cooperation and Relations to Carole Arce Echeverria, which includes a reply from the “relevant authority”—the Costa Rica Criminal Court of Appeals) (“Costa Rica Response”); *Verbal Note 4-2 186/2019 from the Permanent Mission of Ecuador to the OAS* (June 28, 2019) (“Ecuador Response”); Note Of. 4VM.200-2019/GJL/lr/bm, from Mr. Gabriel Juárez Lucas, Fourth Vice Minister of the Interior Ministry of the Republic of Guatemala to Luis Toro Utillano, Technical Secretariat, Inter-American Juridical Committee (June 14, 2019) (“Guatemala Response”); *Note No: 105/2019 from the Permanent Mission of Guyana to the OAS* (July 30, 2019) (“Guyana Response”); *Response Submitted by Peru to the Questionnaire on the Application of International Law in OAS Member States in the Cyber Context* (June 2019) (“Peru Response”).

²⁴ See note 7.

²⁵ Response by Brazil to CJI OEA Note 2.2/14/19 (July 1, 2019).

Secretariat of the Inter-American Committee against Terrorism (CICTE) with the U.N. Office for Disarmament Affairs on August 15-16, 2019, and the informal inter-sessional meeting of the OEWG. I also highlighted three larger conclusions about the state of transparency in the region with respect to international law in cyberspace:

- First, that all of the responding Member States have an abiding interest in the rule of law, including the role international law can play in regulating State behavior in cyberspace.
- Second, the responses reveal the unevenness of State's *legal* capacities in this area. Some States evinced deep knowledge of cyber operations and the novel international legal issues they raise while others demonstrated much less familiarity with the underlying international legal rules and the particular questions their applications generate in the cyber context. This suggests a need for more international legal capacity building beyond the excellent work done to date by CICTE and several Member States.²⁶
- Third, the low response rate to the Committee's questionnaire suggests that States remain reluctant to be transparent in their views on international law's application even when afforded new opportunities to do so. This suggests a need to encourage greater State responses or to seek their inputs in less formal ways.

14. With the Committee's approval, the deadline for responding to the Questionnaire was extended to June 1, 2020. Unfortunately, no additional responses were received. That said, a number of Member States did make relevant statements in their written comments to the OEWG's draft reports on international security.²⁷

15. With the assistance of the OAS Department of International Law, we initiated a second vehicle for bringing a greater range of State views on international law and cyberspace into the public sphere – a Chatham House style conversation on the topic. On June 23, 2020, the Department of International Law hosted—and I moderated—a nearly three-hour discussion that included legal representatives from 16 Member States and the ICRC. The in-depth conversation affirmed several of my fourth report's conclusions, especially the need for greater legal capacity building. It also highlighted several explanations for Member State reluctance to go on record with respect to international law's application to cyberspace.

16. In this report, I do three things. First, I am updating and revising the survey of State responses to the Committee Questionnaire in light of the June 23 meeting as well as relevant Member State statements in the OEWG process. This revised survey is appended at Annex B to this Report.

17. Second, based on the June 23 consultations, I want to highlight three sets of challenges – technical, political and legal – to achieving greater transparency from Member States on international law's application to cyberspace. Technically, the so-called “attribution problem” complicates Member States' ability to talk about international law's application publicly. States may know that they have been a victim of a cyber attack but be unable to discern whether its author was a State (or a proxy for which a State could be held legally responsible). Without the capacity technically (or otherwise) to attribute a cyber operation to a foreign State, States cannot invoke international law since that law only applies if the perpetrator was a State or an actor for whom a State might be held legally responsible. Similarly, where actors operate anonymously, it is difficult to identify the requisite State practice (let alone *opinio juris*) since the behavior is not attributable to a State.

²⁶ For more on CICTE's activities, see <http://www.oas.org/en/sms/cicte/prog-cybersecurity.asp>. Beyond CICTE, several Member States have also supported legal capacity building. Canada and Mexico, for example, co-hosted a workshop with the OAS on May 30, 2019 that targeted OAS countries for a discussion of international law's application to cyberspace.

²⁷ See, e.g., *Second “Pre-draft” of the report of the OEWG on developments in the field of information and telecommunications in the context of international security* (May 27, 2020), at <https://front.un-arm.org/wp-content/uploads/2020/05/200527-oewg-ict-revised-pre-draft.pdf>. The texts of the various national statements are available at <https://www.un.org/disarmament/open-ended-working-group/>.

18. Politically, some of the transparency problems are internal to Member States – several legal representatives reported a continuing need to better organize responsibility for dealing with cyber-related issues (their domestic legal and policy frameworks have yet to catch up to the current reality). Although a number of States have been dealing with cybersecurity issues for some time, for other Member States these issues are still relatively new and novel. As such, several Member States reported a lack of governmental expertise (or resources) on cyber-related issues.

19. In other cases, there are institutional issues; the expertise exists, but is distributed in ways that make it difficult to coalesce into a formal State view that can be expressed publicly. Several foreign ministry representatives emphasized in particular the need for further internal dialogue to ensure that foreign ministries take the leading role in cyber diplomacy discussions, including those relevant to international law's application. At the same time, the desire by certain States to retain freedom to engage in cyber operations has led to a reluctance to take positions on what operations international law might prohibit or restrict lest that limit their future freedom to maneuver or react.

20. Other participants in the June 23 consultations identified external political challenges to greater transparency. It is clear that certain States (e.g., the United States, Russia, China) currently have extensive capacities to conduct and defend against cyber operations, capacities that have led them to stake out discrete—and often conflicting—views on international law's regulatory role. Some Member States indicated a reluctance to make similar signals lest they embroil that State in the competition and conflict among these actors; issues States can avoid by staying silent. For other participants, transparency should only occur gradually, over time, once Member States have had more opportunity for careful diplomatic dialogue and discussion.

21. At the same time, many of the June 23 participants acknowledged that some of the reasons for State silence were legal as much as they were political – several Member States continue to lack sufficient expertise on how international law may manifest itself in the cyber context to formulate a view on some of the more current, pressing questions (and if a State is unable to formulate an informed view, it has nothing to be transparent about).²⁸ One participant put it succinctly: “we are not quite there yet” in terms of being ready to apply international law to the cyber context.

22. Third, given the results of the questionnaire and the June 23 discussion, I would make three concrete proposals for consideration by the Committee specifically and the OAS and its Member States more broadly.

Proposal 1: The Committee Should Recommend that the OAS General Assembly endorse the applicability of international law to State and State-sponsored cyber operations

23. As noted, the U.N. General Assembly and several regional organizations (ASEAN, the EU) have endorsed the applicability of international law to State behavior in cyberspace. To date, however, the OAS has not done so. Such an endorsement would send a clear signal of the commitment of the organization—and the region—to the rule of law in cyberspace. A possible formulation for such a statement would be:

The OAS General Assembly affirms that international law, including the United Nations Charter in its entirety, the OAS Charter, international humanitarian law, international human rights law, the duty of non-intervention, the sovereign equality of states, and the law of state responsibility, is applicable to the use of information and communication technologies (ICT) by States and those for whom States are internationally responsible.

The OAS region benefits from having Member State acceptance of the application of certain international legal regimes (e.g., international humanitarian law) where global consensus has not yet been possible. I have included sovereignty in this list as well, although some Member States may raise concerns about how it applies. In any case, by taking a clear stand on what rules of international law apply, the OAS could contribute to this global conversation, and, in so doing, advance the rule of law.

²⁸ Of course, such States could be transparent about their inability to formulate a view, but it is understandable that few, if any, States would want to make such a concession publicly.

24. Alternatively – or as an interim step – the Committee itself could endorse such a formulation in one of its own resolutions and forward it to the General Assembly for its consideration.

Proposal 2: Retain this Topic on the Committee Agenda and Expand its Scope beyond topics of international law for international peace and security

25. Although my term on the Committee expires at the end of the calendar year, this agenda item would undoubtedly benefit from further attention by the Committee. This is the case whether or not the Committee (or the General Assembly) acts on my first proposal. Participants in the June 23 discussion were enthusiastic about the possibility of further diplomatic exchanges. With the assistance of the Department of International Law, the Committee could continue to host such diplomatic exchanges periodically. Their low stakes and low barriers to entry would provide opportunities to identify convergence and divergence in State views that may be subsequently marshalled against the threat of under-regulated, and to date, largely unfettered State-sponsored cyber operations.

26. With more time and effort, it might be possible to elicit further “official” views from Member States to help serve the overall goal of improving transparency on how international law applies to cyberspace. In doing so, moreover, the Committee might consider expanding the scope of application to cover topics other than international peace and security, which dominate the existing U.N. processes. My questionnaire did not, for example, address the duty of non-intervention, even as a number of State representatives called for further attention to that topic in my June 23 consultations. Similarly, several participants called for more attention to the role of international human rights law in cyberspace; a topic that the Committee could address alone or in concert with the Inter-American Commission on Human Rights.

27. In addition, the Committee might seek to improve transparency around how international law protects the healthcare sector. The COVID-19 pandemic has severely impacted the region in both humanitarian and economic terms. Unfortunately, cyber threats risk even further harm as witnessed by cyber-attacks on hospitals and, most recently, vaccine research efforts. The Committee thus could focus attention on a topic of critical current interest that would assist Member States and their nationals throughout the region.²⁹

Proposal 3: Support or Undertake Additional Legal Capacity Building Efforts

28. CICTE and several Member States have already undertaken significant and important efforts to build capacity on cyber-issues among Member States—both the capacity to understand the technical nature of ICTs and the threats they pose, as well as the capacity to understand and evaluate the legal issues these threats raise. Yet, both the questionnaire responses and the June 23 consultations make it clear that much more work remains to be done, especially in the context of legal capacity building. The participants in the June 23 consultations were quite vocal about the need for additional capacity building on international law’s application in the cyber context. Similar views were expressed by several Member States (e.g., Argentina, Canada and the United States) in their recent comments to the OEWG.³⁰ Thus, the Committee would appear to have solid support should it choose to signal a willingness to lend its expertise or resources to existing capacity building efforts.

29. Alternatively, the Committee might consider whether it could support or conduct its own additional (and more diverse) capacity building efforts. Courses on international law’s application to cyber-space could be supplemented with courses that offer some “technical training”

²⁹ For one ongoing effort to clarify international law protections of the healthcare sector from cyberthreats, see Dapo Akande, Duncan Hollis, Harold Hongju Koh, and Jim O’Brien, *Oxford Statement on the International Law Protections against Cyber Operations Targeting the Health Care Sector*, JUST SECURITY (May 21, 2020) (cross posted at OPINIO JURIS & EJILTALK!).

³⁰ See, e.g., Argentina, *Initial “Pre-draft” of the report of the OEWG on developments in the field of information and telecommunications in the context of international security*; Michael Walma, *Canadian Comments on Draft OEWG Report* (April 6, 2020); United States, *United States Comments on the Chair’s Pre-draft of the Report of the U.N. Open Ended Working Group (OEWG)* (April 6, 2020). These (and other) national Statements are available at United Nations, *Open-ended Working Group*, at <https://www.un.org/disarmament/open-ended-working-group/>.

to non-technical experts to assist State diplomats and other representatives in accurately understanding and gauging how cyber threats operate. Alternatively, the Committee might use its meetings with Foreign Ministry Legal Advisers to “game” certain scenarios involving cyber-threats to give government lawyers more opportunities to apply relevant legal rules and standards (and, in doing so, help facilitate a State’s development of its own view of how the law applies). Finally, the Committee might wish to regularize conversations like those that occurred in June – by hosting and moderating conversations on the application of international law among Member States (and perhaps at some point, other relevant stakeholders from industry and civil society).

30. In short, thru more transparency and capacity building efforts, the Committee could make an important contribution to improving the application (and efficacy) of international law as a regulatory tool in cyberspace. Moreover, it could do this on its own or in concert with other parts of the OAS, certain Member States or other organizations. The ICRC, for example, has expressed enthusiasm for supporting more capacity building efforts around international law in the region.

31. It has been a real privilege to work on this topic during my time on the Committee. I continue to believe that cyber threats – including operations by States and their proxies – create risks that have significant economic, humanitarian, and national security consequences. International law provides a time-tested mechanism for regulating new threats. Yet, technical, political, and legal challenges have made the law generally (and the State practice and *opinio juris* that comprise custom specifically) less visible—and thus less effective—to date. With more transparency on how States understand the law to operate, it should have a greater opportunity to play a much-needed regulatory role in restraining unwanted behavior and facilitating greater assistance and cooperation. It is my hope that reporting on the questionnaire results and other conversations within the region can mark a modest first step in improving the visibility of international law’s application to cyberspace. I would encourage the Committee (and the OAS) to continue to engage in similar efforts in the future and look forward to seeing what products and processes result.

* * *



OAS | More rights
for more people

CJI

INTER-AMERICAN JURIDICAL COMMITTEE

COMISSÃO JURÍDICA INTERAMERICANA

Av. Marechal Floriano, 196 - 3º andar - Palácio Itamaraty - Centro - Rio de Janeiro, RJ
20080-002 - Brasil

Tel.: (55-21) 3172-1474 - e-mail: cjioea.trp@terra.com.br

OEA/2.2/14/19

The Department of International Law of the Secretariat for Legal Affairs of the General Secretariat presents its compliments to the Permanent Missions to the Organization of American States and wishes to inform you that is conducting a study on the application of international law within OAS Member States in the cyber context.

To that end, the Committee respectfully requests to respond to the following questions:

1. Has your Government previously issued an official paper, speech, or similar statement summarizing how it understands international law applies to cyber operations? Please provide copies or links to any such statements.

2. Do existing fields of international law (including the prohibition on the use of force, the right of self-defense, international humanitarian law, and human rights) apply to cyberspace? Are there areas where the novelty of cyberspace excludes the application of a particular set of international legal rights or obligations?

3. Can a cyber operation by itself constitute a use of force? Can it constitute an armed attack that triggers a right of self-defense under Article 51 of the UN Charter? Can a cyber operation qualify as a use of force or armed attack without causing the violent effects that have been used to mark such thresholds in past kinetic conflicts?

4. Outside of armed conflicts, when would a State be responsible for the cyber operations of a non-State actor? What levels of control or involvement must a State have with respect to the non-State actor's operations to trigger the international legal responsibility of that State?

5. Are the standards of State responsibility the same or different in the context of an armed conflict as that term is defined in Articles 2 and 3 common to the 1949 Geneva Conventions?

6. Under international humanitarian law, can a cyber operation qualify as an "attack" for the rules governing the conduct of hostilities if it does not cause death, injury or direct physical harm to the targeted computer system or the infrastructure it supports? Could a cyber operation that produces only a loss of functionality, for example, qualify as an attack? If so, in which cases?

7. Is a cyber operation that only targets data governed by the international humanitarian law obligation to direct attacks only against military objectives and not against civilian objects?

8. Is sovereignty a discrete rule of international law that prohibits States from engaging in specific cyber operations? If so, does that prohibition cover cyber operations that fall below the use of force threshold and which do not otherwise violate the duty of non-intervention?

9. Does due diligence qualify as a rule of international law that States must follow in exercising sovereignty over the information and communication technologies in their territory or under the control of their nationals?

10. Are there other rules of international law that your government believes are important to highlight in assessing the regulation of cyber operations by States or actors for which a State is internationally responsible?

Additional explanations about the questionnaire may be found within the enclosed CJI report entitled "International Law and state cyber Operations: Improving Transparency", document CJI/doc. 578/19.

Responses should be sent via Email before June 28, 2019 to the Technical Secretariat of the CJI, the Department of International Law, through Luis Toro Utillano at luto@oas.org. We may also be reached by phone at (202) 370-0632 or by fax, at (202) 458-3293.

The Department of International Law of the Secretariat for Legal Affairs of the General Secretariat of the Organization of American States avails itself of this opportunity to convey to the Permanent Missions to the OAS renewed assurances of its highest consideration.

Washington, D. C., March 19, 2019



Annex B**Responses to the Feb. 14, 2019 Inter-American Juridical Committee Questionnaire on the Application of International Law within OAS Member States in the Cyber Context¹**

Question 1: Has your Government previously issued an official paper, speech, or similar statement summarizing how it understands international law applies to cyber operations? Please provide copies or links to any such statements.

1. This first question solicited existing national statements on international law and cyberspace. The idea was to make sure the Committee was aware of any prior views of Member States. It also allowed States to avoid having to respond to the questions if they had already taken relevant substantive positions. Of the nine responses, however, only the United States indicated that it had previously made statements and speeches on how international law applies to cyberspace, including 2012 and 2016 speeches by the then-Legal Advisers to the U.S. Department of State and the 2014 and 2016 U.S. Submissions to meetings of U.N. Group of Governmental Experts (GGE) on

¹ Seven States – Bolivia, Chile, Costa Rica, Ecuador, Guatemala, Guyana, Peru – formally responded to the questionnaire. *See Note from the Plurilateral State of Bolivia, Ministry of Foreign Affairs, OAS Permanent Mission to the OAS Inter-American Juridical Committee*, MPB-OEA-NV104-19 (July 17, 2019) (containing responses to IAJC Questionnaire from Bolivia’s Office of the Commander-in-Chief of the State Inspector General of the Armed Forces) (“Bolivia Response”); *Response submitted by Chile to the OAS Inter-American Juridical Committee Questionnaire* (Jan. 14, 2020) (“Chile Response”); *Communication from Carole Arce Echeverria, Costa Rica, International Organizations, Department of Foreign Policy, Minister of Foreign Affairs and Worship to OAS*, (April 3, 2019) (including letter no. 163-OCRI2019 from Yonathan Alfaro Aguero, Office of International Cooperation and Relations to Carole Arce Echeverria, which includes a reply from the “relevant authority”—the Costa Rica Criminal Court of Appeals) (“Costa Rica Response”); *Verbal Note 4-2 186/2019 from the Permanent Mission of Ecuador to the OAS* (June 28, 2019) (“Ecuador Response”); Note Of. 4VM.200-2019/GJL/lr/bm, from Mr. Gabriel Juárez Lucas, Fourth Vice Minister of the Interior Ministry of the Republic of Guatemala to Luis Toro Uillano, Technical Secretariat, Inter-American Juridical Committee (June 14, 2019) (“Guatemala Response”); *Note No: 105/2019 from the Permanent Mission of Guyana to the OAS* (July 30, 2019) (“Guyana Response”); *Response Submitted by Peru to the Questionnaire on the Application of International Law in OAS Member States in the Cyber Context* (June 2019) (“Peru Response”).

The United States response directed the Committee to its prior public statements. *See* Brian Egan, *Remarks on International Law and Stability in Cyberspace* (Nov. 10, 2016), in DIGEST OF U.S. PRACTICE IN INT’L LAW 815 (2016); *U.S. Submission to Group of Governmental Experts on Developments in the Field of Information and Telecommunications in the Context of International Security* (Oct. 2016), in DIGEST OF U.S. PRACTICE IN INT’L LAW 823 (2016) (“2016 US GGE Submission”); *U.S. Submission to Group of Governmental Experts on Developments in the Field of Information and Telecommunications in the Context of International Security* (Oct. 2014), in DIGEST OF U.S. PRACTICE IN INT’L LAW 732 (2014) (“2014 US GGE Submission ”); Harold Koh, *International Law in Cyberspace* (Sept. 18, 2012), in DIGEST OF U.S. PRACTICE IN INT’L LAW 593 (2012). More recently, the General Counsel to the U.S. Department of Defense made a speech that also provided formal views on international law’s application (although it is not clear if he was speaking for the United States as a whole or only the U.S. Department of Defense). *See, e.g.*, Paul C. Ney, *DOD General Counsel Remarks at U.S. Cyber Command Legal Conference* (March 2, 2020), at <https://www.defense.gov/Newsroom/Speeches/Speech/Article/2099378/dod-general-counsel-remarks-at-us-cyber-command-legal-conference/>.

Brazil responded to the Committee questionnaire noting that it would use the UN Group of Governmental Experts (GGE) on Advancing responsible State behaviour in cyberspace in the context of international security as the forum in which to address these issues. *See* Response by Brazil to CJI OEA Note 2.2/14/19 (July 1, 2019).

Developments in the Field of Information and Telecommunications in the Context of International Security.²

2. Other responding States indicated that they were unaware of any prior positions on their views on international law's application in the cyber context.³ Several States took the opportunity, however, to highlight their internal efforts to establish relevant organizations or regulatory regimes for addressing information and communication technology (ICT) issues.⁴

3. Several Member States have used the UN-hosted Open-Ended Working Group on Developments in the Field of Information and Telecommunications in the context of International Security (OEWG) to make public statements that included references to international law's application. For the most part, however, these statements are at a high level of generality or tailored to address particular aspects of the text of the OEWG's drafting report. Several of these statements come from States who already responded to the Committee's questionnaire directly. However, a few others, including Argentina, Brazil, Canada, Colombia, Mexico, Nicaragua, and Uruguay, made comments relevant to this questionnaire.⁵ As such, references have been included to such statements below.

4. The dearth of prior official statements combined with the generality of those made most recently confirms the hypothesis on which this project rests – that States have said relatively little to date about *how* international law applies to State behavior in cyberspace. It also confirms that most domestic efforts relating to cybersecurity to date have centered on national cybersecurity strategies or policies as well as domestic cybercrime and other ICT regulatory efforts.

² For citations, *see supra* note 1. Note, however, that the U.S. Response indicated that these were only “some of” the documents indicating U.S. views. Thus, there may be others that warrant attention. In particular, it might be useful to know how much the U.S. Department of Defense *Laws of War Manual* reflects the views of the United States as a whole. *See* Office of General Counsel, U.S. Department of Defense, *Department of Defense Law of War Manual* (June 2015, updated December 2016) (“DOD Manual”).

³ *See, e.g.*, Ecuador Response, *supra* note 1, at 1 (“We are not aware of any official paper the Government of Ecuador has issued on cyber operations.”); *see also* Guyana Response, *supra* note 1, at 1 (same).

⁴ Bolivia Response, *supra* note 1, at 1 (citing a new 2015 law); Chile Response, *supra* note 1, at 1 (listing the Ministry of Defense's March 2018 “cyber-defense policy”); Guatemala Response, *supra* note 1, at 1 (emphasizing its “national cybersecurity strategy” and new cybercrime law); *see also* Costa Rica Response, *supra* note 1, at 1.

⁵ All national statements can be found at United Nations, *Open-ended Working Group*, at <https://www.un.org/disarmament/open-ended-working-group/>. *See, e.g.*, Argentina, *Initial “Pre-draft” of the report of the OEWG on developments in the field of information and telecommunications in the context of international security* (“Argentina Comments”); Brazil, *Comments submitted by Brazil to the Initial “Pre-draft” of the report of the OEWG on developments in the field of information and telecommunications in the context of international security* (April 8, 2020) (“Brazil Comments”); Michael Walma, *Canadian Comments on Draft OEWG Report* (April 6, 2020) (“Canada Comments”); Colombia, *Colombia's comments on the initial “Pre-draft” of the report of the OEWG on developments in the field of information and telecommunications in the context of international security* (April 16, 2020) (“Colombia Comments”); Mexico, *Preliminary comments of Mexico to the initial “Pre-draft” of the report of the OEWG on developments in the field of information and telecommunications in the context of international security* (2020) (“Mexico Comments”); Nicaragua, *MINIC-MIS-143-04-2020* (April 2020) (“Nicaragua Comments”); Uruguay, *Comments on the pre-draft of the OEWG report* (2020) (“Uruguay Comments”).

For other Member State comments, *see* Chile, *Comentarios de Chile al pre-informe del Chair* (2020) (“Chile Comments”); Ecuador, *Ecuador preliminary comments to the Chair's “Initial pre-draft” of the Report of the United Nations Open Ended Working Group on developments in the field of information and telecommunications in the context of international security (OEWG)* (April 2020) (“Ecuador Comments”); Venezuela (Maduro Regime), *Preliminary Considerations of Venezuela to the Initial Pre-Draft Report of the OEWG on Developments in the Field of Information and Telecommunications in the Context of International Security* (2020) (“Venezuela Comments”); United States, *United States Comments on the Chair's Pre-draft of the Report of the UN Open Ended Working Group (OEWG)* (April 6, 2020) (“United States Comments”).

Question 2: Do existing fields of international law (including the prohibition on the use of force, the right of self-defense, international humanitarian law, and human rights) apply to cyberspace? Are there areas where the novelty of cyberspace excludes the application of a particular set of international legal rights or obligations?

5. Although a recent U.N. General Assembly Resolution⁶ suggests that there is now widespread support for international law's application to cyberspace, earlier efforts at the United Nations revealed that certain States have deep reservations about the applicability of certain international legal regimes. Indeed, these reservations reportedly led the 2016-2017 U.N. GGE to fail to produce any final report.⁷ Thus, there is a continuing need to identify whether the existence of certain areas of international law in cyberspace is contested, and, if so, which ones. This second question was designed to solicit each State's views on any extant international law that it considered inapplicable (or where the application might at least be problematic) in the cyber context.

6. Overall, the questionnaire responses reflected extensive support for the application of existing fields of international law to cyberspace. As Chile's Response summarized, "current international law provides the applicable legal framework ... including rules relating to *jus ad bellum*, international humanitarian law, human rights, and those governing the international responsibility of States."⁸ Other States affirming international law's application included Ecuador, Peru, and the United States.⁹ Along with the *jus ad bellum* and the *jus in bello*, Peru's response emphasized the validity in cyberspace of various human rights, including "the right to privacy, freedom of information, freedom of expression, free and equal access to information, elimination of the digital divide, intellectual property rights, free flow of information, the right to confidentiality of communications, etc."¹⁰ The U.S. echoed the application of international human rights law, while touting the overall application of existing international law as the "cornerstone" of U.S. cyberspace policy.¹¹

7. Bolivia also offered a positive response. But its answer focused on the international law "to be applied in armed conflicts," offering views on how to differentiate when international humanitarian law (IHL) would (and would not) apply.¹² As such, it is not clear whether Bolivia's positive response extends to the application of other sub-fields of international law beyond the *jus ad bellum* and the *jus in bello*.

⁶ See UNGA Res. 266, U.N. Doc. A/RES/73/266 (Jan. 2, 2019).

⁷ See, e.g., Arun M. Sukumar, *The UN GGE Failed. Is International Law in Cyberspace Doomed As Well?*, LAWFARE (July 4, 2017), at <https://www.lawfareblog.com/un-gge-failed-international-law-cyberspace-doomed-well>.

⁸ Chile Response, *supra* note 1, at 1 (As a result, Chile notes that the "planning, conduct, and execution of operations in cyberspace must adhere strictly to respect for public international law, with particular consideration to international human rights law and international humanitarian law").

⁹ Ecuador Response, *supra* note 1, at 1 ("The fields of international law do apply to cyberspace"); Peru Response, *supra* note 1, at 1 ("bearing in mind the fundamental role of the Charter in terms of how it relates to other international instruments ... it would be reasonable to conclude that no area of international relations lies outside the scope of the aforesaid principles... Bearing in mind that cyberspace is becoming an everyday setting for international interaction, the actors in such interactions are required to observe their higher obligations under international law, including the prohibition on the use of force, the right of self-defense, and respect for human rights and international humanitarian law."); Koh, *supra* note 1, at 594 ("Yes, international law principles do apply in cyberspace ... Cyberspace is not a 'law-free' zone where anyone can conduct hostile activities without rules or restraint.").

¹⁰ Peru Response, *supra* note 1, at 1.

¹¹ 2014 US GGE Submission, *supra* note 1, at 733 (application of international law comprises the "cornerstone" of US view, taking into account its distinctive characteristics); Egan, *supra* note 1, at 815; on the application of human rights, see Koh, *supra* note 1, at 598; Egan, *supra* note 1, at 820; 2016 US GGE Submission, *supra* note 1, at 824.

¹² Bolivia Response, *supra* note 1, at 2-7. Thus, Bolivia suggested that IHL would not govern cyber-operations involving national security, propaganda, espionage, manipulation of strategic critical infrastructure, cyber operations with political objectives, or those hacking into private systems putting at risk the state's economic and social operations. *Id.* at 3-7.

8. Guatemala and Guyana both expressed positive support for international law's application. Yet, both offered caveats about how universally the extant law might apply. Without offering any examples, Guatemala noted that there could be areas where "the novelty of cyberspace does preclude the application of certain international rights or obligations."¹³ Guyana, meanwhile, noted that "cyber operations do not fit into traditional concepts" and pointed out "a raging debate as to whether existing fields of international law apply to cyberspace."¹⁴ Acknowledging the prior work of the GGE, Guyana "respectfully submitted that while it is acknowledged that international law should or ought to apply to cyberspace, it is difficult to easily apply existing principles" such as the use of force which "traditionally implies some physical element and armed attacks which traditionally imply some sort of weapon."¹⁵

9. Thus, even as the overall application of international law to cyber operations appears well entrenched, these last two responses suggest the need for further dialogue and discussion. It would be useful to identify *which* particular areas of international law's application give certain States pause and why. Doing so would help illuminate just how much convergence (or divergence) of views exist on how international legal regimes govern State and State-sponsored cyber operations.

10. Comments by Member States to the OEWG reinforce these points. They reflect a broad consensus that international law, including the UN Charter, applies to cyberspace. Canada, Chile, Colombia, Mexico, Uruguay, and the United States all made this point quite explicitly.¹⁶ Some States (e.g., Nicaragua and Venezuela (represented by the Maduro regime)) questioned the suitability of existing international law in cyberspace even as they accepted its application in that context.¹⁷ Several other comments added a new layer of concern not raised in the Committee Questionnaire responses – i.e., whether differences in legal capacity might impact the law's actual application or evolution (as States who possess advanced cybersecurity infrastructure may have a corresponding capacity to disproportionately influence the content and boundaries of rules for cyberspace over States lacking such a capacity).¹⁸

Question 3: Can a cyber operation by itself constitute a use of force? Can it constitute an armed attack that triggers a right of self-defense under Article 51 of the UN Charter? Can a cyber operation qualify as a use of force or armed attack without causing the violent effects that have been used to mark such thresholds in past kinetic conflicts?

11. Most (but not all) States appear to accept the application of international law on the use of force (e.g., the *jus ad bellum*) to their cyber operations. This question sought to identify which States in the region adhere to this dominant view versus alternative positions. At the same time, additional application questions have arisen among States who accept the *jus ad bellum* in cyberspace, most notably the extent to which thresholds for the "use of force" or "armed attacks" require analogous "violent" effects to those deemed to pass these thresholds in the past. The issue is how to handle novelties in the scale or effects of cyber operations (i.e., those operations that are not akin to *either* past kinetic operations—which surpassed the use of force threshold—nor economic or political sanctions—which did not). How should international law regard such cyber operations? Should they be placed, by default, below the use of force threshold or above it? Or, is further investigation and analysis needed to bifurcate cyber operations in this new "grey zone," treating

¹³ Guatemala Response, *supra* note 1, at 1-2.

¹⁴ Guyana Response, *supra* note 1, at 1-2

¹⁵ *Id.*

¹⁶ See Canada Comments, *supra* note 5; Colombia Comments, *supra* note 5; Chile comments, *supra* note 5; Mexico Comments, *supra* note 5; United States comments, *supra* note 5; Uruguay Comments *supra* note 5.

¹⁷ Nicaragua Comments, *supra* note 5 (suggesting we are faced with the "poor applicability" of international law in this sphere but "does not deny in principle that IL is applicable to the sphere of ICTs"); Venezuela Comments, *supra* note 5 (reaffirming a need to "adapt the international law to the context of ICTs, considering the legal gaps that exist"). In its comments to the OEWG, Argentina called for bifurcating the OEWG's suggestions on clarifying the application of the prohibition on the use of force and IHL See Argentina Comments, *supra* note 5.

¹⁸ See, e.g., Mexico Comments, *supra* note 5; Bolivia Comments *supra* note 5; Ecuador Comments, *supra* note 5.

some of these novel operations as above, and others below, relevant thresholds?¹⁹ Thus, this question sought to acquire State perspectives on whether to define cyber operations as uses of force (or armed attacks) entirely by analogy to previous cases or to devise some new standard for doing so.

12. Bolivia, Chile, Guatemala, Peru, and the United States are all clear that both the prohibition on the use of force and the inherent right of self-defense in response to an “armed attack” may be triggered by cyber operations alone.²⁰ As Guatemala explained:

[A] cyber operation in and of itself can qualify as a use of force, since “use of force” does not exclusively mean physical force; it also covers threats to and violations of the security and protection of third parties ... there is a right of legitimate defense against a cyber attack or operation against a country’s sovereignty.²¹

The 2014 U.S. Submission to the GGE emphasized its understanding that the “inherent right of self-defense potentially applies against any illegal use of force” suggesting a single threshold for both rules.²² This stands in contrast to States that view all armed attacks as uses of force but not all uses of force as armed attacks (the latter are said to involve only the “most grave” forms of a use of force).²³ The United States also emphasized that its inherent right of self-defense can be triggered by cyber activities that “amount to an actual or imminent armed attack” and regardless of “whether the attacker is a State or non-State actor.”²⁴

13. In contrast, Guyana’s response expressed doubts about the applicability of the *jus ad bellum* to cyber operations alone. Relying on *Black’s Law Dictionary* for a definition of force as “power dynamically considered,” Guyana indicated that a cyber operation “by itself may not constitute a use of force.”²⁵ Similarly, it defined an armed attack as involving “weaponry” and to the extent “no physical weaponry is involved” in a cyber operation, it may not be considered an armed

¹⁹ See Michael N. Schmitt, *Grey Zones in the International Law of Cyberspace*, 42 YALE J. INT’ L. 1 (2017).

²⁰ Bolivia Response, *supra* note 1, at 2-7 Chile Response, *supra* note 1, at 1 (Chile will refrain from using force “through cyberspace” in a manner that is against international law and will exercise “its right to self-defense against any armed attack carried out through cyberspace”); Guatemala Response, *supra* note 1, at 2; Peru Response, *supra* note 1, at 1-3; Koh, *supra* note 1, at 595 (Stating the U.S. view that (a) “Cyber activities may in certain circumstances constitute uses of force within the meaning of Article 2(4) of the UN Charter and customary international law”; and (b) “[a] State’s national right of self-defense, recognized in Article 51 of the UN Charter, may be triggered by computer network activities that amount to an armed attack or imminent threat thereof.”); 2014 US GGE Submission, *supra* note 1, at 734; Egan, *supra* note 1, at 816 (suggesting 2015 UN GGE also endorsed the right of self-defense). Ecuador also responded to the question affirmatively, but cited the definition of “armed attack” used in Article 92 of *Tallinn 2.0*, which defines that term in the context of an armed conflict (*i.e.*, the *jus in bello*) – a distinct usage of the term from its expression in UN Charter Article 51 and the *jus ad bellum*. See Ecuador Response, *supra* note 1, at 1; MICHAEL N. SCHMITT (ED.), *TALLINN MANUAL 2.0 ON THE INTERNATIONAL LAW APPLICABLE TO CYBER OPERATIONS* (2017) (“*Tallinn 2.0*”); see also ICRC, *Report on International Humanitarian Law and the Challenges of Contemporary Armed Conflict*. In its OEWG comments, Colombia expressed the idea that self-defense is “essential to maintaining peace and stability in the ICT environment.” Colombia Comments, *supra* note 5.

²¹ Guatemala Response, *supra* note 1, at 2; accord Peru Response, *supra* note 1, at 3 (citing the ICRC and Michael Schmitt for the idea that uses of force are not limited to kinetic force).

²² Koh, *supra* note 1, at 597.

²³ See *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. U.S.)* [1986] ICJ Rep. 14, ¶191 (June 27) (describing armed attacks as “the most grave forms of the use of force.”).

²⁴ 2014 US GGE Submission, *supra* note 1, at 734-5. The submission also reiterates the “unwilling or unable” test for engaging in self-defense against a State without its consent where “a territorial State is unwilling or unable to stop or prevent the actual or imminent attack launched in or through cyberspace.” *Id.* at 735.

²⁵ Guyana Response, *supra* note 1, at 2.

attack triggering self-defense.²⁶ At the same time, Guyana did emphasize that cyber operations could be used in armed conflicts and governed by international humanitarian law (IHL).²⁷

14. With respect to whether a cyber operation could cross the use-of-force threshold (or that for an armed-attack²⁸) without having violent effects, State views were mixed. Most responding States continue to find power in drawing the relevant thresholds by analogizing cyber operations to kinetic or other past operations that did (or did not) qualify as a use of force or armed attack. Some States, however, hinted at the potential to move beyond such analogies. Chile, for example, suggested that cyber operations analogous to “the threshold of necessary severity” to satisfy the requirements established by international law to be an armed attack can give rise to a right of self-defense.²⁹ At the same time, however, Chile’s response may have left room for defining armed attacks more broadly, suggesting that “cyberattacks directed against its sovereignty, its inhabitants, its physical or information infrastructure” could qualify as such.³⁰

15. Peru more openly admitted the “possibility of a cyber operation that does not cause violent effects being classed as a use of force or an armed attack.”³¹ It did so, however, based on the idea that kinetic weaponry in the past might have also been employed without causing violent effects and yet still constituted a use of force (*i.e.*, firing a missile across another State’s territory even if it does not land in that State).³² Overall, Peru emphasized the need to differentiate “cyber-attacks” (which “cause damage to a militarily significant target, resulting in its total or partial destruction, capture, or neutralization”) from “cyber disruptions” that “cause inconvenience, even extreme inconvenience, but no direct injury or death, and no destruction of property.”³³ As such, the specifics of Peru’s response emphasized evaluating the legality of cyber operations in the use of force context based on whether they “cause death or injury to persons or property.”³⁴

16. Guatemala’s response adopted a different approach, suggesting a willingness to rethink what qualifies as “violent effects” because a cyber operation’s consequences “can be greater and more lasting, in that they threaten such sectors as health, security, and others.”³⁵ It suggested that in the cyber context, consequences that produce “death, anxiety, and poverty” should be considered violent.³⁶

17. Bolivia’s response suggested that the threshold might be difficult to apply in practice since the “effects of cyber-attacks will not always be immediately known” making it hard to check if there’s been a use of force. At the same time, Bolivia indicated that it would evaluate the threshold based on analogies to the kinetic context, *i.e.*, an “armed attack” arises where “the cyber virtual attack uses unconventional means that have the same impact [as] an armed attack.”³⁷

18. The United States did not respond to the questionnaire itself. Nonetheless, its previous statements shed some light on its views. In his seminal 2012 speech, Harold Koh indicated the U.S. preference for a contextual approach to identifying uses of force (albeit with the aforementioned caveat that the U.S. definition also would identify armed attacks):

In assessing whether an event constituted a use of force in or through cyberspace, we must evaluate factors including the context of the event, the actor perpetrating the

²⁶ *Id.*

²⁷ *See id.* at 3, 5.

²⁸ This assumes, contra the U.S. view, that there may be two different thresholds. *See supra* notes 42-24, and accompanying text.

²⁹ Chile Response, *supra* note 1, at 2.

³⁰ *Id.* at 2.

³¹ Peru Response, *supra* note 1, at 3.

³² *Id.*

³³ *Id.* at 2.

³⁴ *Id.* at 3.

³⁵ Guatemala Response, *supra* note 1, at 2.

³⁶ *Id.*

³⁷ Bolivia Response, *supra* note 1, at 2-7 (Bolivia emphasized that the right of self-defense also encompasses “pre-emptive self-defense,” which is only available when the threat is imminent and the need for self-defense is immediate (rather than retaliatory)).

action (recognizing challenges of attribution in cyberspace), the target and location, effects and intent, among other possible issues.³⁸

At the same time, Koh clearly viewed the test as requiring an analogy, asking “whether the direct physical injury and property damage resulting from the cyber event looks like that which would be considered a use of force if produced by kinetic weapons.”³⁹ He also cited specific examples of cyber operations that would constitute uses of force: (i) a nuclear plant meltdown caused by cyber activity; (ii) cyber operations that “open a dam above a populated area causing destruction”; and (iii) a cyber operation that disables “air traffic control resulting in airplane crashes.”⁴⁰ To the extent all these examples involve some form of “violence,” it would appear that the United States favors a use of force threshold analogous to the one applied in the kinetic context.

Question 4: Outside of armed conflicts, when would a State be responsible for the cyber operations of a non-State actor? What levels of control or involvement must a State have with respect to the non-State actor’s operations to trigger the international legal responsibility of that State?

Question 5: Are the standards of State responsibility the same or different in the context of an armed conflict as that term is defined in Articles 2 and 3 common to the 1949 Geneva Conventions?

19. States are responsible not only for the behavior of their own organs and agencies in cyberspace, but also for any non-state actor that they endorse or control.⁴¹ The fourth and fifth questions ask about how States understand the assignment of international legal responsibility for non-State actor behavior, in particular the extent of State “control” required. As is well known, cyber threats may be authored not just by States directly but also by a range of non-State actors, including hacktivist groups and cybercriminal organizations. In some cases, States may seek to employ these non-State actors as proxies for conducting various cyber operations.

20. Tying a proxy back to a principal in cyberspace can be technically quite challenging (although perhaps not as difficult as some supposed in the past). At the same time, a factual linkage is not enough, there must be legal attribution as well – *i.e.*, a sufficient connection between a State and a non-State actor for the former to assume legal responsibility for the latter’s behavior. A State may, for example, endorse a non-State actor’s behavior after the fact, thereby assuming legal responsibility for it.⁴² Alternatively, States are legally responsible for non-State actor behavior that they control. Precisely how much control is, however, often unclear. In the *Nicaragua* case, the ICJ indicated that international law contains a rule imposing responsibility on a State for acts of those non-State actors over which it has “effective control” (*e.g.*, ordering the behavior or directing an operation).⁴³ But, a few years later, the International Criminal Tribunal for the Former Yugoslavia (ICTY) adopted a looser standard of “overall control” for the purposes of IHL. As the ICTY put it, this test requires “more than the mere provision of financial assistance or military equipment or training” but not going so far as to insist on the “issuing of specific orders by the State, or its direction of each individual operation.”⁴⁴ The ICC later endorsed the “overall control” standard.⁴⁵

³⁸ Koh, *supra* note 1, at 595 (“Cyber activities that proximately result in death, injury, or significant destruction would likely be viewed as a use of force”). The U.S. has maintained this view subsequently. 2014 US GGE Submission, *supra* note 1, at 734. The 2014 US GGE Submission was also appended to the 2016 US GGE Submission, suggesting continued support for its contents.

³⁹ Koh, *supra* note 1, at 595.

⁴⁰ *Id.*

⁴¹ See ILC, “Draft Articles on the Responsibility of States for Internationally Wrongful Acts” in *Report on the Work of its Fifty-first Session* (May 3-July 23, 1999), UN Doc A/56/10 55 [3] (“ASR”); *accord Tallinn 2.0*, *supra* note 20, Rule 15.

⁴² ASR, *supra* note 61, Art. 11; HEATHER HARRISON DINNISS, *CYBER WARFARE AND THE LAWS OF WAR* 52 (2012).

⁴³ *Nicaragua Case*, *supra* note 43, at ¶115.

⁴⁴ *Prosecutor v. Dusko Tadić aka ‘Dule’* (Judgment) ICTY-94-1-A (15 July 1999) ¶¶131-145, 162.

⁴⁵ *Prosecutor v. Lubanga*, Case No. ICC-01/04-01/06, Trial Chamber, Judgement (Int’l Crim. Court, March 14, 2012) ¶541.

21. The ICJ, however, has continued to insist on its “effective control” formulation in the use of force context. At the same time, it signaled that the “overall control” test might be appropriate in the IHL context, raising the possibility of a consensus on “overall control” in the IHL context and “effective control” in other contexts.⁴⁶ Given this possibility, the questionnaire asked about state responsibility both generally and in the IHL context based on the existence of some armed conflict as that term is used in the Geneva Conventions.

22. In terms of their responses, several Member States emphasized the difficulty of attribution in cyberspace.⁴⁷ Others focused less on the question of liability for proxy behavior and more on the State’s responsibility to take care that its territory was not used by non-State actors to launch attacks.⁴⁸ Thus, Peru commented that “if there is inertia on the part of a State in controlling a nonstate actor that unleashed a cyberattack against another State, despite having the capacity to control them, then that could give rise to their conduct being attributable to the State.”⁴⁹ For its part, Bolivia emphasized that States should not bear responsibility where they lack the technological infrastructure to control non-State actors.⁵⁰ And the United States emphasized that the “mere fact that a cyber activity was launched from, or otherwise originates from, another State’s territory or from the cyber infrastructure of another State is insufficient, without more, to attribute the activity to that State.”⁵¹

23. For those States whose responses focused on the question of proxy actors, the Articles of State Responsibility (“ASR”) loomed large. Chile, Guyana, and Peru all based their response on ASR Article 8:

The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.⁵²

The ASR, however, did not offer an opinion on which type of “control” the State needs to exhibit, suggesting it is “a matter for appreciation in each case.”⁵³ This tracks U.S. views, which endorse State responsibility for “activities undertaken through ‘proxy actors’ who act on the State’s instructions or under its direction or control” while only saying that the degree of control exhibited

⁴⁶ *Case concerning application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* (Judgment) [1997] ICJ Rep. 43, 208–09, ¶¶402–407 (indicating that the overall control test “may well be ... applicable and suitable” for IHL sorts of classifications).

⁴⁷ Guatemala Response, *supra* note 1, at 3 (finding “clear responsibility” for a cyberattack is “by no means an easy task”); Peru Response, *supra* note 1, at 4 (noting great “uncertainty in attribution, and levels of attribution, of cyber attacks” making it harder “to control those who use cyberspace to unleash attacks over the Internet”).

⁴⁸ Ecuador Response, *supra* note 1, at 1 (“States cannot be held liable for an attack by a non-state actor, but there should be some way [for them] to collaborate to find the perpetrators. Furthermore, a state is responsible for regulating/setting standards for services to prevent territory belonging to a state from being launch [sic.] an attack.”); Guatemala Response, *supra* note 1, at 3 (answering in terms of due diligence of the host State rather than the amount of control over proxy actors).

⁴⁹ Peru Response, *supra* note 1, at 4 (citing ASR Article 11).

⁵⁰ Bolivia Response *supra* note 1, at 3–7. On the question of proxies, Bolivia’s response was indirect, although it did suggest a link between a State and non-State actors associated with its defense policy objectives and/or strategies of a State in a situation of armed conflict. *Id.*

⁵¹ 2014 US GGE Submission, *supra* note 1, at 738.

⁵² ASR, *supra* note 61, Art. 8; Chile Response, *supra* note 1, at 2; Guyana Response, *supra* note 1, at 3; Peru Response, *supra* note 1, at 4. Chile and Peru’s responses also appear based on ASR Article 5 assigning State responsibility to “[t]he conduct of a person or entity which ... is empowered by the law of [a] State to exercise elements of the governmental authority ... provided the person or entity is acting in that capacity in the particular instance.” See Chile Response, *supra* note 1, at 2; Peru Response, *supra* note 1, at 4.

⁵³ ASR, *supra* note 61, at 48 (Commentary to Art. 8).

must be “sufficient.”⁵⁴ The United States has also acknowledged that a State may later acknowledge or adopt a non-State actor’s cyber operation as its own.⁵⁵

24. However, one State, Chile, did offer its views on the level of control required to trigger legal responsibility. Citing the *Nicaragua* and *Genocide* cases, Chile opined that the “degree or level of control or involvement of a state in the operations of a non-state actor, required to trigger its international responsibility is that of effective control.”⁵⁶ Chile, moreover, took the view that the standards of State responsibility are the same in the context of armed conflicts.⁵⁷

25. With respect to IHL, Peru took a similar stance, favoring a uniform rule of State responsibility both in and outside of armed conflicts. While recognizing the ASR contemplates being supplanted by *lex specialis*, it indicated that doing so requires an integrated analysis. And in this case, “[a]n examination of the Geneva Conventions does not disclose any difference with respect to the provisions on international responsibility set down in the Draft Articles on Responsibility of States for Internationally Wrongful Acts; therefore, it cannot be argued that the draft articles have a different scope of application.”⁵⁸ As noted, however, the ASR standard of responsibility only references “control” generally, without differentiating whether it must be “effective” or “overall.”

26. Other States had more trouble answering the fifth question. Guatemala suggested that “international forums must continue their discussions on the uniquely different aspects that a conflict in cyberspace would entail, particularly regarding such issues as attribution and territorial considerations.”⁵⁹ Other States read this question to ask about differing standards of responsibility between international and non-international armed conflicts.⁶⁰

Question 6: Under international humanitarian law, can a cyber operation qualify as an “attack” for the rules governing the conduct of hostilities if it does not cause death, injury or direct physical harm to the targeted computer system or the infrastructure it supports? Could a cyber operation that produces only a loss of functionality, for example, qualify as an attack? If so, in which cases?

27. The sixth question is the first of two addressing how international humanitarian law (IHL or the *jus in bello*) applies to cyber operations. It focuses on an issue that has divided States and scholars to date – how to define an “attack” for IHL purposes. Much of IHL, including its fundamental principles of distinction, proportionality, and precautions, are largely framed in terms of prohibiting certain types of “attacks” (*e.g.*, those targeting civilians or civilian objects) while permitting others (*e.g.*, those targeting military objects).⁶¹ As the ICRC recently noted, “[t]he question of how widely or narrowly the notion of ‘attack’ is interpreted with regard to cyber operations is therefore essential for the applicability of these rules and the protection they afford to

⁵⁴ Koh, *supra* note 1, at 596; 2014 US GGE Submission, *supra* note 1, at 738 (same); Egan *supra* note 1, at 821; 2016 US GGE Submission, *supra* note 1, at 826.

⁵⁵ Egan *supra* note 1, at 821; 2016 US GGE Submission, *supra* note 1, at 826.

⁵⁶ Chile Response, *supra* note 1, at 2.

⁵⁷ *Id.* at 3.

⁵⁸ Peru Response, *supra* note 1, at 4-5.

⁵⁹ Guatemala Response, *supra* note 1, at 3.

⁶⁰ *See, e.g.*, Bolivia Response, *supra* note 1, at 4-7; Guyana Response, *supra* note 1, at 3. Ecuador’s Response simply emphasized that States “are responsible for complying with the rules in armed conflicts, even where there are parties that are not party” to those Conventions. Ecuador Response, *supra* note 1, at 2.

⁶¹ For example, the principle of distinction is regularly framed as a prohibition on making civilians the object of an attack. *See, e.g.*, Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Armed Conflict (Protocol I) (June 8, 1977), 1125 UNTS 3, Art. 51(2) (“API”); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Dec. 12, 1977), 1125 UNTS 609, Art. 13(2); Rome Statute of the International Criminal Court (July 17, 1998), Art. 8(2)(b); Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land (Oct. 18, 1907), 36 Stat. 2277, Art. 23(b); JEAN MARIE HENCKAERTS & LOUISE DOSWALD-BECK, 1 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW (ICRC, 2005), Rules 1, 7, 9, and 10.

civilians and civilian infrastructure.”⁶² Indeed, to the extent an operation *does not* constitute an “attack,” it may be conducted in an armed conflict without regard to most IHL rules.⁶³

28. Under IHL, an “attack” is defined by customary international law (as codified in Article 49 of Additional Protocol I to the Geneva Conventions (API)) as “acts of violence against the adversary, whether in offence or defense.”⁶⁴ As the *Tallinn Manual 2.0* explains, moreover, “the consequences, not its nature, are what generally determine the scope of the term ‘attack’; ‘violence’ must be considered in the sense of violent consequences and is not limited to violent acts.”⁶⁵ The ICRC has noted, moreover, “[i]t is widely accepted that cyber operations expected to cause death, injury or physical damage constitute attacks under IHL.”⁶⁶ As is well known, however, some cyber operations (e.g., ransomware) are novel in that they offer an opportunity to “render objects dysfunctional without physically damaging them.”⁶⁷ This raises the question whether a cyber operation that does not produce such effects (e.g., disrupting the functionality of a water treatment facility without necessarily causing physical damage) can constitute an attack. Diverging views have emerged to date including among the *Tallinn Manual 2.0*’s Independent Group of Experts.⁶⁸

29. A majority of the *Tallinn Manual 2.0*’s experts took the view that violence required some physical damage, including “replacement of physical components” such as a control system.⁶⁹ Others interpreted damage to include cases where no physical components require replacing and functionality can be restored by reinstalling the operating system, while a few other experts believed an attack could occur via the “loss of usability of cyber infrastructure” itself.⁷⁰ For its part, the ICRC has argued that during an armed conflict an operation designed to disable a computer or a computer network constitutes an attack under IHL, whether the object is disabled through kinetic or cyber means.⁷¹

30. The sixth question was thus designed to see if Member States likewise view IHL’s attack threshold in terms of violence (or violent effects) or if they would consider that the “attack” label could be applicable to cyber operations based on loss of functionality rather than more traditional concepts of physical damage or destruction.

31. The questionnaire responses reveal support for the applicability of IHL generally as well as the idea that cyber operations can constitute an attack in that context.⁷² Responses were more mixed, however, with respect to whether a cyber operation could qualify as an “attack” under IHL if it fails to cause death, injury, or direct physical harm. Chile, Peru, and the United States all gave

⁶² ICRC, *Position Paper on International Humanitarian Law and Cyber Operations during Armed Conflicts* (Nov. 2019) at 7 (“ICRC Position Paper”).

⁶³ Even outside of attacks, States must still exercise “constant care” in an international armed conflict to avoid “unnecessary effects” on civilians and their objects. API, *supra* note 81, Art. 57(1); *Tallinn 2.0*, *supra* note 20, at 476.

⁶⁴ API, *supra* note 81, Art. 49.

⁶⁵ *Tallinn 2.0*, *supra* note 20, at 415.

⁶⁶ See ICRC Position Paper, *supra* note 62.

⁶⁷ ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, (Oct. 2015) 41 (“2015 ICRC Report”).

⁶⁸ *Tallinn 2.0*, *supra* note 20, at 417.

⁶⁹ *Id.*

⁷⁰ 2015 ICRC Report, *supra* note 67, at 41; see also ICRC, *Report on International Humanitarian Law and the Challenges of Contemporary Armed Conflict* (Nov. 2019) at 28 (“2019 ICRC Report”) (“IHL rules protecting civilian objects can, however, provide the full scope of legal protection only if States recognize that cyber operations that impair the functionality of civilian infrastructure are subject to the rules governing attacks under IHL.”)

⁷¹ See ICRC Position Paper, *supra* note 62, at 7-8; 2015 ICRC Report, *supra* note 67, at 43 (arguing that international law must treat as attacks those cyber operations that disable objects since the definition of a military objective includes neutralization (suggesting that neutralizing objects falls within the ambit of IHL)).

⁷² See, e.g., Bolivia Response, *supra* note 1, at 3-7; *id.* at 4-7 (noting two views on whether a cyber operation alone can give rise to an armed conflict subject to IHL); Chile Response, *supra* note 1, at 3. Guyana Response, *supra* note 1, at 3; Peru Response, *supra* note 1, at 1; Koh, *supra* note 1, at 595 (U.S. view).

negative responses.⁷³ Chile cited Article 49 of Additional Protocol 1 to the Geneva Conventions (API) to insist that IHL attacks must involve “effects or consequences arising from the act itself” that are “violent.”⁷⁴ In particular, it suggested that to qualify as an attack, its result must require the affected State to “take action to repair or restore the affected infrastructure or computer systems, since in those cases the consequences of the attack are similar to those described above, in particular physical damage to property.”⁷⁵ Peru’s response suggests for there to be an “attack” there must be “people” or “public or private property” that is “physically harmed.”⁷⁶ The United States, meanwhile, has emphasized that the IHL “attack” threshold requires looking at “*inter alia*, whether a cyber activity results in kinetic and irreversible effects on civilians, civilian objects, or civilian infrastructure, or non-kinetic and reversible effects on the same.”⁷⁷ The implication is that if a cyber operation produces non-kinetic or reversible effects, it will not “rise to the level of an armed attack.”⁷⁸ This would seem to exclude, for example, ransomware exploits that are not kinetic themselves or where the data they interrupt can be restored.

32. In contrast, Guatemala and Ecuador both responded positively to the idea of delimiting attacks based on functionality losses rather than death, injury, or destruction of property. Guatemala indicated that among cyber operations that can be considered an attack are those “that only produce a loss of functionality.”⁷⁹ Ecuador opined that “[a] cyber operation can qualify as an attack if it renders inoperable a state’s critical infrastructure or others that endanger the security of the state.”⁸⁰

33. Bolivia and Guyana’s responses were more equivocal. On the one hand, Bolivia emphasized that IHL would define attacks to include those cyber operations “intended to be able to cause loss of human life, injury to people, and damage or destruction of property.”⁸¹ On the other hand, it suggested that a cyber operation “could be considered an attack when its objective is to disable a state’s basic services (water, electricity, telecommunications, or the financial system).”⁸² Guyana noted that “[w]hen a cyber operation produces a loss of functionality, it may or may not constitute an attack.”⁸³ Like Chile, it referenced API Article 49, tying the attack concept to a need for violence (whether in terms of means or consequences): “a cyber operation which does not result in death, injury, or physical harm cannot constitute an attack” under IHL.⁸⁴ On the other hand, it also suggested that “cyber operations that undermine the functioning of computer systems and infrastructure needed for the provision of services and resources to the civilian population constitute an attack” among which it included “nuclear plants, hospitals, banks, and air traffic control systems.”⁸⁵ Such responses suggest a need for further dialogue on how proximate the death or destruction must be to the loss of functionality. In other words, does the loss of functionality to an essential service alone constitute an attack or must there be some attendant (or reasonably foreseeable) death or injury to people or property?

⁷³ Guyana Response, *supra* note 1, at 4.

⁷⁴ Chile Response, *supra* note 1, at 3.

⁷⁵ *Id.*

⁷⁶ Peru’s response is, however, a bit ambiguous, as it appears to rely on *jus ad bellum* materials to identify the standards for an IHL attack, including citing the U.S. contextual approach favored by Harold Koh. Peru Response, *supra* note 1, at 6.

⁷⁷ 2014 US GGE Submission, *supra* note 1, at 736.

⁷⁸ Egan, *supra* note 1, at 818. Egan’s speech did not mention the reversible/irreversible criterion but emphasized instead “the nature and scope of those effects, as well as the nature of the connection, if any, between cyber activity and the particular armed conflict in question.” *Id.*

⁷⁹ Guatemala Response, *supra* note 1, at 3.

⁸⁰ Ecuador Response, *supra* note 1, at 3.

⁸¹ Bolivia Response, *supra* note 1, at 4-7.

⁸² *Id.*

⁸³ Guyana Response, *supra* note 1, at 3.

⁸⁴ *Id.*

⁸⁵ *Id.* (citing API Art. 54(2)).

Question 7: Is a cyber operation that only targets data governed by the international humanitarian law obligation to direct attacks only against military objectives and not against civilian objects?

34. IHL clearly requires “attacking” States to distinguish between civilian and military objects, permitting attacks on military objectives while prohibiting those against civilians and civilian objects.⁸⁶ When it comes to cyberspace, however, it is not always clear what constitutes an “object” to which this principle applies. The primary debate has centered on “data.” Does the non-physical nature of “data” mean it will not constitute an object so that militaries need not distinguish it and exclude it as a target in their cyber operations? Or should at least some “data” qualify as an “object” to which the principle of distinction and relevant IHL rules apply?

35. A majority of the *Tallinn Manual 2.0*’s Independent Group of Experts adopted the former view: the “armed conflict notion of ‘object’ is not to be interpreted as including data, at least in the current state of the law.”⁸⁷ That said, the experts did agree that a cyber operation against data could trigger IHL’s rules where it “foreseeably results in the injury or death of individuals or damage or destruction of physical objects” since the latter individuals and objects would be protected by relevant IHL rules like distinction.⁸⁸ The ICRC has, in contrast, suggested a more expansive definition of data via the term “essential civilian data” (e.g., medical data, biometric data, social security data, tax records, bank accounts, companies’ client files, or election lists and records). It has pointed out that “[d]eleting or tampering with essential civilian data can “cause more harm to civilians than the destruction of physical objects.”⁸⁹ Although it recognizes that the question of whether data can constitute a civilian object remains unresolved, the ICRC has suggested that IHL should do so or otherwise face a large “protection gap” inconsistent with IHL’s object and purpose. The seventh question sought Member State views on this important issue.

36. None of the States that responded to this question took the position that civilian data is directly subject to the principle of distinction in armed conflict. Indeed, several States emphasized the principle of distinction without offering an opinion on the status of data as an object.⁹⁰ Chile’s response suggested, however, that the principle of distinction could apply to cyber operations against data indirectly based on the knock-on effects of such operations. It cited the Commentary to API for the idea that objects must be “visible and tangible” which means that “under current international humanitarian law the aforementioned data would not qualify as objects, in principle, because they are essentially intangible, without prejudice to the physical elements containing the data—hardware, for example.”⁹¹ At the same time, Chile emphasized that “an attack directed exclusively at computer data could well produce adverse consequences affecting the civilian population,” citing as an example the possibility of a cyber operation eliminating a State’s social security database.⁹² It concluded that “[t]he principle of distinction must therefore be taken into consideration in the context of cyber operations, whereby a state should refrain from attacking data in case it could affect the civilian population, unless such data are being used for military purposes.”⁹³ Guyana’s response

⁸⁶ When a particular object is used for both civilian and military purposes (so-called “dual-use objects”), it becomes a military objective (except for separable parts thereof). For sources codifying this principle of “distinction” see *supra* note 81.

⁸⁷ *Tallinn 2.0*, *supra* note 20, at 437.

⁸⁸ *Id.* at 416.

⁸⁹ ICRC Position Paper, *supra* note 62, at 8; *accord* 2019 ICRC Report, *supra* note 70, at 21 (“Moreover, data have become an essential component of the digital domain and a cornerstone of life in many societies. However, different views exist on whether civilian data should be considered as civilian objects and therefore be protected under IHL principles and rules governing the conduct of hostilities. In the ICRC’s view, the conclusion that deleting or tampering with essential civilian data would not be prohibited by IHL in today’s ever more data-reliant world seems difficult to reconcile with the object and purpose of this body of law. Put simply, the replacement of paper files and documents with digital files in the form of data should not decrease the protection that IHL affords to them.”); 2015 ICRC Report, *supra* note 67, at 43.

⁹⁰ See Bolivia Response, *supra* note 1, at 5-7; Ecuador Response, *supra* note 1, at 2; Guatemala Response, *supra* note 1, at 3.

⁹¹ Chile Response, *supra* note 1, at 4.

⁹² *Id.*

⁹³ *Id.*

adopted a similar lens. Noting that “the deletion, suppression, corruption of data may have far reaching consequences,” it focused on the effects of the cyber operation rather than whether the data targeted qualified as an object or not.⁹⁴

37. Peru’s response did not address the potential of data to qualify as a civilian object, but focused (affirmatively) on its potential to qualify as a military objective. It characterized certain “data” (e.g., software allowing troop communications in the field, synchronization of a missile arsenal or location of enemy aircraft) as lawful “military objectives” while suggesting other data systems used in conflicts (e.g., “a data system that enabled the operating room of a field hospital treating war wounded or civilians to function”) were not subject to attack.⁹⁵

38. Several Member States’ comments to the OEWG affirmed the importance of applying IHL to the cyber context. States like Brazil emphasized, moreover, that this application should expressly include core principles—“humanity, necessity, proportionality, and distinction.”⁹⁶ None of the Member State OEWG contributions, however, addressed the definition of an attack nor the idea of data as a civilian (or military) object.

Question 8: Is sovereignty a discrete rule of international law that prohibits States from engaging in specific cyber operations? If so, does that prohibition cover cyber operations that fall below the use of force threshold and which do not otherwise violate the duty of non-intervention?

39. Sovereignty is undoubtedly the core architectural feature of the current international legal order, providing States with both rights and responsibilities.⁹⁷ Sovereignty serves as a foundational principle for some of the international legal rules already mentioned (e.g., the prohibition on the use of force, the right of self-defense, State responsibility). Moreover, in certain contexts, sovereignty exists not as just a background principle, but as an independent rule directly regulating State behavior (i.e., a foreign aircraft entering another State’s airspace without permission violates its sovereignty).⁹⁸ It is not yet clear, however, whether sovereignty operates as a rule in cyberspace. *Tallinn Manual 2.0* indicated that it constitutes a rule that operates to constrain a State’s

⁹⁴ Guyana Response, *supra* note 1, at 4 (“As it relates to data...regard should be had to whether the cyber operation that targets data has produced such a loss of functionality that it may constitute an attack”).

⁹⁵ Peru Response, *supra* note 1, at 6. Peru explained that attacks in the first case could cause significant military harm to opposing forces while an attack on the data in the field hospital would “not create a legitimate military advantage.” *Id.*

⁹⁶ Brazil Comments, *supra* note 5.

⁹⁷ *Island of Palmas (Netherlands v. United States of America)*, 2 R.I.A.A. 829, 839 (1928) (“Sovereignty in the relations between States signifies independence. Independence in regard to the portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State ... Territorial sovereignty, as has already been said, involves the exclusive right to display the activities of a State. This right has as corollary a duty: the obligation to protect within the territory the rights of other States, in particular their right to integrity and inviolability in peace and in war.”).

⁹⁸ See, e.g., Michael N. Schmitt and Liis Vihul, *Respect for Sovereignty in Cyberspace*, 95 TEXAS L. REV. 1639, 1640 (2017). In addition to Article 2(4)’s prohibition on the use of force, there is widespread agreement on a duty of non-intervention in international law that is applicable to cyberspace. See, e.g., *Case Concerning Armed Activities in the Territory of the Congo (Democratic Republic of the Congo v. Uganda)* (Jurisdiction and Admissibility) [2006] ICJ Rep. 6, ¶¶46-48; *Nicaragua Case*, *supra* note 43, at ¶205; Declaration on Principles of International Law concerning Friendly Relations & Co-operation among States, UNGA Res. 2625 (XXV), U.N. Doc. A/RES/25/2625 (Oct. 23, 1970). The 2015 UN GGE endorsed it among the applicable rules of international law in cyberspace. U.N. Secretary-General, *Report of the Group of Governmental Experts on Developments in the Field of Information and Telecommunications in the Context of International Security*, U.N. Doc. A/70/174 (July 22, 2015) ¶¶26, 28(b). And Rule 66 of *Tallinn 2.0* posits that “A State may not intervene, including by cyber means, in the internal or external affairs of another State.” *Tallinn 2.0*, *supra* note 20, at 312. As with the use of force, however, questions remain about how this duty operates in cyberspace and what cyber operations it prohibits or otherwise regulates.

cyber operations that do not rise to the level of a use of force or constitute a prohibited intervention.⁹⁹ In 2018, however, the U.K. Attorney General took the view that sovereignty was a principle that informed other rules not a rule of international law itself.¹⁰⁰ Since then, the French Ministry of Defense and the Dutch government have both expressed support for sovereignty as a stand-alone rule.¹⁰¹

40. The eighth question sought to solicit Member State views on the question of sovereignty-as-principle versus sovereignty-as-rule. It was focused on the constraining function of sovereignty, *i.e.*, whether and how it limits a State's ability to conduct cyber operations outside of its territory. Interestingly, many of the responding States took the question as an invitation to reaffirm sovereignty's enabling function – *i.e.*, according State's authority to regulate ICTs within their own territorial jurisdiction. Bolivia and Guyana, for example, both cited sovereignty as authorizing States to exercise jurisdiction over cyber infrastructure or activities in their territory.¹⁰² Ecuador, in contrast, cast doubt on the ability of States to exercise their sovereignty in cyberspace given its "intangible" characteristics, while affirming States do have sovereignty over "Cyber infrastructure" and activity related to that infrastructure in their territory.¹⁰³ Chile and the United States also echoed the power sovereignty accords States over ICTs in their territory, but noted that this power must operate within limits. Both cited the need for States to exercise their sovereignty consistent with international human rights law.¹⁰⁴ This last point was echoed by Colombia in its comments to the OEWG.¹⁰⁵

⁹⁹ *Tallinn 2.0*, *supra* note 20, Rule 4 ("A State must not conduct cyber operations that violate the sovereignty of another State.").

¹⁰⁰ *See, e.g.*, Jeremy Wright, QC, MP, *Cyber and International Law in the 21st Century* (May 23, 2018), at <https://www.gov.uk/government/speeches/cyber-and-international-law-in-the-21st-century> ("U.K. Views") ("Some have sought to argue for the existence of a cyber-specific rule of a 'violation of territorial sovereignty' ... Sovereignty is of course fundamental to the international rules-based system. But I am not persuaded that we can currently extrapolate from that general principle a specific rule or additional prohibition for cyber activity beyond that of a prohibited intervention. The UK Government's position is therefore that there is no such rule as a matter of current international law.").

¹⁰¹ *See* Ministère des Armées, *Droit international appliqué aux opérations dans le cyberspace* (Sept. 9, 2019), at https://www.defense.gouv.fr/salle-de-presse/communiqués/communiqués-du-ministère-des-armées/communiqué_la-france-s-engage-a-promouvoir-un-cyberspace-stable-fondé-sur-la-confiance-et-le-respect-du-droit-international ("French Ministry of Defense Views") at 6 ("Any unauthorised penetration by a State of French systems or any production of effects on French territory via a digital vector may constitute, at the least, a breach of sovereignty" (English translation by Rapporteur)); *Letter to the parliament on the international legal order in cyberspace*, July 5, 2019, Appendix 1, at <https://www.government.nl/ministries/ministry-of-foreign-affairs/documents/parliamentary-documents/2019/09/26/letter-to-the-parliament-on-the-international-legal-order-in-cyberspace> ("The Netherlands Views") ("According to some countries and legal scholars, the sovereignty principle does not constitute an independently binding rule of international law that is separate from the other rules derived from it. The Netherlands does not share this view. It believes that respect for the sovereignty of other countries is an obligation in its own right, the violation of which may in turn constitute an internationally wrongful act."). A recent scholarly treatment questions if France clearly falls in the sovereignty-as-rule camp. *See* Gary Corn, *Punching on the Edges of the Gray Zone: Iranian Cyber Threats and State Cyber Responses*, JUST SECURITY (Feb. 11, 2020) ("although the MdA does state that cyberattacks, as it defines that term, against French digital systems or any effects produced on French territory by digital means may constitute a breach of sovereignty in the general sense, at no point does it assert unequivocally that a violation of the principle of sovereignty constitutes a breach of an international obligation. To the contrary, obviously aware of the debate, the document is deliberately vague on this point and simply asserts France's right to respond to cyberattacks with the full range of options available under international law...").

¹⁰² Bolivia Response, *supra* note 1, at 5-7; Guyana Response, *supra* note 1, at 5.

¹⁰³ Ecuador Response, *supra* note 1, at 2.

¹⁰⁴ Chile Response, *supra* note 1, at 4-5 (recognizing sovereignty authorizes protection and defense of a State's "critical information infrastructure" as long as those sovereignty-based measures "do not violate the rule of international law – for example, those contained in international human rights law

41. On the question of whether sovereignty operates as a stand-alone rule in cyberspace, three States—Bolivia, Guatemala, and Guyana—affirmed its status as such.¹⁰⁶ Guyana, for example, indicated that sovereignty protections are “not limited to activities amounting to an unjustified use of force, to an armed attack, or to a prohibited intervention.”¹⁰⁷ Thus, it took the view that a State “must not conduct cyber operations that violate the sovereignty of another State” with the existence of such violations depending on “the degree of infringement and whether there has been an interference with government functions.”¹⁰⁸ Guatemala adopted a similar stance, indicating that “a State participating in a specific cyber operation violates a country’s sovereignty if, in the course of a cyber attack, it takes certain information from another State’s cyber realm, even when no harm that could affect equipment or the human rights of a person or persons is caused.”¹⁰⁹

42. Other States’ responses were quite equivocal. Peru simply cited sovereignty as “one of the fundamental pillars of international society” without opining on its status as an independent rule.¹¹⁰ Ecuador suggested that the “rule” authorizing States to control their own cyber infrastructure “does not prevent a state from engaging in cyber operations” without offering an opinion on whether it might regulate how they do so vis-à-vis other sovereign States.¹¹¹

43. Chile’s response described sovereignty as a “principle” that “States carrying out cyber operations must always take ... into account.”¹¹² Thus, “every time a state considers carrying out a cyber operation, it must consider ensuring it does not affect the sovereignty of another.”¹¹³ The use of “principle” may suggest something other than a concrete rule, although the use of “must” creates a more obligatory expectation. Moreover, Chile did suggest that:

every state has an obligation to respect the territorial integrity and independence of other states and must faithfully discharge its international obligations, including as regards the principle of nonintervention. Cyber operations that hinder another state from exercising its sovereignty therefore constitute a violation of that sovereignty and are prohibited under international law.¹¹⁴

The last sentence suggests sovereignty might constitute a stand-alone rule unless one reads the reference to intervention with another State’s exercise of sovereignty as equivalent to the *domaine réservé* protected by the duty of non-intervention.¹¹⁵

44. The U.S. position is murkier. In 2014, then-legal adviser Harold Koh indicated that “State sovereignty ... must be taken into account in the conduct of activities in cyberspace, including outside of the context of armed conflict.”¹¹⁶ It is not clear, however, whether taking “State sovereignty ... into account” signals U.S. recognition of sovereignty as a standalone rule. In his own speech in 2016, then-Legal Adviser Brian Egan made clear that “remote cyber operations involving computers or other networked devices located on another State’s territory do not constitute a per se violation of international law.”¹¹⁷ At the same time, he conceded that “[i]n certain circumstances, one State’s non-

or international humanitarian law.”); 2014 US GGE Submission, *supra* note 1, at 737-8 (noting that the exercise of jurisdiction of a territorial State “is not unlimited; it must be consistent with applicable international law, including international human rights obligations” and citing, in particular freedom of expression and freedom of opinion).

¹⁰⁵ Colombia Comments, *supra* note 5.

¹⁰⁶ Bolivia Response, *supra* note 1, at 5-7; Guatemala Response, *supra* note 1, at 3; Guyana Response, *supra* note 1, at 5.

¹⁰⁷ Guyana Response, *supra* note 1, at 5.

¹⁰⁸ *Id.*

¹⁰⁹ Guatemala Response, *supra* note 1, at 3.

¹¹⁰ Peru Response, *supra* note 1, at 6-7.

¹¹¹ Ecuador Response, *supra* note 1, at 2.

¹¹² Chile Response, *supra* note 1, at 5.

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ See note 117.

¹¹⁶ Koh, *supra* note 1, at 596; Accord 2014 US GGE Submission, *supra* note 1, at 737; 2016 US GGE Submission, *supra* note 1, at 825.

¹¹⁷ Egan, *supra* note 1, at 818. Among other things, Egan indicated that the United States does engage in intelligence collection activities overseas and that such activities may violate the domestic

consensual cyber operation in another State's territory could violate international law, even if it falls below the threshold for the use of force." In any case, Egan indicated that "[p]recisely when a non-consensual cyber operation violates the sovereignty of another State is a question lawyers within the U.S. government continue to study carefully, and it is one that ultimately will be resolved through the practice and opinio juris."¹¹⁸ This might suggest that the United States may accept the idea of sovereignty-as-rule in principle, albeit without much clarity on its contours or contents. Most recently, the General Counsel for the U.S. Department of Defense declined to adopt this view: "[f]or cyber operations that would not constitute a prohibited intervention or use-of-force [i.e., those that might be covered by a rule of sovereignty], the Department believes there is not sufficiently widespread and consistent State practice resulting from a sense of legal obligation to conclude that customary international law generally prohibits such non-consensual cyber operations in another State's territory."¹¹⁹

45. A discussion among 16 Member States' representatives under "Chatham House rules"¹²⁰ on June 23, 2020 reinforced the current diversity of viewpoints on the sovereignty question. Several participants called for affirming the "sovereignty-as-rule" view for cyberspace, violations of which would trigger international legal responsibility. Others, however, expressed more skepticism about the value of such efforts; one participant suggested that there may be too many meanings for the term "sovereignty" to ascribe it a rule-like status. Another participant viewed the "sovereignty debate as a distraction" while a third explicitly suggested a need to "rethink" its meaning in the cyber context.

Question 9: Does due diligence qualify as a rule of international law that States must follow in exercising sovereignty over the information and communication technologies in their territory or under the control of their nationals?

46. Due diligence is a principle of international law that requires a State to respond to activities that it knows (or reasonably should know) have originated in its territory or other areas under its control and that violate the right(s) of another State.¹²¹ It is an obligation of effort, not result – where a State knows or should know of the conduct, it must employ "all means reasonably available" to redress it.¹²² As a principle, due diligence currently regulates State behavior in a number of contexts, most notably international environmental law, where it is the basis for requiring States to stop pollution in their territory that serves as a source for transboundary harm to other States' territories.

47. Like sovereignty, there are competing views on whether due diligence is a requirement of international law in cyberspace. The 2015 UN GGE report listed it among the "voluntary" norms of responsible State behavior rather than listing it under applicable international law principles.¹²³ The Netherlands and France's Ministry of Defense have characterized it as a legal rule in cyberspace.¹²⁴ In doing so, however, the Netherlands noted that "not all countries agree that the due

laws of other States, but that there is no "per se prohibition on such activities under customary international law." *Id.*

¹¹⁸ *Id.* at 819.

¹¹⁹ See Paul C. Ney, *DOD General Counsel Remarks at U.S. Cyber Command Legal Conference* (March 2, 2020), at <https://www.defense.gov/Newsroom/Speeches/Speech/Article/2099378/dod-general-counsel-remarks-at-us-cyber-command-legal-conference/>. It is not clear, however, whether Ney was expressing views for the United States as a whole, or, if the position was just that of the U.S. military, an ambiguity that also exists with respect to the French Ministry of Defense Views. See *supra* note 101.

¹²⁰ Chatham House, *Chatham House Rule*, at <https://www.chathamhouse.org/chatham-house-rule> ("When a meeting, or part thereof, is held under the Chatham House Rule, participants are free to use the information received, but neither the identity nor the affiliation of the speaker(s), nor that of any other participant, may be revealed.").

¹²¹ See, e.g., *Corfu Channel Case; Assessment of Compensation (United Kingdom v. Albania)* [1949] ICJ Rep. ¶22 (April 9). *Trail Smelter Case* (United States-Canada), UNRIAA, vol. III, 1905 (1938, 1941).

¹²² See *Application of the Convention on the Protection and Punishment of the Crime of Genocide (Bosnia v. Serbia)* (Judgment) [2007] ICJ Rep. 1, ¶430.

¹²³ 2015 UNGGE, *supra* note 1, at ¶¶13, 26-28.

¹²⁴ French Ministry of Defense Views, *supra* note 101, at 10 ("Under the due diligence obligation, States should ensure that their sovereign domain in cyberspace is not used to commit internationally

diligence principle constitutes an obligation in its own right under international law” and the United States is widely thought to be among those contesting its status as such.¹²⁵ The ninth question thus sought to obtain Member State views on the status of due diligence with respect to a State’s obligations under international law in cyberspace.

48. Chile, Ecuador, Guatemala, Guyana, and Peru all took the position that the due diligence principle is a part of the international law that States must apply in cyberspace.¹²⁶ As Chile explained, “[f]rom a cyber-operations standpoint, a state must exercise due diligence to prevent its sovereign territory, including the cyber infrastructure under its control, from being used to carry out cyber operations that affect another state’s rights or could have adverse consequences for them.”¹²⁷ Guatemala adopted a similar stance, while noting that since “cyberspace” is such a broad term, performing due diligence can be extremely complicated.¹²⁸ Still, to the extent due diligence “derives from the principle of sovereignty,” Guatemala opined that “each State should exert the control necessary to halt all harmful activities within its territory and be obliged to take preventive measures, establish a CERT, adopt information security policies, and raise awareness about information security.”¹²⁹

49. Bolivia offered a more equivocal response. Without opining one way or another on the legal status of due diligence, it did opine that a State may not be held responsible for a cyberattack when it lacks technological infrastructure to control a non-State actor.¹³⁰ This view could be consistent with having due diligence as an international legal rule for cyber operations as due diligence generally has required States to “know” about the activities in question, which may not be possible for States lacking the requisite technical infrastructure.¹³¹ On the other hand, the inability to “control” cyber activities of which it has knowledge might suggest Bolivia does not accede to the due diligence doctrine in cyberspace. Without further clarification of Bolivia’s response, it is difficult to reach a conclusion one way or another. Similarly, prior public U.S. statements have not addressed the international legal status of due diligence directly. It is notable, however, that the United States has tended to describe any obligations to respond to requests for assistance in non-binding terms.¹³²

unlawful acts. A State’s failure to comply with this obligation is not a ground for an exception to the prohibition of the use of force, contrary to the opinion of the majority of the Tallinn Manual Group of Experts.”); The Netherlands Views, *supra* note 101, Appendix, at 4 (“the due diligence principle requires that states take action in respect of cyber activities: - carried out by persons in their territory or where use is made of items or networks that are in their territory or which they otherwise control; - that violate a right of another state; and - whose existence they are, or should be, aware of”). Although it did not describe due diligence as a specific rule of international law, Estonia has catalogued its contents as a requirement for State behavior. Kersti Kaljulaid, President of Estonia, *President of the Republic at the opening of CyCon 2019* (May 29, 2019), at <https://www.president.ee/en/official-duties/speeches/15241-president-of-the-republic-at-the-opening-of-cycon-2019/index.html> (“Estonian Views”) (“states have to make reasonable efforts to ensure that their territory is not used to adversely affect the rights of other states. They should strive to develop means to offer support when requested by the injured state in order to identify, attribute or investigate malicious cyber operations. This expectation depends on national capacity as well as availability, and accessibility of information.”).

¹²⁵ The Netherlands Views, *supra* note 101, Appendix, at 4.

¹²⁶ Chile Response, *supra* note 1, at 6-7; Ecuador Response, *supra* note 1, at 2; Guatemala Response, *supra* note 1, at 4; Guyana Response, *supra* note 1, at 5; Peru Response, *supra* note 1, at 7.

¹²⁷ Chile Response, *supra* note 1, at 6-7. Ecuador simply stated: “due diligence is applicable to what happens with technological resources within national territory.” Ecuador Response, *supra* note 1, at 2.

¹²⁸ Guatemala Response, *supra* note 1, at 4.

¹²⁹ *Id.* at 2, 4.

¹³⁰ Bolivia Response, *supra* note 1, at 3-7.

¹³¹ See *Tallinn 2.0*, *supra* note 20, at 40.

¹³² 2014 US GGE Submission, *supra* note 1, at 739 (“A State *should* cooperate, in a manner consistent with domestic law and International obligations, with requests for assistance from other States in investigating cybercrimes, collecting electronic evidence, and mitigating malicious cyber activity from its territory.”).

The lack of any public U.S. endorsement of due diligence as a legal rule in either the GGE context or elsewhere may be indicative of U.S. doubts as to its legal status.

50. In the June 2020 Chatham House discussion, several Member States expressed support for due diligence as an (important) rule of international law in the cyber context. However, one Member State’s representative did express some hesitation about endorsing due diligence given the risk of non-compliance that might occur for States unable to adequately respond to cyberthreats because of a lack of technical capacity.

Question 10: Are there other rules of international law that your government believes are important to highlight in assessing the regulation of cyber operations by States or actors for which a State is internationally responsible?

51. The final, tenth, question invited States to identify additional areas of international law on which the Committee should focus improving transparency in the cyber context. Responses focused on different issues. Bolivia called for more attention to protecting people’s “fundamental rights” wherever they operate, including in cyberspace.¹³³ Several other responses focused on cybercrime, particularly the Council of Europe’s Budapest Convention.¹³⁴ Others emphasized the contributions of the *Tallinn Manuals*.¹³⁵

52. Two States – Ecuador and Guyana – indicated that there may be a need for new international law in the cyber context. Ecuador emphasized establishing how “to regulate attacks against military and/or civilian targets that affect the huge sections of the population, such as the case of critical infrastructure, hospitals, public transportation, and other infrastructure affecting state security.”¹³⁶ Guyana suggested that “it might be prudent to have a set of international law principles that are tailored to the special nature of cyberspace,” noting that existing legal principles were developed for a different time and context.¹³⁷

53. In the June 2020 Chatham House consultations, multiple Member States called for more attention to the duty of non-intervention (and the question of what cyber activities constitute coercion). Several participants echoed a call for more attention to legal issues “below” the use of force threshold set by the UN Charter’s Article 2(4) prohibition. Others suggested less focus on issues of international peace and security in favor of more attention to the application of international human rights law to cyberspace. Additional topics receiving attention included diplomatic law, the principle of good faith, countermeasures, and the standards of proof for attribution of cyber operations to a State.

54. Finally, at least one participant called for developing a distinctly Latin American perspective on the international governance and legal framework of cyberspace. The participant noted how most ideas on international law in cyberspace have been developed by European States, or scholars from the Global North. Instead of duplicating existing efforts (e.g. UN GGE, UN OEWG, etc.), Latin American countries could build on these foundations to develop a Latin American framework for understanding international law in cyberspace based on a shared political culture of democratic institutions and Ibero-American history. The OAS was cited as the ideal venue for articulating such a shared vision.

* * *

¹³³ Bolivia Response, *supra* note 1, at 6-7.

¹³⁴ Guatemala Response, *supra* note 1, at 4; Bolivia Response, *supra* note 1, at 6-7.

¹³⁵ Costa Rica Response, *supra* note 1, at 2 (emphasizing Costa Rican interest in joining the Budapest Convention); Guatemala Response, *supra* note 1, at 4 (citing the Budapest Convention).

¹³⁶ Ecuador Response, *supra* note 1, at 3.

¹³⁷ Guyana Response, *supra* note 1, at 5-6 (emphasizing anonymity as a particular challenge to applying existing law).

CJI/RES. 260 (XCVII-O/20)**INTERNATIONAL LAW AND STATE CYBER OPERATIONS**

THE INTER-AMERICAN JURIDICAL COMMITTEE,

BEARING IN MIND:

That the OAS General Assembly, through resolution AG/RES. 2930 (XLIX-O/19) "International Law", in point i on "Observations and recommendations on the Annual Report of the Inter-American Juridical Committee," requested the CJI to permanently report on progress regarding the topics included in its agenda, such as matters related to cyber security;

AWARE of the need to provide OAS Member States with clear parameters on the application of international law to cyberspace, thereby limiting the risks of escalation or involuntary conflict;

TAKING INTO ACCOUNT the document "International Law and Cybernetic Operations of the State: Improving Transparency - Fifth Report", document CJI/doc. 615/20, presented by Dr. Duncan B. Hollis, rapporteur of the topic,

RESOLVES:

1. To thank Dr. Duncan B. Hollis for his work as rapporteur on the subject and for the presentation of said report.

2. Based on the proposals in the aforementioned report, to recommend to the General Assembly that it support the applicability of international law to state operations in cyberspace through the approval of the following statement:

The OAS General Assembly affirms that international law, including the United Nations Charter in its entirety, the OAS Charter, international humanitarian law, international human rights law, the duty of non-intervention, the sovereign equality of states, and the law of state responsibility, is applicable to the use of information and communication technologies (ICT) by States and those for whom States are internationally responsible.

3. To request the Department of International Law, in its capacity as Technical Secretariat of the Inter-American Juridical Committee, to present to the CJI a proposal to support or undertake training activities for various actors on the application of international law to cyberspace.

4. To keep the theme on its agenda and broaden its scope beyond the themes of international law related to international peace and security to encompass other international legal regimes.

This resolution was unanimously approved at the regular session on the 7th August 2020, in the presence of the following members: Drs. Luis García-Corrochano Moyano, Eric P. Rudge, Mariana Salazar Albornoz, José Antonio Moreno Rodríguez, Milenko Bertrand-Galindo Arriagada, Duncan B. Hollis, Alix Richard, George Rodrigo Bandeira Galindo, Miguel A. Espeche-Gil, Iñigo Salvador Crespo and Ruth Correa Palacio.

6. Foreign interference in a state's electoral process: a threat to democracy and sovereignty of states, response under international law

During the 93rd Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, August, 2018), Dr. Alix Richard submitted a report under the title “Foreign interference in a state's electoral process: a threat to democracy and sovereignty of states, responses under international law,” (document CJI/doc. 565/18), aiming at showing its relevance while proposing a new theme for the working agenda. The report analyzes various kinds of interference in electoral systems, in an attempt to make available international juridical mechanisms to protect States. Among the various forms of interference, he highlighted the topic involving the funding of electoral campaigns and cyber-interference in the digital era. In this regard, he wondered whether the current mechanisms of international law were sufficient to provide juridical protection to the States as well as an effective response in case of foreign interference in electoral processes. He confirmed that the Tallin Manual presents a complete analysis of cyber-operations. However, in view of the relevance and complexity of the issue, the Committee could well issue some recommendations to the States, including the best practices that might help them. At the end of his presentation he volunteered as a rapporteur for the theme.

Dr. Luis García-Corrochano recognized the sophistication of cyber-threats during campaigns and noted that the topic is related to the provisions of the Inter-American Democratic Charter, therefore that the Committee might well be involved in this issue.

Dr. Duncan Hollis thanked the previous speaker for introducing the topic, and agreed with the pertinence of evaluate the study of this theme by the Committee. He confirmed that there were two ways to address it. One of them could refer to the manipulation of elections to change the final results; the second option would be related to the use of social media and the control of speeches in order to influence people's decisions. In this last case, it is really difficult to make a distinction between undue influence and mere influence.

Dr. Carlos Mata thanked Dr. Alix Richard for the proposal and also Dr. Hollis for his support. He said that the topic was a complex and broad one that should be connected to the OAS Charter. In this regard he was in favor of including the theme on the agenda. Dr. Baena Soares was thankful for the proposal and suggested contacting Member States in order to find out their interest on the topic. Dr. Ruth Stella Correa Palacio was of the opinion that this topic might complement the report of Dr. Hernán Salinas. Dr. Miguel Espeche-Gil explained that this theme had been considered by the Committee in the year 1965, and that the report made a distinction between intervention and collective action, and the innovation was represented by the cybernetic aspect in the case of elections. In this regard, the Inter-American Democratic Charter establishes guidelines to be added to the report. Furthermore, he confirmed that electoral fraud within the States must be studied by the Committee, and should also to some extent be included in development regarding the Democratic Charter. In this context, he asked to distribute the reports presented by Dr. Jean-Michel Arrighi to IHLADI (*Instituto Hispano Luso Americano de Derecho Internacional*) and the cited Committee report of 1965.

The Chair welcomed the proposal and emphasized the interest to protect electoral processes and distinguish this from cases in which the OAS could intervene. The issue of freedom of expression is of prime importance. Therefore, the objective of the study should be limited to good practices regarding undue interference. In this regard, he asked Dr. Alix Richard, with the support of Dr. Hollis, to present a scheme containing the elements of what is proposed together with specific contents.

Dr. Duncan Hollis proposed including the topic in the agenda of the 7th Joint Meeting with Legal Advisors (August 15, 2018), in order to gather their opinion, which was accepted by the plenary.

At the last day of the session and having discussed the issue with the legal advisors, the theme was incorporated into the agenda of the Committee. Dr. Alix Richard, who was designated as rapporteur, expresses it is appreciation to the response of the members of the Committee and undertook to present a report at the next session of the Committee.

During the 94th Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, February, 2019) the issue was not discussed.

During the 95th Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, July 31 to August 9, 2019), the rapporteur for the topic, Dr. Alix Richard, explained the background to his proposal and his intention to prepare a document that would include an inventory of past and present forms of interference as well as describing the existing norms to confront such interference and, to the extent possible, determine their effectiveness. He asked if it would be preferable to draft a binding instrument, a model law, a study, or a guide. He alluded to challenges to efficiently determine interference and to punish (or deter) those who do. He explained differences between his topic and electoral fraud, which in principle would have domestic overtones, as opposed to foreign interference, as well as clarifying that it was not his intention to include developments of that nature in his report. Finally, he suggested sending a questionnaire to States to find out the state of affairs from firsthand sources, and he asked committee members to suggest the way forward in order to provide States with practical contributions.

Dr. Carlos Mata urged the rapporteur to determine the object of the work in order to better define his task. He suggested working on the impact of new technologies, through actions coming from abroad, taking as a reference point the principle of non-intervention stipulated in the OAS Charter. In this regard, he cited the case of influence that political parties exerted through telephone calls from abroad. In his view, the Committee's contribution did not necessarily need to be a model law.

Dr. Milenko Bertrand stressed the importance of the purpose of the study, that there was no need to develop a model law, but that it should include topics concerning the responsibility of States. He urged the rapporteur to limit himself to legal issues that refer to new forms of intervention, but without omitting the ways in which the States of the Americas have historically suffered interference and its effects, and to include solutions in each case.

Dr. Espeche-Gil invited the rapporteur to present developments in the area of non-intervention and collective action, as well as the necessary updating to confront new situations.

Dr. Duncan Hollis suggested not determining the format at that stage and that the nature of the document be defined based on the report to be submitted. Mechanisms should be sought to defend against interference. The initial report should contain developments on the events that occurred in the elections in France, the European Union, and the United States. Determining steps to confront interference, such as the G-7 political commitments; Macron's appeal that takes up the G-7 commitment (the Paris Appeal), which involved both states and nongovernmental actors. An analysis should also be made of the impact of non-intervention and its definition under the current state of international law.

The rapporteur for the topic, Dr. Alix Richard, welcomed the comments and committed to include both traditional and newer forms of interference, including cyber attacks; all with the aim of finding a formula to protect governments from various forms of interference.

The Chair asked the rapporteur to present a report that propose the nature of the instrument to be developed at the next session of the Committee.

During the 96th Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, March, 2020), this issue was not considered because the rapporteur was absent.

During the 97th Regular Session of the Inter-American Juridical Committee (Virtual Session, August, 2020), this issue was not considered.

* * *

7. Guidelines for the subsequent normative development of diplomatic asylum

During the 95th Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, July/August 2019), Dr. Íñigo Salvador presented a proposal for a new item to be included on the Committee's agenda by means of a report entitled "Guidelines for the further development of regulations on diplomatic asylum," (document CJI/doc. 592/19). To that end, the rapporteur identified the conventional norms (1954 Convention, which gives the State exclusive power) and the jurisprudential developments in the field. He also referred to the distinction between territorial and diplomatic asylum, citing opinions of the Inter-American Court of Human Rights and doctrine from specific cases in the Hemisphere and beyond. In that regard, Dr. Salvador presented three legal principles that should be considered in relation to the obligations of asylum seekers:

1. *No obligations should be established that are impossible for asylum seekers to fulfill or that place too great a burden on them.*
2. *On no account should the obligations of asylum seekers be a kind of consideration for the granting of asylum.*
3. *The obligations of asylum seekers must be compatible with the legal nature of the form of asylum applied.*

In conclusion, he said that his proposal sought to determine the conditions, content, and scope of diplomatic asylum, taking into account the obligations of the person who has been granted asylum, the principles of non-interference in the internal affairs of the receiving State and the inviolability of diplomatic missions, and the issue of the qualification of its nature by the host State.

Dr. Milenko Bertrand thanked the rapporteur for the proposal on a topic around which there was a bit of anarchy. He suggested including progress on laws against terrorism and genocide. In his view, the grounds for refuge should be considered in the application for asylum. On the issue of sovereignty and human rights, he cited the case of a Chilean national who had several charges pending against him for crimes committed in his country and who had been granted refuge in Argentina (the defense for which alluded to political asylum). It urged that the pertinence be reviewed of the possible elimination of the institution of asylum. He was aware that asylum had made it possible to save lives, but the refugee crisis of our times and the expansion of the grounds for it made it necessary to develop a concept of refuge that could include asylum.

Dr. Mariana Salazar appreciated the topicality of the subject and the description proposed by Dr. Salvador. She opposed any attempt to eliminate the figure of asylum in the light of the increased non-recognition of the Cartagena Convention on Refugees and the possibilities that allowed when one was unable to leave one's country of origin. She called for caution regarding the characterization of asylum as a human right, in relation to the causes cited in the report.

Dr. George Galindo thanked Dr. Salvador and stressed the appropriateness of the proposal. In relation to the purpose of the work, he considered that a study on asylum would allow for an update and would be an important contribution. He suggested adding the duties of states in relation to diplomatic asylum (in light of the *Iran v. USA* case which established that diplomatic law was self-contained), as well as the relationship with asylees and diplomatic personnel. He proposed verifying the political dimension with regard to the way States relate to each other, and not only the human rights dimension. He also urged the inclusion of elements on the duty to ensure the inviolability of diplomatic missions and the necessary guarantees to maintain neutrality.

Dr. Luis García-Corrochano noted a lack of clarity in certain elements that were not resolved by the International Court of Justice in the *Haya De la Torre* case. It was not a question of a right to asylum, but rather a discretion of the State under certain guidelines. The inclusion of the status of the asylum seeker in the report was fundamental; that was also related to the ability to maintain neutrality and allow the State to guarantee the asylum seeker his or her essential rights. Finally, it was decided to regulate the temporal aspect (since by nature diplomatic asylum should be transitory).

The Chair referred to the importance of the inviolability of Embassies and invited Dr. Iñigo Salvador to serve as the rapporteur for the topic, to which the plenary agreed.

The rapporteur for the topic welcomed the comments and the interest in the continued study of the topic and requested guidance on the way forward.

Dr. Arrighi recommended that the Committee educate the public on the proper use of the concepts formulated, taking into account the elements raised by the members. The rapporteur proposed identifying the terms without losing sight of the interest of being able to make a normative proposal at the end of that first task.

During the 96th Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, March, 2020), this issue was not considered because the rapporteur was absent.

During the 97th Regular Session of the Inter-American Juridical Committee (Virtual Session, August, 2020), this issue was not considered.

* * *

8. International customary law in the context of the American Continent

During the 95th Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, July 31 to August 9, 2019), the rapporteur for the topic, Dr. George Galindo presented a new proposal to be included in the Committee's agenda, entitled "Regional Customary International Law," (document CJI/doc. 587/19). The rapporteur explained the three main motivations for the subject:

- that the CJI reflect on what it means to belong to the American hemisphere;
- to consider the advisory opinion of the Inter-American Court of Human Rights of May 30, 2018, Advisory Opinion OC-25/18 on "The Institution of Asylum, and Its Recognition as a Human Right under the Inter-American System of Protection," and
- to analyze the pronouncement of the International Law Commission on identification of customary international law, notably Conclusion 16 (of which the General Assembly took note):

Conclusion 16

Particular customary international law

1. A rule of particular customary international law, whether regional, local or other, is a rule of customary international law that applies only among a limited number of States
2. To determine the existence and content of a rule of particular customary international law, it is necessary to ascertain whether there is a general practice among the States concerned that is accepted by them as law (*opinio juris*) among themselves."

Among the elements that will be considered in his study, Dr. Bandeira Galindo, proposed the following topics:

- The "delimitation of customary rules", in the light of doctrine proposals that limit it to a number of States that make it up.
- The consent, its express or tacit character. Need to investigate the issue of silence in the restricted environment imposed by the regional system.
- The relationship between regional and universal custom.
- The principle of persistent objection, in particular to a customary rule requiring consent.
- The existence of a regional *jus cogens*.
- The determination of a concept of region that is "legally relevant."

As a methodology, he proposed identifying the customary rules that currently exist in the Hemisphere (general primary rules in the area of regional custom) through a study of the decisions of international tribunals, doctrinal contributions, and a survey in OAS member states.

Dr. Iñigo Salvador supported Dr. George Galindo's proposal and, as a way to enrich his consideration of the topic, proposed reflecting both aspects of the concept under study—regional as well as universal, including the particular versus general aspect, in order to include the opinions of the International Court of Justice in the invocation of custom. With regard to the relationship between this topic and asylum (for which he is rapporteur), he suggested including the cross-referencing of sources (elements from conventions and customary international law).

Dr. Luis García Corrochano also supported the proposal presented. He referred to the generating effect of custom of Judge Jiménez de Arrechaga. Being a hemispheric unit, one would have to ascertain where custom begins and ends. A case-by-case analysis should be done. Finally, he proposed to refer to the passage from customary norm to peremptory norm, independently of its questioning.

Dr. Milenko Bertrand referred to the revitalizing challenge that the proposal entailed. He advised including in the analysis the "bilateral custom" (its point of connection and differentiation with estoppel); value aspects in relation to the practice of the Inter-American Court of Human Rights

following the *Atala* case, for example; issues related to silence in consent, in particular the effect of the declarations of international organizations of a political order that are not voted on because it favors consensus.

Dr. Jean-Michel Arrighi recommended referring to the existence or absence of a custom of a regional nature in relation to democracy, based on the OAS Democratic Charter, a text adopted as a resolution.

During the 96th Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, March, 2020), the rapporteur of this topic, Dr. George Galindo, presented his report on this issue (document CJI/doc. 602/20). He stated that the most appropriate methodology is the inductive option, as it allows an even balance with the case law laid down by the International Court of Justice on the topic under study.

The case law developments presented in his report encompass decisions on a variety of themes, such as on asylum; the rights of United States nationals in Morocco; the right of passage over the territory of India (“The Court sees no reason why a prolonged practice between two States that accept it as a regulatory element of their relations cannot serve as a basis for mutual rights and obligations between both States”); military and paramilitary activities in Nicaragua and against Nicaragua (Nicaragua against the United States of America); the border dispute (Burkina Faso against the Republic of Mali) that brings up the issue of *uti possidetis*; the dispute over navigation rights and related rights (Costa Rica vs. Nicaragua), where the Court makes an assumption on the existence of a customary practice in favor of Costa Rica; the right to subsistence fishing by the riverside fishermen along the San Juan river, thus reversing the burden of proof regarding asylum cases.

Dr. Luis García-Corrochano referred to regional customs and bilateral customs and the type of evidence required in each case (i.e. testing the custom and after the specific claim).

Dr. Salazar praised the rapporteur for the methodology used and for having integrated the dissenting or separate opinions of judges. She asked the rapporteur whether regional custom would impose stricter requirements for the expression of the will of States, as would appear to be the case in the early cases heard by the Court, a trend that seems to have been reversed in the latest decision mentioned in his report, for cases where there is acquiescence to a rule. Finally, she asked the rapporteur if he intended to draw up a list of rules that are regional custom in the Americas, which she felt would be advisable and useful. The rapporteur explained that the shift in the position of the Court should be investigated in greater depth. In relation to the classification, whether regional or particular, he requested more time for further reflection. He suggested looking at the possibility of including the distinction between primary and secondary rules; or perhaps identifying how the rule arises and then seeing if it would be worthwhile to analyze some issues that constitute regional custom.

Dr. Milenko Bertrand urged the rapporteur to draw up a list of particular areas where a custom exists today, outside the Latin American system (and even in the region, including the Caribbean). This proposal was supported by Dr. Eric Rudge, who considered the inclusion of the practices of the entire region as an important move.

Dr. José Moreno asked the rapporteur about preparing a list that could address the topic of investments.

The Chair, Dr. Ruth Correa, thanked the rapporteur for his work, and invited him to take the necessary time to advance in his reflections.

During the 97th Regular Session of the Inter-American Juridical Committee (Virtual Session, August, 2020), this issue was not considered.

* * *

9. Electoral fraud as an international crime in the inter-American system

During the 95th Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, July/August 2019), Dr. Miguel Angel Espeche-Gil expressed his interest in developing the theme of electoral fraud, which currently takes various forms and ramifications (including in the realm of cyberspace). Specifically, his proposal was to include a new provision in the Inter-American Democratic Charter, given its importance in this area, through an addition to Article 23 in Chapter V, which would read:

“Electoral fraud, in all its forms, is illegal within the inter-American system because it violates one of the fundamental principles of the OAS, namely the effective exercise of representative democracy. Electoral fraud is as illegal as *coups d'état*: both give rise to illegitimate governments.”

Dr. Arrighi explained that the original draft of the Inter-American Democratic Charter prepared by the Peruvian Government sought precisely to pronounce on electoral fraud, in light of both candidates' claims in the 2000 presidential election contested by Fujimori and Toledo. However, no progress was made on the issue and none of the four crisis scenarios envisaged by the Inter-American Democratic Charter makes provision for electoral fraud. He recommended avoiding modifying the Democratic Charter at present and adopting a resolution along the lines suggested by the Committee, which already had studies on the elements of democracy.

Dr. Espeche-Gil thanked Dr. Arrighi for his suggestion and agreed to work on a pronouncement on the issue of electoral fraud without for the time being proposing changes to the Inter-American Democratic Charter.

Dr. Luis García-Corrochano welcomed Dr. Espeche-Gil's proposal and the path proposed by Dr. Arrighi. In view of the increase in the number of threats to democracy, an extensive list of elements that have an impact should be included.

Dr. George Galindo requested additional information on the Committee's developments on the issue of democracy. In that regard, Dr. Dante Negro referred to the volume "Democracy in the Work of the Inter-American Juridical Committee," which compiles the developments from 1946 to 2010.

The Chair asked the Secretariat to forward to the members not only the approved reports but also to include the developments of Dr. Hernan Salinas.

To distinguish the treatment of this issue from Dr. Richard's proposal, Dr. Espeche-Gil proposed the possibility of submitting a separate opinion on Dr. Richard's report to clarify his position on electoral fraud. Dr. Espeche-Gil's proposal was kept on the Committee's agenda and he was appointed rapporteur for the topic.

During the 96th Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, March, 2020), the rapporteur for this topic, Dr. Miguel Espeche presented a verbal report on this subject. He explained that the idea was based on a proposal that he had originally brought to the Committee in 1994. He proposed that a declaration be drawn up, indicating electoral fraud as something that undermines the principles of democracy, thereby condemning fraud as illegal. He also explained that originally he was favorable to an amendment to the Inter-American Democratic Charter, but he felt that it was not pertinent at the current moment to continue along this path.

Dr. Luis García supported the proposal of adopting a declaration setting out the Committee's position on illegal types of conduct, such as electoral fraud.

Dr. Jean-Michel Arrighi referred to electoral fraud in the 2000 elections in Peru between Toledo and Fujimori, which served as a reference for Article 20 of the Inter-American Democratic Charter: "when there is a serious alteration to the constitutional order". The CJI has elaborated a report addressing elements that would lead to a definition of any such alteration entitled "Essential and fundamental elements of representative democracy and their relations to collective actions within the framework of the Interamerican Democratic Charter," resolution CJI/RES. 159 (LXXV-O/09), adopted

in 2009. In this context, the Committee could reopen the topic and follow up on the application of the Charter, but he did not feel that it would be appropriate to embark on a proposal to reform it.

Dr. Duncan Hollis urged the rapporteur to develop the concept of "electoral fraud" and motivate the Committee's action in this matter.

Dr. Milenko Bertrand felt that it was necessary to discuss about the definition of electoral fraud and even to identify issues related to the actors involved, as well as possible interventions from other countries.

The Chair asked the rapporteur to submit a new version of his report at the next session.

During the 97th Regular Session of the Inter-American Juridical Committee (Virtual Session, August, 2020), the rapporteur of the topic, Dr. Miguel A. Espeche-Gil presented his report "Analysis of electoral fraud in the framework of the effective exercise of representative democracy in the inter-American system", (document CJI/doc. 610/20). He explained that electoral fraud should be considered an insuperable obstacle to the government of that State participating in the process of the Summits of the Americas, and referred to the Inter-American Democratic Charter (CDI) as a set of guiding norms that embrace, among other matters, the periodic holding of elections. The rapporteur stressed the convenience of taking a qualitative leap to establish that electoral fraud can be committed within one State or by illegal intrusion from another, and that such actions could by different means maliciously alter the results of the genuine holding of the vote before or during the electoral act and would install governments as illegitimate as those arising from coups d'état. He also considered that electoral fraud constitutes a serious upheaval to the constitutional order in terms of article 19 of the IADC. Dr. Espeche commented that the approval of this proposal would demonstrate the coherence that must exist between domestic and inter-American law, and proposed to consolidate this legal-political aspect in order to contribute to the strengthening of the democratic system on the continent through a document that could eventually be considered by the OAS General Assembly as a contribution towards strengthening the rule of law.

Dr. Eric P. Rudge noted that the provisions of the IADC could eventually become binding customary norms, which is why it is important to adopt this proposal and possibly issue a Committee resolution on the importance of having free and fair elections in the region, and its alteration is contrary to all the principles of the democratic system that the countries of the region have adopted.

In turn, Dr. Luis García-Corrochano suggested to send a resolution to the General Assembly denouncing electoral fraud as the modern version of the *coup d'état*; this should include cyber fraud, which jeopardizes the legitimate representation of the popular will that must be legitimately included in the result of the process.

Dr. Alix Richard observed that for the proposal to prove effective, it should define "fraud" more precisely, as well as the ways to prove the crime, a crime that today can be perpetrated in many ways and performed by many different actors.

The Chair congratulated Dr. Espeche on his precise and opportune proposal and suggested that his work should focus on preparing a resolution for the CJI.

In response to these observations, Dr. Espeche considered it convenient to incorporate a definition of electoral fraud that could take the following form: "intentionally spurious alterations of electoral results characteristically typified as crimes in the States of the region". He also embraced the idea of drawing up a resolution.

As regards the way to prove electoral fraud, Dr. Eric Rudge suggested that reference be made to article 23 of the Inter-American Democratic Charter, which states that if an Electoral Observation Mission (EOM) concludes that there has indeed been fraud, the burden of the test is satisfied so as not to jeopardize the momentum.

Dr. Arrighi intervened to refer to certain background regarding the issue of electoral fraud, prior to the adoption of the IADC in which the provisions of the OAS Charter on Democracy were invoked. He recalled that the issue of electoral fraud was not included in the IADC due to the difficulties of

identifying all the elements involved and the individuals responsible for them. He recalled that the CJI had already studied the issue of fraud and had determined that its elements are casuistic, so this resolution should only complement what the CJI has already considered, such as serious cases of alteration of democracy. For his part, he clarified that EOMs are only convened when the country requests them, so it is inconvenient to subordinate the presumption of fraud exclusively to the existence or not of an EOM, to avoid countries not requesting EOMs or not authorizing them.

Along the same lines, Dr. Alix Richard observed that there have been antecedents where the management of the OEM itself might be questioned, so it is very delicate to associate the presumption of fraud exclusively with the OEM without including other internal factors that must be taken into account.

Dr. Eric P. Rudge said it would be advisable to strengthen the selection and training of those who make up the EOM so that its results and its management do not leave any room for questioning, but that once the EOM issues its report, it should be given the greatest possible credit. He noted that otherwise, the system built by the OAS itself would be weakened.

Dr. Luis García-Corrochano referred to an unfortunate management of the EOM in Peru in relation to the elections of year 2000 and recommended that the proposal should underpin the strengthening and neutrality of the authorities of the States that accompany the EOM, but not as subordinate to it or to any external entities, because the treatment even by the EOM itself can be controversial in certain cases.

The Chair supported Dr. García-Corrochano's suggestion that the implications of the EOM report deserve further study in the future due to time constraints.

Then, Dr. Espeche proposed a definition of electoral fraud that alludes to conduct typified by domestic legislation, which strengthens internal institutions, but avoiding engaging in the thorny issue of elements of proof (evidence). He also mentioned Articles 19, 20 and 23 of the IADC, and suggested that these additional aspects be incorporated by the Secretary of Legal Affairs into the text of the draft resolution.

In turn, Dr. Arrighi advised against bringing this issue to the attention of the General Assembly at the present time, considering that the level of specificity that is being proposed could imply reopening the IADC discussion on a highly sensitive issue.

As requested by the Chair, during the last working session, Dr. Miguel A. Espeche Gil, submitted a revised version of his report (document CJI/doc. 610/20 rev.1), which incorporates the agreements reached, but suggested that this document be kept limited for analysis over the course of the next year.

The Chair asked that the topic be kept in the agenda for further discussion.

* * *

10. Model Law on the use of Fireworks, for either personal use or in mass firework displays

Dr. Milenko Bertrand explained the mandate from the OAS General Assembly, instructing the CJI "to prepare a model law regulating the use of fireworks, whether for personal use or in large-scale firework displays, based on the existing legislation on this matter in the region, as well as the inputs that the states provide in collaboration with the CJI," contained in resolution AG/RES. 2930 (XLIX-O/19) at Section iii. Regarding background, Dr. Bertrand said that the initial proposal was presented by two Chilean NGOs that provide assistance to burned children and that traveled to OAS headquarters to present the work done to the States. It was an issue that related to the Chilean experience which had a law specifically governing fireworks. The regulations prohibited their sale and use, and law breakers may be subject to fines and confiscations. The law also applied to fireworks displays and set permitted safety levels, covering both public and private institutions. The introduction of the rule was accompanied by advertising campaigns that sought to generate a cultural change in public opinion and proved very effective. Studies showed that since the publication of the law 15 years earlier, the number of burns had dropped considerably and that there had been no more deaths. He further noted that apparently there was already a study describing the type of regulations in place in 10 OAS member states, and that a study by the University of California on the actual impact of the use of fireworks on children throughout the Americas was underway. In that context, he expressed his interest in being rapporteur for the topic—considering his interest in it and his links to the NGOs involved—and he proposed the following working agenda:

- Present the University of California's study that could allow a law to be developed based on effective information.
- Review the existing questionnaire and draft a new one to send to government agencies in member states.
- Propose a model law that incorporated models of legislative technique, both from the Americas and Europe, that would allow pronouncements on public policies based on specific cultures and practices. This would make it possible to incorporate issues concerning the effectiveness of laws in the Latin American context, including the generation of a methodology that could be used in other areas.

Dr. Espeche-Gil confirmed that the initiative was likely to encounter very stiff opposition from powerful companies in the region's countries.

Dr. George Bandeira noted the timeliness of the General Assembly's mandate and asked if there was any global initiative on the subject, highlighting the relationship of poverty with the issue of fireworks, so that the issue could be considered from the point of view of law. He also requested that the technical dimension of the work being done by doctors and engineers and other stakeholders be included.

Dr. José Moreno congratulated Dr. Bertrand, and asked him if there was anything in common law that could have any significant impact on the work of the Committee.

The Chair, Dr. Ruth Correa, referred to her country's law, which incorporated issues of public order, health (seen from various perspectives), and safety (as it regulates the use of gunpowder). She also asked the members if they would agree to appoint Dr. Milenko Bertrand as rapporteur for this mandate which had been requested by the OAS General Assembly.

It should be noted that in the days prior, the Ambassador of Chile to the OAS and former member of the Committee, Dr. Hernán Salinas had referred to the initiative regarding fireworks described by Dr. Bertrand, stressing the importance of introducing rules on their responsible use based on the positive experience of his country. Dr. Iñigo Salvador explained that problems with the use of white phosphorus fireworks were not limited to burns in his country, but also that when used as a poison it had had unintended consequences on people's health, including death. In that regard he announced the filing of a case with the Inter-American Court of Human Rights. He also referred to the

negative impact of fireworks in places such as the Galapagos Islands, where the effects were felt by animals and that they could start fires, and therefore that posed a risk to public health and the environment.

The designated rapporteur for the topic, Dr. Milenko Bertrand, welcomed the contributions. He explained that although he was not an expert on the subject, he was aware of the important impact it would have on the population. In addition, it would lead him to interact with specialists in technical issues, including doctors, engineers, and sociologists. As for the objective, he would seek to develop a methodology that would allow him to incorporate contributions from beyond the legal domain, in particular aspects of public policy. At the UN, there were no initiatives in that area, despite the efforts of one of the Chilean NGOs at the universal level. With regard to national legislation, he pointed out the need to make greater efforts in places where the State is much less present; he agreed, therefore, that there were a number of different challenges.

During the 96th Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, March 2020), the rapporteur for the item, Dr. Milenko Bertrand, stated that the mandate was born of a civil society initiative and was based on the success of Chilean legislation that restricts pyrotechnic articles, prohibiting their use, manufacture, distribution, and sale. This legislation imposes total bans very different from the legislation of other States. Violators are brought before judges and the local police and fined. The rapporteur explained that studies show a direct connection between the law and a reduction in the number of deaths and injuries in Chile. The study seeks to verify that a model law could have some effect in the OAS member states through a comparative study of the legislation and practice in other countries. As the basis for his study, the rapporteur used studies of the situation in other States provided to him by nongovernmental organizations such as *Organización Pro-Bono* and not necessarily data from the ministries of foreign affairs. He found that no other country has a total ban like Chile's. The report also considers the pertinent oversight agency, the Ministry of Defense in Chile (a prerogative of the fire department in other countries). He stated that the report includes the grounds for the regulations in the countries studied (some note health issues, such as the protection of persons with autism, while others stress environmental concerns). The rapporteur criticized use of the classification adopted in the Hemisphere to deal with the different types of fireworks (UN-0336), which is based on the transportation of hazardous materials rather than the harm to human beings. In this regard, he suggested following the European model, which requires the labeling of fireworks and imposes regulations such as the minimum distance for safety, the noise level, the time it takes to ignite them, etc.

The rapporteur proposed that the scope of the mandate not be limited to regulation of the use of fireworks but also include the stages prior to use, such as their sale, importation, and distribution. Concerning the bodies charged with their regulation, it would be necessary to consider the diversity of political regimes, bearing in mind the prerogatives that governments establish in this area. He stated that the UN classification focused on the transport of hazardous materials should be amended to include other factors, such as harm to the environment and wildlife. Since a model law based on a total ban might not prove successful, he proposed a model with options and alternatives that other countries could follow.

Dr. Duncan Hollis stressed four elements in particular. Concerning the issue of a ban, he proposed that different alternatives be indicated to consider other regulatory responses. Furthermore, the Committee's response should be guided by the purpose of the model law, which is to determine whether the objective is simply to ensure that the States regulate this matter or to try to standardize their regulations. If the former, then the model law could include different options for different policy preferences. Consideration should also be given to the degree of danger posed by each type of firework and explosive. Finally, he discussed the issue of the prerogatives of local governments, which could complicate efforts to enforce national regulations, noting the particular situation of indigenous peoples in the United States, which posed similar challenges.

Dr. Luis García Corrochano asked the rapporteur to determine the situation in our countries and its real implications. To this end, he proposed bearing in mind the high degree of informality in this

area and the challenge it poses to effective control, which in any case can vary within a country (here, he cited the patron saint celebrations in villages in the Andes). The report should provide for gradual restrictions but not a total ban. In this context, it was important to consider the effectiveness of the regulations in terms of the effectiveness of the penalty.

Dr. José Moreno suggested that instead of a model law, the instrument should take the form of legislative guidelines that offer options and proposals to resolve or tackle challenges.

Dr. Mariana Salazar proposed that, from the methodological standpoint, an initial assessment of the region be conducted that included a comparison of country regulations. This would help to determine the type of product.

Dr. Eric Rudge expressed surprise to see this item on the agenda. In Suriname, this matter is regulated by the central government, and fireworks are prohibited for most of the year (permitted only for New Year celebrations). He invited the rapporteur to consider the situation in the Caribbean and urged caution about the type of regulation to propose and respect for the General Assembly's mandate, limited to use. Concerning the situation of indigenous peoples noted by Dr. Hollis, he observed that this did not exist in other countries. The rapporteur explained that fireworks can be used in Chile but under certain regulatory criteria. He also indicated that the document being prepared would not be binding.

The Committee's Chair explained that there was unanimity about the nature of the work, a model law. She also indicated that the document should consider issues related to environmental and wildlife protection, all of which would require a shift in mentality, since the use fireworks is very ingrained today.

The rapporteur for the item, Dr. Milenko Bertrand, thanked the members of the Committee for their proposals. He agreed with Dr. Hollis's comments. Aware of the cultural aspect of the issue (the need to consider indigenous traditions), he believed it would be best to draft a proposal presenting "model laws" instead of a single model law. Classification and labeling indicating the degree of danger were essential and could be used for standardization. Responding to Drs. García-Corrochano and Moreno, he observed a certain consensus among the Committee members about avoiding an absolute model with obligations like those of Chile. He stated his interest in opting for a gradual approach that would allow for the consideration of alternatives such as different degrees of prohibition. He would also include penalties and proposals for change to make progress, especially given the informality that existed in certain places. The rapporteur made clear his intention to include a classification on danger and harm to persons, along with the issue of environmental and wildlife protection, all this to help them become part of national law. He also said that he would propose communication activities to address the fireworks culture.

The Chair thanked the rapporteur, inviting him to prepare a report that considered the different opinions.

During the 97th Regular Session of the Inter-American Juridical Committee (Virtual Session, August 2020), this issue was not considered.

* * *

11. Legal aspects of foreign debt

During the 95th Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, July-August 2019), Dr. Miguel Angel Espeche-Gil requested the inclusion of a new topic, under the title of ‘Legal aspects of the States’ foreign debts’. The proposal was accepted by the plenary, and the issue was reactivated, having been several years prior in the agenda.

During the 96th Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, March, 2020), this issue was not considered.

During the 97th Regular Session of the Inter-American Juridical Committee (Virtual Session, August, 2020), this issue was not considered.

* * *

12. Guide on the law applicable to foreign investments

During the 97th Regular Session of the Inter-American Juridical Committee (Virtual Session, August, 2020), Dr. José Antonio Moreno Rodríguez gave a formal presentation requesting inclusion of the item: “Guide on the law applicable to foreign investments,” whose purpose would be to discuss issues affecting investments that have resulted in conflicting decisions. He pledged to work on developing a guide with best practices. The plenary of the Committee endorsed the proposal, and the item was added to the agenda, with Dr. Moreno Rodríguez designated as rapporteur.

* * *

13. Incorporation of the United Nations guiding principles on business and human rights

During the 97th Regular Session of the Inter-American Juridical Committee (Virtual Session, August 2020), Dr. Milenko Bertrand requested addition of the item “Human Rights and business” to the agenda, in light of the United Nations guiding principles. He noted that there were disparities between States in the region, with the same companies operating differently. The proposal would compile information on best practices within initiatives aimed at creating national programs. The Committee approved the request for its inclusion, and the item was added to the agenda, with Dr. Bertrand designated as rapporteur.

* * *

THEMES CONCLUDED

1. Binding and non-binding agreements

Documents

CJI/doc. 600/20	Binding and Non-Binding Agreements: sixth report (presented by professor Duncan B. Hollis)
CJI/RES. 259 (XCVII-O/20)	Guidelines of the Inter-American Juridical Committee on binding and non-binding agreements
CJI/doc. 614/20 rev. 1 corr.1	Binding and Non-Binding Agreements: final report (presented by professor Duncan B. Hollis)

* * *

At the 90th Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, March, 2017), Dr. Duncan B. Hollis expressed his willingness to work on the issue of agreements and the process by which decisions are taken at the domestic level by a State on a binding *vs.* non-binding instrument. The plenary agreed with the proposal, the topic was added to the agenda, and Dr. Hollis was designated as the rapporteur.

During the 91st Regular Session (Rio de Janeiro, August 2017), the rapporteur was pleased to present his report, (document CJI/doc. 542/17 corr.1), which focused on four elements: differentiation, capacity, effects and procedures.

The topic of differentiation involves identifying and distinguishing between three categories of commitments in the international context. On this score, he highlighted three ways of undertaking international commitments and defined each one: treaties, contracts and political agreements. In order to ascertain its nature, it must be determined whether the instrument is binding and, if so, whether it is a treaty or a contract. If the nature of the instrument is not expressly stated, there may be indications of the authors' intent, such as the structure of the texts and the wording used to express consent in undertaking an obligation, the appointment of a trustee, etc. Every case must be analyzed on an individual basis because of the specificity of each instrument.

In the rapporteur's view, there is a presumption that these documents are best if they are binding. The rapporteur also expressed his preference for treaties when choosing between them and contracts. As for the topic of capacity to enter into treaties, he explained that even though this is a power of the sovereignty of States, there is no clarity regarding who may represent the State or act as its proxy in entering into treaties. Although it is a practice in the United States and Canada for agencies to obtain authorization of representation, in countries such as Egypt and South Africa government agencies lack such capacity. In this regard, current practice seems to be that recognition of government agencies is based on the internal consent of the State and the external consent of the counterpart. He also posited differences between Federal States, citing the example of Canada, whose distribution of competencies grants the province of Quebec certain powers in the international sphere, which the Argentine Constitution does not grant its provinces. As for municipal agencies, he gave the example of the authorization granted to municipalities in Mexico to undertake obligations.

The rapporteur underscored the problematic widespread practice of unauthorized agreements between agencies of different countries, and explained that political commitments render limitations on capacity inapplicable in binding agreements. As to the effect of instruments, he cited as the main element respect for the principle of *pacta sunt servanda* and, therefore, overriding effects lie in the terms themselves. In this context, he recognized three main sources: the law of treaties, acts of retorsion and the law of State responsibility. Political agreements, he further explained, are not subject to any particular regime and the law of treaties and the provisions of State responsibility are not applicable to them. However, they may have political effects and, sometimes, though they are not binding, they could indirectly have legal effects. There is variation in domestic procedures to terminate an instrument and the way States authorize binding and non-binding agreements. States almost

universally assign the task to the executive branch, assign the approval procedure to the legislative branch and, in some instances, include judicial review. Few countries have no checks in place on the executive by other branches of government. In the United States, the procedure provides for the Department of State to act as a check on the agency or federal or municipal branch (Circular 175). As for political agreements, it is difficult to obtain information on the full range of procedures, the number of instruments, the type, the subjects and the obligations pursued.

He concluded his presentation by proposing a menu of options with regard to the road map as to what to expect from the report in terms of general principles, responsibilities and best practices. In this context, he proposed drafting queries for the governments by means of questionnaire to learn each State's practice and asked the members their opinion about whether this should be done, mainly because of the lack of information on States' practices.

The Chair regarded as highly important the paper the rapporteur presented, which had been introduced originally at the meeting of the legal advisors, who should be participating at some point in the discussion on the subject along with the others.

Dr. Hernández noted the shortcomings of Mexico's law on treaty ratification, and explained that international agreements struck at any level in his country can lead to international responsibility of the State and, consequently, in terms of formal requirements, every agreement must be backed by a prior legal opinion to be executed, based on the legal competence of the entity, with the obligation to be included in the government registry.

He also expressed his agreement with the classification presented by the rapporteur, but suggested that treaties be split into two types: *latu sensu* and *stricto sensu* (State to State agreements that require parliamentary approval). When a classification is required based on the entity executing it, then there must be a distinction drawn between agreements or treaties entered into between executive branches, agreements that are entered into between ministries, and lastly, agreements entered into between subnational units (the practice varies, in some places agreements may only be executed between similar categories of entity). As to the rapporteur's questions, he asserted that a practical guide should be drafted to establish general principles. As a second component, a catalogue of best practices should be included (requirements for their formalization, coordination mechanisms, etc.). A list of agreements with different characteristics should be provided in light of legal requirements at the domestic level.

Dr. Carlos Mata Prates requested separating the field of international law from the field of domestic rights (which requires resorting to constitutional law) when distinguishing declarations from treaties. As to the classification based on the effects, it would be worthwhile, he said, to frame it to determine whether or not they have legal effects. When a pronouncement is made in favor of a treaty, a link should be established with the domestic law that takes into consideration the application of domestic procedures. In the case of political declarations, there should be clear guidelines without dwelling on determining whether or not it creates legal effects. The task is complex. Accordingly, he proposed to the rapporteur to flesh out the topic of the effects of instruments instead of the determination of their nature, inasmuch as it can be established based on the actor that participates in it and serves as a point of reference to establish its nature, but in every case, the State is responsible.

Dr. Correa explained that regulation in Colombia is made up of different controls or checks in terms of procedures for the signing of international instruments. She requested the rapporteur to take into account the declarations adopted by legislative and judicial bodies in several forums, which do not necessarily fall under the scope of the mandatory.

Dr. Elizabeth Villalta agreed that a questionnaire should be submitted to all States to find out about the experience of each region, which should include the following questions, in addition to other ones:

- The type or category of instrument that they sign;
- Whether they are parties to the Vienna Convention on the Law of Treaties or whether they enforce it as customary law;

- The way in which political declarations are put on the record.

The report should allow us to draw a conclusion on how States use treaties.

Dr. Juan Cevallos proposed seeking the participation of the States in the drafting of the document.

Dr. José Moreno noted that political commitments should be fleshed out and, in this regard, he suggested devoting some space to the topic of centralized registries. He also concurred on the importance of simple questionnaires.

Dr. Alix Richard concurs with the Committee members about the report presented by the rapporteur. He cited the existence of agreements between cities of Haiti and other cities of world and urged the rapporteur to include this arrangement. He explained in broad strokes the domestic system of ratification in Haiti, which requires review of the constitutionality of treaties. Lastly, he mentioned the signing of memoranda of understanding as a recent practice.

Dr. Carlos Mata asked the rapporteur to differentiate the international sphere from domestic spheres, in view of what said distinction means, in particular, to a judge of an international forum. A study of the domestic sphere would involve a complex domestic discussion about the provinces and scopes of the constitutional law of each State, a considerable challenge. Consequently, he suggested that the rapporteur focus only on the international sphere. He mentioned international courts, in their judgments, regarding domestic acts as unilateral. He also supported the idea of short texts in the questionnaire.

Dr. João Clemente Baena Soares shared that, in his experience, establishing agreements between foreign entities or municipal units with Brazilian ones has not had a positive effect and have had to be neutralized through effective provisions.

The Chair first stressed the importance of differentiating between a non-binding agreement and an international treaty; which can be done by reviewing the practice of the States. We should find out how States address this issue, including learning about the different types of legal provisions that the States apply and their practice.

The topic involves, he said, two areas: agreements between States and agreements between non-State entities. In the first group, he suggested looking at the intent of the parties to see if they are binding or not (he cited the case of maritime delimitation and territorial issues between Qatar and Bahrain). In the second area, he suggested reviewing the status of agreements signed by non-State entities, in terms of domestic law and the practice of States with regard to these instruments. It is something that must be done cautiously. In addition to that, we should try to review the issue of breaches and whether it incurs State responsibility, based on the traditional rules. As to legitimate expectation or *estoppel*, he proposed that they be treated cautiously. He agreed the questionnaire should be brief and concrete, to address crucial issues and encourage the highest number of responses possible. It is also essential, he noted, to hold a meeting of the legal advisors of the region to discuss, among other topics, work on this subject matter.

The rapporteur explained that his original idea was to be able to present a wide range of options. As to the approach, he thought that the idea is mostly to stick to the sphere of international law, but at the same time certain domestic topics are relevant, particularly with regard to instruments drafted by agencies or subnational or regional governments. Although the way each country regulates its domestic cases is not going to be explained, because of the implications of State responsibility, domestic law has to be taken into account.

He proposed as the next step to review the questionnaire with the support of the Secretariat, and once it is approved by the members, to circulate it among the States. He will also review the situation of the simplified agreements and he noted that it would be unwise to flesh out the topics concerning *estoppel*. The intention therefore is to distinguish treaties from declarations, and determine the status with respect to adoption of agreements by subnational entities, in a non-judgmental way, respecting the sovereignty of each State.

Dr. Joel Hernández requested that the rapporteur include a section on minimum standard rules in political declarations.

The Chair supported Dr. Hernández's proposal and urged the rapporteur to include references to overt violations of norms pertaining to the capacity or competence to enter into treaties. That would make it necessary to link international law and domestic law in order to determine the international standards existing in the subject matter with respect to the determination of the nature of the instrument. Lastly, he proposed that the questionnaire be sent out as soon as possible.

At the 92nd Regular Session (Mexico City, February 2018), the rapporteur referred to the distinction made between treaties, non-binding (political) agreements and contracts, and recalled that the CJI approved sending questionnaires to member states, 10 of whom responded in due course: Argentina, Brazil, Colombia, Ecuador, United States, Jamaica, Mexico, Peru, Dominican Republic and Uruguay. The second report submitted in the present session (document CJI/doc. 553/18) is a synthetic analysis of the responses received, and proposes a path forward to prepare a series of practical guidelines on the matter.

He found that most of the member states who sent in responses to the questionnaire are signatories of the Vienna Convention on the Law of Treaties, underlining that is within the internal definition of international treaties that differences arise. Likewise, he noted that all those who answered coincided that political agreements lack any legal worth, but differ in their perception of the content that such agreements should have in order to be considered non-binding in accordance with the internal legislation of each State. Dr. Hollis also found that the main difference lies in whether the language and context of the juridical act are determinant for us to know if we are dealing with a binding agreement. The rapporteur emphasized that the figure of institutional agreements presents certain unusual particularities even for most States. This is generally a question of internal law, but the very concept is diffuse, and this is where member states could benefit from some clarification as to the juridical authority of their agencies and ministries to sign agreements that are binding to international law. In this sense, he detected enormous differences as regards the binding agreements signed between provinces or regions of different countries, and whether they are obligatory only for these provinces or for the entire State. This allowed the rapporteur to appreciate how opportune the CJI exercise is in respect to preparing guidelines to align both parties of an agreement concerning the nature of same. Dr. Hollis concluded by proposing that a new effort be made to obtain a greater number of responses to the questionnaire, given that despite its importance and usefulness, a mere ten answers represents a minority of the membership of the OAS. On the other hand, he proposed preparing a draft or guidelines for entering into international agreements, rather than some general principles of a practical, political nature to be adopted by member states, which could prove far less fruitful.

The Chair thanked the rapporteur and agreed that emphasis should be made in the sphere of institutional agreements, since the CJI's contribution on the issue of treaties would not be substantial, and the Vienna Convention has proved to be sufficient for member states. He also agreed to renew urging member states to send their answers to the questionnaire and suggested enhancing the focus of the guidelines to be presented in order to have an outline of these available at the meeting with legal advisors of ministries to be held at the next regular session.

Dr. Mata complimented the rapporteur on his thorough analysis and pointed out that in the case of the Uruguayan unitary system, foreign affairs are conducted by the Executive, while departmental governments can sign institutional agreements with prior parliamentary approval and only on certain matters – usually credit – with the central government playing an obligatory subsidiary role. Consequently, a departmental government lacking parliamentary authorization cannot oblige the Uruguayan State to take responsibility for such measures; this is what is called an inter-institutional agreement, because it only obliges institutions, not the entire State. Conversely, in a federal system the States or provinces have other powers with regard to signing treaties and the concept of institutional agreement. Dr. Mata therefore suggested caution not to enter into an analysis of human rights or to repeat what is already regulated by conventional common-law legislation. Here he agreed with the rapporteur as to the advisability of the guidelines concentrating on those topics that the Vienna

Convention treats superficially, as well as on the effect of institutional agreements and political declarations. He added that these guidelines will also be useful to judges and arbiters, which makes such documents a very valuable asset for the CJI.

Dr. Correa congratulated the rapporteur on his work synthesizing the responses of the States, and went on to point out that the Legislative and Judiciary powers often attend international meetings where they make declarations or assume some commitments besides the formal processes of signing agreements, adopting informal mechanisms in which they make their intentions clear but whose legal effects are often lacking clarity for the parties involved. In her opinion the State is responsible for the agreements that fail to comply with the formalities of a treaty; this is a theme that concerns internal law, which would make it somewhat difficult to prepare guidelines.

Dr. José Moreno also congratulated rapporteur Hollis and expressed his confidence in the usefulness of guidelines that could help the States to drive ahead regulatory changes; he suggested that the guidelines should contain examples in order to give them a pedagogic feature.

Dr. Alix Richard, appreciating the work of the rapporteur, asked the Chair if he could personally answer the questionnaire on behalf of his country, in collaboration with Haitian experts, or if it was necessary to answer via the official channels. As he saw it, a document of guidelines would be extremely useful for Haitian judges, and disseminating this document would greatly enrich the work of the lawyers in this area.

The Chair clarified that without jeopardizing the official answer, which is the proper way to obtain the position of the State concerning the questionnaire, nothing prevents a member from offering his opinion and in this way making an input contribution. He also remarked that the Vienna Convention is supplementary and does not prevent internal law from allowing instruments the right to sign these agreements, and that in such cases the practice of the American States and comparative law on the world level would constitute a useful tool that could also lend clarity to the guidelines. He concluded that the CJI's most significant contribution would be a document of good practices.

The rapporteur agreed with the members that the guidelines are an international-law project that is not meant to change internal law, and explained that the purpose of the document is two-fold: i) to clarify which international agreements are binding, so as to prevent some of the parties being surprised when compliance is demanded or if some responsibility is required of them, and ii) to determine who is responsible in the case of institutional agreements, whether the State or only the institution that signs the agreement, this being the area with the most diverse legal opinions among the member states. Finally, the rapporteur offered presenting a preliminary draft for a practical guide for the appreciation of the members in July 2018.

The Chair agreed that the guidelines will concentrate on institutional agreements and the analysis of good practices that the region can adopt, and asked for a document to comment on the exchanges with the legal advisors scheduled for the next regular session in August 2018.

During the 93rd Regular Session (Rio de Janeiro, August 2018), the rapporteur Dr. Duncan Hollis presented the third report on the subject of binding and non-binding agreements, (document CJI/doc. 563/18). By way of introduction, he spoke of the origin of the theme at the 5th Joint Meeting with Legal Advisors (25-26 August, 2003) before identifying three types of international agreements (treaties, political commitments and contracts) and considering the capacity of States to conform to each of the instruments under analysis. He also referred to the considerations on the juridical effects and procedures at different agreements types. He explained that the rapporteurship received a total of twelve answers to the questionnaire sent to the member states and showed the situation regarding five themes relating to international agreements: definition; methods of identification; capacity; effects; and procedures. He closed by commenting on the decision of the Committee to adopt guidelines to differentiate international agreements, as in the project that appears in annex I and the commentary to each provision in annex II of his report. He asked the plenary to submit general comments ahead of the analysis of the guidelines.

Dr. Joel Hernández spoke of the usefulness of the document presented in such a short time. The classification between binding and non-binding agreements and contracts is very pertinent, and therefore an explanation of this division should be included in the introductory section, besides the definitions. He also suggested the importance of including the theme of dispute resolutions, because of the lack of understanding that often happens between parties concerning the intention of adopting an agreement that is binding or not. He closed by recommending using examples to illustrate the concepts mentioned in the topic of best practices, perhaps by including the answers to the questionnaire.

Dr. Carlos Mata Prates also thanked the rapporteur for his report. In respect to the inter-institutional agreements on page 8, he proposed including a reference to the international character of these agreements.

The Chair of the Committee congratulated the rapporteur and asked him to change the title so as to show that it deals more broadly with the guidelines of the OAS in the field of international agreements.

The rapporteur appreciated the proposals received and said he would certainly consider their inclusion in the report. Regarding the relevance of the title, he confirmed that perhaps it would be convenient to use the one it had been used in the previous version of his report. He then proceeded to explain the guidelines. In relation to the difference between the instruments, the rapporteur provided explanations on the need of defining them and checking their legal status case-by-case: agreements, political commitments and contracts.

In relation to the topic involving definitions, Dr. Carlos Mata Prates asked to bear in mind that the reference to treaties must be broad enough so as to include written and non-written ones. Additionally, we should avoid limiting the definition of treaties to States, including international organizations. Regarding contracts, Dr. Ruth Stella Correa Palacio asked for a greater articulation of the definition of the same. Dr. Joel Hernández agreed to include a definition of agreements in its broad sense. On page 12, he asked for more explanations on the reference to unilateral agreements. As regards treaties, their legal binding aspect should be highlighted. He asked the rapporteur about the distinction between political commitments and inter-institutional agreements. Regarding contracts, he endorsed Dr. Correa's suggestion and asked for more information regarding progress on the material and spatial spheres of same (a contract between two persons or private international contracts). Dr. José Moreno congratulated Dr. Hollis on the good work. As regards the definition of contracts, there is a perception about contracts governed by a non-national law whose reference appears on page 19 of the Paraguayan Law, and therefore the notion needs some clarification. The President asked to take into account the opinion of authors on the issue, and in that context the treaties reached in writing, notwithstanding the existence of the verbal agreements duly mentioned by the rapporteur. As regards the area of contracts, he asked to try to find the best way to show that they are governed by national law. He did not deem it necessary to define agreements, as that would be excessive or "too academic". He also asked to restrict political commitments to States, without involving private individuals. Finally, he asked for additional explanations regarding the determination of inter-institutional agreements mentioned on page 21. Dr. Espeche Gil mentioned the executive agreements among the Ministries of Foreign Affairs and the need to include that sort of arrangement. In this regard, Dr. Hernández was in agreement with the need to include them in the report. An additional category should not be created, though, but this needs to be explained. This proposal was also endorsed by Dr. Mata Prates. Dr. Luis García-Corrochano said that it was essential to keep on using the definitions as originally presented.

The rapporteur of the theme, Dr. Duncan Hollis, was grateful for the comments received. He expressed his agreement with Dr. Mata on the reference to international organizations, and at the same time he asked for more time to think about the topic involving non-written agreements. He also thanked Drs. Ruth Stella Correa Palacio and José Moreno about their perception regarding the definition of contracts. In response to Dr. Joel Hernández, he explained that his intention when mentioning contracts referred to those cases in which it is evident that an agreement has to be interpreted according to the laws of the country involved or subject to the domestic law applicable. Regarding the differentiation on agreements, he noted that the International Court of Justice has

suggested the need for an agreement separate from the question of whether it is binding or not, a point on which the Chair showed his disagreement, as in his opinion the Court does not rule on agreements, but does so regarding treaties. In addition, the President asked for the document to address the three categories, and this view was endorsed by Dr. Joel Hernández (that is, the need to define a treaty, a contract and a political commitment). On page 21, the rapporteur explained that there are treaties that are not necessarily reciprocal, but that can still be treaties. Furthermore, that the idea of inter-institutional agreements obeys the need to understand that these agreements may be binding or non-binding. Finally, regarding executive agreements, he expressed his intention to include them in a later section of the report on procedures.

Right afterwards, the rapporteur mentioned the question involving capacity in each case. There is no doubt whatsoever about the capacity of states to enter into treaties. The institutions of the State, in addition, are empowered to adopt treaties, although they are not obliged to do so. In any case, it is important to endeavor to confirm whether the institutions enjoy the prerogatives in the area of treaties and the corresponding authorization.

Dr. Joel Hernández suggested emphasizing Article 46 of the Vienna Convention on the Law of Treaties. Regarding item 2.2, he asked the rapporteur to include a reference to full powers. An illustration of the practice in relation to this topic is Hong-Kong's power to enter into treaties.

Dr. Carlos Mata Prates said that item 2.3 on prerogatives of entities to enter into treaties seemed to impose an obligation on the State to investigate or interpret the domestic law of another country, especially taking into consideration that item 2.2 already establishes the question involving the full powers of the states to adopt treaties, and therefore the topic is fully covered.

The Chair asked to avoid including any additional reference to domestic legislation in adopting political commitments. He understood the explanation given by Dr. Mata Prates on item 2.3, and for that reason he asked to include a reference in item 2.2 regarding the need of the governmental institution to guarantee that it has the legal capacity to act. In fact, transparency has to be a good practice.

The rapporteur of the theme thanked the commentators in this section. He undertook to make a reference to Article 46 of the Vienna Convention on the Law of Treaties. Regarding the question of transparency, he proposed assigning the non-state entity to demonstrate that it has the prerogatives to reach an agreement and not the opposite. In turn, Dr. Correa made a distinction between the topics involving capacity and representation, and for that reason he thought it would not be necessary to announce the theme of full powers, as they are part of the representation issue not capacity. Dr. García-Corrochano mentioned the competence of certain ministries or offices of the executive power to comply with formal requirements binding the will of the States, regardless of the degree of relevance they enjoy. The Chair was in favor of the argument provided by Dr. Correa in restricting the report to the issue of capacity and not the issue of representation. However, the rapporteur deemed it might be convenient to include the issue of representation in the commentary to the guidelines.

Finally, the rapporteur of the theme mentioned the method used to identify the existence of each one of the types of agreements. From a practical viewpoint, the clauses in the text, the circumstances and the conduct of the parties will determine the nature of the instrument. Therefore, this section is a detailed reference that might well help to determine the type of instrument. In case of contradictory evidence, an approach should be sought that combines both objective and subjective methods.

Dr. Espeche-Gil was of the opinion that the academic exercise was really very broad, and seemed to believe that not in all cases are the States capable of implementing the various hypotheses. He suggested that perhaps the central theme ought to be divided into sub-themes. In this regard, the President explained that background information on the topic, stemming from the meetings of the VI Joint Meeting of Legal Advisors (October 5, 2016), and reflecting the result of dialogue and interaction that the Committee must enjoy with the juridical community, which is regarded as one of the main problems of ministries of foreign affairs. As a result, he reaffirmed its relevance in view of its concrete and practical nature, which allows for highly relevant directives and guidelines.

As regards the report, the Chair suggested eliminating item 3.1 as it deals solely with agreements and their academic nature, and starting the Report directly with item 3.2 and the determination of the type of treaty. Dr. José Moreno asked not to include the doctrine in the footnotes of the final document. Dr. Baena Soares asked for an explanation regarding item 3.4, which omits a reference to conventions and protocols.

In response to the comments made, the rapporteur of the theme agreed that the report is in fact comprehensive, and that it includes several themes. He expressed some reticence regarding the interpretation of the President on the jurisprudence mentioned in item 3.1. In response to Dr. José Moreno, he suggested presenting the guide to the public without comments/footnotes. Finally, he agreed with Dr. Baena Soares' opinion and proposed to add a section that includes other titles for treaties.

At the conclusion of the debates, the rapporteur undertook to include the suggestions presented and agreed to submit a new version of the report during the forthcoming session of the Committee.

During the 94th Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, 18 – 22 February, 2019), the rapporteur for this topic, Dr. Duncan B. Hollis, presented his fourth report (document CJI/doc. 580/19), through a video conference since he was unable to travel to meetings of the Committee. In the first part of his oral presentation, he offered a brief explanation of the latest developments in the treatment of this topic within the Committee, describing the three main categories of international agreements – treaties, political commitments, and contracts – as well as the more ambiguous category of “inter-institutional agreements”. In each case, he proposed an analysis of the best criteria for characterizing the type of agreement, the capacities of different State institutions, and the methods for defining each type of agreement. He offered his thanks for the comments received from the States as well as from the representatives of the legal advisers of the Ministries of Foreign Affairs, whose replies confirmed the need for the differentiation proposed by the rapporteur.

He then explained the reasons prompting him to continue using the word “agreements” as distinct from other concepts:

- Historical grounds in which agreement is recognized as being broader than treaty;
- The concept of agreement covers the three main categories (treaties, political commitments, and contracts) and distinguishes it from other instruments;
- He does not want to limit the word agreement to treaties;
- Any risk of confusion is avoided by using the terms binding and non-binding agreements.

Toward the end of his presentation, the rapporteur announced his intention to include procedures, effects, capacity-building, and training in Annex I and explained that Annex II currently contains comments on the Guidelines regarding procedures. The procedures are designed to facilitate conditions and communications among the parties to a negotiation and completion of an agreement, in which there is a catalog that helps distinguish political commitments. As regards effects, consideration should be given to defining the type of contract or agreement, including determination of the responsibility of the institution or the State. Finally, capacity-building should be provided for those in charge of the agreements, to ensure that they are familiar with their procedures and effects.

Dr. José Moreno asked the rapporteur to kindly include non-state rights in item 4.3, so as to provide a more open option allowing involvement of players from the private international law field.

Dr. Jorge Galindo praised the detail and accuracy of the work. As regards use of the term “approval procedures” for political commitments (included in items 4, 4.2, 4.3, 4.4 and 4.7), he explained that countries such as Brazil have no approval procedure for this type of instrument, which is perhaps why this wording would not be appropriate. His second question addressed the explanation of the word “agreements” and the use of the verb “conclude” as in “conclusion of treaties”, whereby he wondered whether that was specifically for treaties only, rather than instruments of a political nature, for example. He also asked for clarification of the phrase “government ministries and sub-national units” mentioned in item 4.4 and asked whether it would not be appropriate to include the “government

agencies” referred to in item 6.2, thereby standardizing the wording used. Finally, he suggested merging items 4.6 and 4.7 for practical reasons, particularly when there is no prior legal opinion as to whether an instrument is binding or not.

Dr. Milenko Bertrand asked about the legal consequences of instruments that do not meet the conditions required for a binding treaty, but which may give rise to obligations, such as estoppel.

Dr. Mariana Salazar suggested modifying the Spanish verb tense to “are” (“*son*”) in Item 4.1 of the Guideline. Regarding procedures, she said that the term “would gain” (“*ganarian*”) needed clarifying in item 4.4. In regard to item 4.5 on the topic of publication, she suggested using the phrase “make public” (“*hacer pública*”). Finally, for item 5.8, she suggested the inclusion of a model clause for cases in which the responsibility derived from inter-institutional agreements on this matter needs to be limited.

The rapporteur thanked the members for their comments and replied to some of them. He agreed to include a reference to “non-state rights”, as suggested by Dr. Moreno, and also to take into account Dr. Galindo’s comment about the use of the word “procedures”. He said he would also review the reference to “conclusion” of agreements and the suggestion about incorporating “agencies.” With regard to including agreements in the report that are not treaties, that would involve asking whether there is a wish to expand the proposal in its current form. In response to comments made by Dr. Salazar, he acknowledged that the use of the conditional was in response to some States that had expressed their disagreement with a document that would be mandatory. He agreed, however, that in the cases she mentioned, the conditional should not be used. Finally, he said that he appreciated the suggestion of including a model inter-institutional agreement.

During the 95th Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, July 31 – August 9, 2019), the rapporteur for the topic, Dr. Duncan Hollis submitted his fifth report, (document CJI/doc. 593/19), which includes a draft guide to facilitate the task of addressing this complex topic for States, based on the following elements: definitions, capacity, methodology, internal procedures, international legal effects, training programs. Among the new features of this version, the rapporteur highlighted the following:

- An introductory text is included to clarify that it is not the intention of the rapporteur to codify or propose rules on the progressive development of international law.
- An effort has been made to define the term "agreements" so as to include the different forms worked on.
- The term "treaty" was also revised—irrespective of the definition it receives domestically—to refer to a binding agreement.
- The definition of "contracts" was revised in response to Dr. Moreno's proposal to include those governed by non-state law.
- The language in relation to capacity and methodology was reformulated to reflect good practice for States and other subjects of international law.
- Illustrations of clause have been included to support the drafting of the document and to facilitate the determination of its nature.
- In relation to the measures to identify a treaty, a set of formulae with linguistic keys have been introduced.
- The legal effects have been organized into guidelines.
- The analysis of good practice in terms of political commitments includes indirect legal effects in specific circumstances.
- For its part, the treatment of interagency agreements refers to the expectation that treaties of this nature will generate State responsibility as a whole.

Regarding the methodology, the rapporteur urged members to submit their comments in order to enable him to make the necessary revisions. He also suggested sending this document to States, including those that are not members of the OAS but have expressed interest in this work. His intention was that the report be adopted in August next year.

At the end of his presentation, the rapporteur noted the positive impact of his work outside the inter-American system, having participated in two events organized by the UN: one with legal consultants and the other with treaty experts.

Dr. Mariana Salazar expressed appreciation for the changes made to the report, in particular the precaution over the type of document proposed and the type of language used.

Dr. Carlos Mata welcomed the reference to guidelines and considered that the report covered issues within the scope of both international and domestic law. He also highlighted the developments in relation to agreements between federal states within a particular region and the issue of capacity and applicable law in such agreements. For dissemination purposes, he proposed that the work be brought to the attention of the legal consultants who would meet in Rio de Janeiro next year, and that it be approved in August. Finally, he suggested making modifications in terms of form to facilitate better understanding.

Dr. George Galindo noted the universal nature of the document, which could serve all countries and which responded to the initial request made by the legal consultants. He highlighted some general ideas and asked the rapporteur to explain the use of "normative commitment" (*compromiso normativo*) in the definition of agreement, an expression that could be tautological. He asked about the relevance of referring to the two schools of interpretation (intention and objective) to determine the binding or non-binding nature, which in many cases overlap. He also considered that one of the most important contributions of the document were the elements indicating the binding or non-binding nature of an agreement. He asked that the Spanish document be reviewed, owing to certain inconsistencies in the translation. In relation to the effect, he questioned the usefulness of distinguishing between primary and secondary effects. He also suggested not making a distinction between direct and indirect effects. Finally, he considered that education and training should be extended to other areas, since foreign ministries do not always play a direct role in negotiations.

Dr. José Moreno asked how the text would be disseminated at the UN. He urged that a protocolary act with the legal consultants be carried out in August, and that the document be sent to the consultancies now to obtain their views. He appreciated the reference to contracts as non-State rights, considering among other things that documents of this type were important in the field of arbitration.

The Chair, Dr. Ruth Correa, commended the rapporteur on his work and highlighted the contributions that his work could make in the areas of education and standardization. She expressed concern about the current definition of contract and invited him to use the concept that the CJI had adopted in that regard. She appreciated the clarity of the description in point 4.1 on the development of internal procedures. She requested clarification of the term "displacement" in point 5.2. Finally, she asked for greater precision on the competencies of the State in the description of the situation in Colombia with respect to simplified agreements.

Dr. Espeche-Gil noted the importance of distinguishing between agreements that allow the execution of a prior treaty and executive agreements, based on its own constitutional powers.

Dr. Luis García-Corrochano noted that simplified agreements are a power of the executive to bind the State, and that there was no apparent difference in rank with solemn treaties (requiring the consent of other bodies).

The rapporteur, Dr. Duncan Hollis, expressed thanks for the comments. In response to Dr. Mariana Salazar, he noted that the Mexican institutional framework makes it possible to limit the responsibility of institutions, and he promised to include a clarification in that regard. With regard to Dr. Carlos Mata's comments, the rapporteur supported the idea of differentiating between the internal and external spheres. In response to Dr. Galindo's suggestion on the subject of behavior, he explained that his original idea was to include references to behavioral expectations (normative commitment). In

point 3.2 he indicated that his intention was to take into account cases where a treaty had been concluded, without that necessarily reflecting the intention of the parties. He supported the idea of conducting a review of the Spanish translation of the text. It undertook to simplify references to the primary and secondary nature and to review the issue of direct and indirect character. On the subject of training, he said that it was important to centralize it in an entity such as the Ministry of Foreign Affairs, without prejudice to involving other areas. He asked Dr. Moreno for assistance in better linking contracts to treaties. As a formula for promoting the topic, he advised presenting the document to the UN International Law Commission. Regarding the reference to Colombia, he asked Dr. Ruth Correa for her support in improving the explanation and in clarifying when an agreement would be governed by international or domestic law. Finally, he explained that the term displacement referred to the rule that would apply in the event of of silence.

At the end of the discussion it was decided to wait for comments from members, which were expected by mid-December. At the next session, the rapporteur would present a new version to be sent to States for comment.

During the 96th Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, March, 2020), the rapporteur for the topic, Dr. Duncan Hollis submitted his report, (document CJI/doc. 600/20). He explained that his intention is to present a set of best practices in light of the activities and views of assorted actors, States, government agencies and sub-national territorial units. He emphasized the goal of the project is not to attempt to code or expand on the development of international law (although the project does highlight areas where international law is unclear). His main purpose is rather to present a set of voluntary understandings and practices that can be used by member states to enhance their understanding.

So far, replies to the Committee's questionnaire have been received from the following countries: Argentina, Brazil, Colombia, Dominican Republic, Ecuador, Jamaica, Mexico, Panama, Paraguay, Peru, Uruguay and the USA. A new reply from Canada was included in the sixth report, together with information on the situations in Finland, Germany, Israel, Japan, South Korea and Spain.

The new report contains a draft set of *Guidelines* that includes comments received by the members during the August session. In particular, the new version emphasizes a best practice where whereby responsibility for the agreement of an institution lies with the State as a whole, while the Guide acknowledges that some States may not accept this assignment in practice. The new version also urges States to provide procedures for authorizing political commitments, leaving to States to decide which commitments should be subject to these procedures. Finally, in terms of training government officials, the new draft *Guide* proposes working with various Ministries rather than just the Ministry of Foreign Affairs.

Dr. Hollis concluded his presentation by describing the support he received for progress on this issue from OAS States (such as Paraguay), the UN, as well as Germany and South Korea.

In requesting comments from the Committee Members, he suggested the following options for next steps:

- a. Approve the Guide at this session and then circulate it among the OAS States to obtain their respective comments; or,
- b. Circulate the rapporteur's report immediately in order to seek comments and suggestions from member states, setting a June 1 deadline. A final review would be undertaken at the next session of the CJI, with the Report submitted for approval.

Dr. Mariana Salazar supported the second option, in order to obtain the views of the States on the proposed text, aiming at approving a final text at the next session.

Dr. George Galindo welcomed the rapporteur's report as a useful tool for Chancelleries. He suggested preparing a book, similar to that on the topic of international commercial contracts. With regard to the terminology on page 10, he requested that more examples be included, illustrating for instance the use of the expression "shall endeavor". He asked the rapporteur about the relevance of

distinguishing between primary and secondary legal rules. In item 5.4.2, he noted that filing a complaint would be up to the State in question, so the reference to institutions might not be necessary. Regarding subsequent practices, he asked why mention is made of "subsequent conduct" rather than practices. He further explained that in Brazil some States may establish contracts, but not agreements on handling treaties regulated by public international law. Finally, in item 2.2, it would be useful to refer to the Vienna Convention on Treaties Article 7(1)(b) in terms of who can bind a State to a treaty.

When thanking the rapporteur, Dr. José Moreno mentioned that this was a historic document. Judges and arbitrators need a Guide on these issues. On the subject of contracts, it would be preferable not to refer to *displaced persons*. On page 36, he suggested that a contract's application should be in accordance with the relevant law.

Dr. Eric Rudge noted the usefulness of the report for operating in this field, and asked whether the report included agreements between cities and contracts with private entities. With regard to the way forward, he supported the second option, with the report being sent to Chancelleries prior to its adoption by the Committee.

The rapporteur thanked the participants for their comments and words. He noted that there was an interest in forwarding the document to the States through the Committee Secretariat. He agreed with Dr. Galindo on the binding and non-binding nature of the columns in the illustrative examples, adding that if words are mixed, different obligations are created. For the primary and secondary rules, he requested time to reflect and decide whether or not to include them. In relation to item 4.1 on the insertion of the institution, he wished to take into account those cases where a State concurs that institutions are part of an agreement or not. Regarding contracts, he thanked Dr. Galindo for the information he provided on Brazil. In view of the proposal from Dr. Moreno, the rapporteur understood that it would be interesting for judges and arbitrators to make use of it. He accepted the suggestion on the execution of non fundamental laws, but the problem is that this is a controversial concept. Finally, in response to Dr. Rudge, he explained that agreements with private actors would not be encompassed by this project. He then suggested circulating this version among the States.

The Chair thanked the rapporteur for his work and noted its great usefulness. She asked the rapporteur whether the circulated document would include the additions made at this session. In this regard, the rapporteur suggested sending this version as presented and undertook to introduce the proposals presented today at a later date. Accordingly, it was decided to circulate (document CJI/doc. 600/20) dated 3 February 2020.

During the 97th Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, August 2020), Dr. Duncan B. Hollis presented his seventh report on binding and non-binding agreements, (document CJI/doc. 614/20), which includes a proposal for OAS Guidelines for Binding and Non-binding Agreements, with annotations ("Guidelines"). This is a nearly four-year project that was launched at the request of legal consultants from ministries of foreign affairs, who were concerned about the growing number of non-binding agreements being signed by government ministries and subnational territorial units that were becoming binding. In short, it was an issue that aroused legitimate concern about the impact of such agreements. The purpose of the Guidelines is to help the member states clarify the nature of different types of binding and non-binding international agreements and establish expectations concerning their drafting, implementation, and interpretation. The rapporteur for the item explained that the Guidelines were not intended to codify or implement international law, even though they employ the concept of international agreements and allude to commitments regarding the behavior to which the parties give their consent. The Guidelines contain six sections: 1) definitions of the elements of the agreements; 2) the capacities of State institutions to conclude treaties; 3) methods of identification, which include a list of suggested terms to distinguish between treaties, political commitments, and contracts; 4) the negotiation and conclusion of treaties and contracts, together with best practices; 5) a summary of legal effects; 6) recommendations on training for relevant actors. The study includes the responses received from the following 13 OAS member states to a questionnaire drafted by the rapporteur: Argentina, Brazil, Canada, Colombia, the Dominican

Republic, Ecuador, Jamaica, Mexico, Panama, Paraguay, Peru, Uruguay, and the United States. It also includes recent comments about the rapporteur's report by Argentina, Chile, and Colombia.

Dr. Hollis concluded his presentation by thanking the Committee's Technical Secretariat, the OAS Department of International Law, in the person of Drs. Jean Michel, Dante Negro, and Luis Toro U., for its unflagging support, advice, and encouragement. He proposed transmitting the Guidelines to the OAS General Assembly for consideration and potential approval. He also recommended publishing the report to benefit not only the OAS member states but other States and international organizations.

Next, all members of the Committee thanked and congratulated the rapporteur for his extraordinary work, praising it as beneficial, useful, and essential for the gradual development of international law.

Dr. George Galindo stated that it was a historical moment for the CJI to have completed an extraordinary task through this report. He also offered specific comments on the following elements: (i) on page 28 of the report on the responsibility of the States, he requested that concerning an international obligation imposed by an international agreement, a distinction should be made between the concept of attribution and that of full powers; (ii) he requested the rapporteur to include a footnote on page 66 referring to Panama's comment suggesting that there may be some customary international norms that would allow entry into this type of institutional agreement, considering that it could lead to error; (iii) concerning Colombia's proposal on the concept of the binding nature of treaties, he proposed issuing some sort of clarification on the existence of treaties that do not impose binding obligations for the parties and the need indicated by certain experts to include the concept of "binding" when referring to treaties; and (iv) due to its importance for the Committee, he suggested that it would be very useful to circulate and publish this report or the guidelines in all the official languages of the OAS.

Dr. Luis García-Corrochano called Prof. Duncan Hollis's work momentous because of its contribution to the debate surrounding treaties. He also underscored the distinction between uses and concepts that revealed the essence of treaties, political commitments, and contracts. This study, moreover, was useful for a range of actors, including those possessing full powers and those participating in the constitutional structure of each OAS member state.

Dr. Iñigo Salvador mentioned particular aspects of the report, such as the formalities used to draft agreements, their effects, and the capacities of those who sign them, in addition to the responsibilities for non-compliance or violation. When concurring with the points made by Dr. Galindo, he urged the rapporteur to make the changes requested during this session in the coming days. Next, he moved for a vote of applause for the rapporteur approving this document, considered the Committee's greatest work.

Dr. Mariana Salazar noted the relevance and quality of this report, which reflected the opinion of academics and researchers and the vision of the 13 OAS member states that responded to the questionnaire. She also expressed her agreement with Dr. Iñigo Salvador that the time had come to approve it, and with Dr. George Galindo that it should be translated into all the official languages of the OAS.

Dr. Eric Rudge seconded the proposal of Drs. Salvador and Salazar to approve this report and proceed to circulate it among the OAS member states. He also urged that the document be transmitted to the General Assembly for consideration and potential approval.

Dr. Miguel Ángel Espeche joined his colleagues in considering the report ready for approval. Moreover, if anyone disagreed, the traditional practice in the Committee was to append an additional comment to the affirmative vote.

In his second intervention, Dr. George Galindo indicated that he was fully satisfied with the report and noted that his initial comments were not substantive. He would therefore agree that the report should be approved.

Dr. Alix Richard observed that the report accurately covered all aspects and concurred with Dr. Galindo's statement about publishing this document in French, which would enable it to be promoted in Haiti.

Dr. José Moreno indicated that he had no additional comments on this seventh version and declared that this historic report deserved effusive congratulations, supporting the motion to translate it into all the official languages of the OAS.

Dr. Ruth Correa called the work outstanding, revealing the academic who wrote it. The report clearly determines what type of instrument the actors are drafting. It is therefore a positive contribution for those who consult it, and it may even prevent future problems. She issued a caveat in regard to points 4.5.1 and 4.5.2, noting that they are identical in the Spanish version.

Dr. Duncan B. Hollis thanked the members for their comments, insisting that he had merely followed the example of others in undertaking such an important project. He proposed making the pertinent changes and submitting a final document to the Committee for consideration and approval on the last day of the virtual session.

On the issue of attribution mentioned by Dr. George Galindo, he asked him for a proposal to include on page 28, noting that the concepts of attribution and full powers are discretionary. Concerning the document from Panama, he would add a clarification stating that while an isolated position, the existence of this point of view should be noted. As for the definition of "treaty" and the inclusion of its binding nature, he did not embrace Colombia's position for fear of the issue of obligations, in case there was a desire to cover behaviors. He was aware that the concept of treaty does not include the binding nature of this instrument, since a treaty is governed by international law and therefore binding. Finally, he pledged to review points 4.5.1 and 4.5.2 and make the necessary changes.

Dr. Dante Negro thanked Dr. Hollis for this report and his contributions. He also cleared up certain aspects of its monitoring by OAS bodies. While this item was born of the Committee's own initiative, the General Assembly requested the Committee to keep it apprised of developments in this area. Thus, the Committee had two avenues that it could consider for its adoption. One was that the Committee approve the report and have it be an independent publication, as in the case of the Guide to the Law Applicable to International Contracts, which was not submitted to the General Assembly [for approval] but was informed about it. The other was to consider it a document subject to adoption by the General Assembly, as in the case of the Draft Model Law 2.0 on access to public information, and to approve it as a draft until its eventual approval by the General Assembly. The rapporteur proposed that this be a Committee product but also understood that it would have a more prominent profile if were endorsed by the General Assembly, although this avenue could encounter obstacles and not be adopted at the next regular session of the General Assembly. On the last day of the virtual session, the rapporteur for the item, Dr. Duncan Hollis, submitted the final version of his report on Binding and Non-binding Agreements, (document CJI/doc. 614/20 rev. 1 corr. 1), indicating that he had made the changes requested, such as the distinction between full powers, the responsibility of States, and authority. He had also reached the conclusion that the report should be guidelines of the Inter-American Juridical Committee and not the OAS General Assembly.

Drs. Rudge, García, Moreno, Salazar, Bertrand, and Salvador concurred with Dr. Hollis's proposal, considering the report a first-rate contribution to international law. Dr. Moreno described his experience with the adoption of the Guide to the Law Applicable to International Contracts, which has had an international impact, even though it is not an OAS document. Dr. Galindo noted the importance of this report and its historic nature, expressing full agreement with all the changes. Dr. Espeche also indicated that he was pleased with the report, while Dr. Richard reiterated his call to translate it into French. In this regard, Dr. Rudge urged the Secretariat to support a search for funds to translate the report. As an exception, the Chair proposed translating Dr. Hollis's works with available resources, making it clear that the CJI works in only two languages. Dr. George Galindo also mentioned the possibility of producing a Portuguese version with the help of students in Brazil, whose final product he himself would supervise. The rapporteur for the item thanked the members for their contributions to his report over the past four years. The Chair then requested that the Guidelines be approved and

transmitted to the General Assembly for its knowledge and consideration, a decision endorsed by the plenary.

The following documents were presented by the rapporteur for the topic, Dr. Duncan B. Hollis, in February and August, 2020, respectively, and the resolution adopted by the Committee in August 2020:

CJI/doc. 600/20

BINDING AND NON-BINDING AGREEMENTS: SIXTH REPORT

(presented by professor Duncan B. Hollis)

INTRODUCTION

1. This is my sixth report on binding and non-binding agreements. The increasing prevalence of non-binding agreements generally—and ministry-level and sub-national level binding and non-binding agreements specifically—has generated calls from OAS Member States to better understand the various forms of international agreement in use today. The complexity and diversity of current practice provide an increasing number of ways to coordinate and cooperate, but also raise real risks of inconsistent understandings, unaligned expectations, and disputes.

2. This project seeks to assist OAS Member States in making, implementing, and interpreting international agreements by generating *OAS Guidelines on Binding and Non-Binding Agreements, with Commentaries*. If approved by the OAS General Assembly, these *Guidelines* may offer a concrete and detailed set of definitions, understandings and “best practices” for OAS Member States (and others) to employ in pursuing different types of international agreements and engaging with the various actors – States, government agencies, and sub-national territorial units – who make them. In doing so, these *Guidelines* will not aspire to codify or develop international law (although they do note several areas where existing international law is unclear or disputed). Rather, they aim to provide a set of voluntary understandings and practices that Member States may employ to improve knowledge in these areas and reduce the risk of future difficulties with other States in the region and beyond.

3. The current project adopts as its fundamental premise the idea that international agreements may be divided into (i) those that are “binding” in the sense of being governed by law—whether international law (i.e., “treaties”) or domestic law (i.e., contracts)—and (ii) those that are not binding (i.e., “political commitments”) in the sense that law provides none of the normative force for the agreement’s formation or operation. The rule of law governs the first set of agreements, while the second is a matter of international politics or morality.

4. My first, preliminary report responded to a request from Member State Foreign Ministry Legal Advisers to explore the topic and identify the issues in need of attention.¹ My second report reviewed responses to a questionnaire on the subject sent by the Committee to Member States.² Specifically, it assessed responses received from Argentina, Brazil, Colombia, the Dominican Republic, Ecuador, Jamaica, Mexico, Peru, Uruguay and the United States.³

¹ See Duncan B. Hollis, *Preliminary Report on Binding and Non-Binding Agreements*, OEA/Ser.Q, CJI/doc. 542/17 (24 July 2017) (“Preliminary Report”).

² See Duncan B. Hollis, *Binding and Non-Binding Agreements: Second Report*, OEA/Ser.Q, CJI/doc. 553/18 (6 February 2018) (“Second Report”).

³ See Argentina, *OAS Questionnaire Answer: Binding and Non-Binding Agreements* (“Argentina Response”); Brazil, *Binding and Non-Binding Agreements: Questionnaire for the Member States* (“Brazil Response”); Colombia, *Responses to the Questionnaire for the Member States of the Organization of American States (OAS) Binding and Non-Binding Agreements: Practice of the Colombian State* (“Colombia Response”); Dominican Republic, Legal Department, Ministry of Foreign Affairs, *Replies to the Questionnaire on Binding and Non-Binding Agreements*, 29 Nov. 2017 (“Dominican Republic Response”); Government of Ecuador, Department of Foreign Affairs and Trade, *Questionnaire: Binding and Non-Binding Agreements* (“Ecuador Response”); Jamaica, *Note from the Mission of Jamaica to the O.A.S. to the Department of International Law, O.A.S.*

Since then, Canada, Panama and Paraguay provided responses reflected in subsequent reports, including this one.⁴

5. My third report offered initial draft text for a set of *OAS Guidelines on Binding and Non-Binding Agreements*. Specifically, it laid out guidelines and commentary on (a) definitions for different forms of international agreement; (b) which entities have the capacity to conclude each agreement type; and (c) methods for identifying each agreement type.⁵ My fourth report continued that effort with additional guidelines on (d) domestic procedures for concluding binding and non-binding agreements; (e) the international legal effects, if any, of concluding different types of international agreements; and (f) training and education programs relating to binding and non-binding agreements.⁶ It responded to various issues raised regarding this project during the IAJC's second meeting with Foreign Ministry Legal Advisers.⁷ The fourth report also addressed several comments on the use of the term "agreement" in the Guidelines for both binding and non-binding categories.⁸

6. My fifth report provided a complete "first draft" of *The OAS Guidelines for Binding and Non-Binding Agreements, with Commentary* ("Draft Guidelines").⁹ In doing so, it added commentary on the issues of effects and training/education. It also provided a revised text of the other guidelines and commentary, including revisions and adjustments in light of many helpful

Secretariat for International Affairs, Ref. 06/10/12, 14 December 2017 ("Jamaica Response"); Reply of Mexico, *Report of the Inter-American Juridical Committee, Binding and Non-Binding Agreements: Questionnaire for the Member States* ("Mexico Response"); Peru, General Directorate of Treaties of the Ministry of Foreign Affairs, *Report of the Inter-American Juridical Committee, Binding and Non-Binding Agreements: Questionnaire for the Member States* ("Peru Response"); Uruguay, *Reply to questionnaire on "binding and non-binding agreements"* ("Uruguay Response"); United States, *Inter-American Juridical Report: Questionnaire for the Member States* ("U.S. Response").

⁴ See Canada, Treaty Law Division, Global Affairs Canada, *Binding and Non-Binding Agreements: A Questionnaire for OAS Member States—Submission by Canada* (9 Sept. 2019) ("Canada Response"); Panama, *Note from the Republic of Panama, Ministry of Foreign Affairs – International Legal Affairs and Treaties Directorate to the Department of International Law of the Secretariat for Legal Affairs of the Organization of the American States*, N.V.-A.J._MIRE-201813176 ("Panama Response"); Paraguay, *Note from the Permanent Mission of Paraguay to the Department of Law of the Secretariat for Legal Affairs, OAS General Secretariat*, No. 635-18/MPP/OEA (12 June 2018) ("Paraguay Response").

⁵ See Duncan B. Hollis, *Binding and Non-Binding Agreements: Third Report*, OEA/Ser.Q, CJI/doc.563/18 (15 July 2018) ("Third Report").

⁶ See Duncan B. Hollis, *Binding and Non-Binding Agreements: Fourth Report*, OEA/Ser.Q, CJI/doc. 580/19 (11 February 2019) ("Fourth Report").

⁷ See OAS Inter-American Juridical Committee, *Joint Meeting of the Inter-American Juridical Committee with Legal Advisers of OAS Member States, Summary Minutes*, 93rd Regular Session, Wednesday 15 August 2018 (IAJC-Legal Advisers 2018 Joint Meeting).

⁸ Fourth Report, *supra* note 6, ¶¶7-13 (noting five arguments in favor of scoping the *Draft Guidelines* in terms of binding and non-binding "agreements"—(i) the ILC and others never viewed treaties as synonymous with agreements, but rather as a sub-set of the broader agreement category; (ii) the criterion of an agreement unites treaties, political commitments, and contracts and distinguishes them from alternatives (e.g., unilateral declarations) in ways that alternative labels like "instruments" cannot; (iii) State practice counsels against using "magic words" to define or identify treaties; using the term "agreement" in a text cannot guarantee its status as a treaty; (iv) to overcome current confusion it is important that States become more aware of the *concept* of agreement independent of its usage; and (v) any risk of confusion over the use of the term may be mitigated if the *Guidelines* and accompanying *Commentary* adopt a transparent approach to the issue and the risks of confusion they might pose).

⁹ See Duncan B. Hollis, *Binding and Non-Binding Agreements: Fifth Report*, OEA/Ser.Q, CJI/doc. 593/19 (22 July 2019) ("Fifth Report").

comments and suggestions received from Committee Members and OAS Foreign Ministry Legal Advisers.¹⁰ It reflected additional input received from presentations made on this project at the United Nations: (i) to the UN General Assembly's 29th Informal Meeting of Legal Advisers held on 23 October 2018 and (ii) to an informal working group of treaty experts and practitioners hosted by the governments of Canada and Colombia in concert with UN General Assembly events marking the 50th Anniversary of the conclusion of the Vienna Convention on the Law of Treaties. Both events confirmed that concerns about issues associated with binding and non-binding agreements extend well beyond Member States.

7. Among other things, the 5th Report *Draft Guidelines* added (i) a new chapeau to clarify that the *Guidelines* present a set of working definitions, understandings and best practices that are not intended to codify existing international law or progressively develop it in some way; (ii) a revised definition of "agreement" that encompasses the broad concept under which treaties, political commitments, contracts, and inter-institutional agreements fall while acknowledging that, in practice, the term "agreement" is frequently employed only in concert with treaty texts; (iii) sample clauses and a table of words and phrases that Member States (or others) may use in an instrument as evidence that it is a treaty, a political commitment, or a contract; and (iv) a new guideline encouraging States to honor their political commitments (while recognizing they have no legal obligation to do so).

8. In this, my sixth report, I present a revised version of the *Draft Guidelines*. It responds to further input received from Committee Members during the Committee's 95th Regular Session, particularly with respect to

- Revising the definition of an "agreement" to remove the reference to a "normative commitment" (which in Spanish posed a potential tautology) and replacing it with the idea of a "commitment to future behavior." This change is not, however, intended to be substantive as "norms", by definition, reference shared expectations of future behavior.
- Revising the definition of a "contract" to align more closely with the definition offered in the Committee's recently approved *Guide on the Law applicable to International Commercial Contracts in the Americas*.¹¹
- Reworking *Draft Guideline 3.2* to acknowledge that subjective and objective evidence may become entangled and to encourage a best practice where States are transparent in their own test and work to align outcomes under both tests where possible.
- Adding commentary to *Guideline 4.1* to differentiate Colombian executive agreements from simplified procedure agreements, while noting that exceeding the scope of authority in either case would be unconstitutional.
- Clarifying that the "displacement" term used in the earlier version of *Draft Guideline 5.2* referred to the capacity for a contract to supplant the default rules provided by a State's domestic law.
- Adding commentary to *Draft Guideline 5.3.2* to differentiate (a) how political commitments may have legal relevance where they are converted (through a discretionary act) into an international or domestic legal instrument and (b) those

¹⁰ For the records of these questions and comments, see, e.g., IAJC-Legal Advisers 2018 Joint Meeting, *supra* note 7; *Summarized Minute*, 91st Regular Session of the Inter-American Juridical Committee, 9 Aug. 2017; *Summarized Minute*, 92nd Regular Session of the Inter-American Juridical Committee, 27 Feb. 2018; *Summarized Minute*, 93rd Regular Session of the Inter-American Juridical Committee, 9, 15-16 Aug. 2018; *Summarized Minute*, 94th Regular Session of the Inter-American Juridical Committee, 20 Feb. 2019. *Summarized Minute 6*, 95th Regular Session of the Inter-American Juridical Committee, 7 Aug. 2019.

¹¹ See GUIDE ON THE LAW APPLICABLE TO INTERNATIONAL COMMERCIAL CONTRACTS IN THE AMERICAS, OAS/Ser. Q, CJI/RES. 249 (XCIV-O/19) (21 February 2019).

cases where the political commitment may serve as an interpretative reference point without any additional discretionary acts.

- Proposing a presumption of unitary state responsibility for binding inter-institutional agreements (*i.e.*, that an institution’s binding agreement triggers the responsibility of the State as a whole, rather than only the responsibility of the concluding institution). The earlier version has listed unitary state responsibility as an “expectation.” Given a majority of States clearly follow this approach, it seems that as a best practice, States should operate on the assumption that this rule holds. Nonetheless, the *Draft Guidelines* continue to acknowledge that some States may not accept this presumption and deny unitary state responsibility for their inter-institutional agreements. As such, the current version continues to offer several guidelines for how States adopting divergent views on State responsibility may reconcile them in agreements *inter se*.
 - Revising *Draft Guideline 4.2* on developing domestic procedures for political commitments: The earlier draft had suggested two options – Member States should either have domestic procedures for (a) “all” their political commitments or (b) only their “most significant” ones. The revised version directs States to have domestic procedures for these commitments without any qualification. This language should allow States to choose whether to craft such procedures for all their political commitments or only some specified sub-set of them.
 - Adding language to *Draft Guideline 6.1* to make it clear that training on binding and non-binding agreements should be offered not only to Foreign Ministry officials but also to officials from other relevant ministries or agencies involved in a State’s international agreement practice.
9. The new version of the *Draft Guidelines* also incorporates responses received from Canada to the Committee’s Questionnaire, including:
- Clarifying that although Canada uses the term “Memorandum of Understanding” (or “MOU”) for its non-binding legally binding political commitments, it does not regard that title as determinative since other States may consider an MOU as a treaty.
 - Delineating a political commitment by its political or moral character.
 - Elaborating on Canada’s practice of doing inter-institutional agreements as non-binding, political commitments or contracts rather than as treaties.
 - Referencing Canada’s policies for reviewing political commitments within the Foreign Ministry and maintaining a database of such non-binding agreements.
 - Recounting Canada’s efforts to obtain waivers of privileges and immunities in its inter-State contracts, the absence of which (along with the absence of governing law or forum selection clauses) may be the basis for denying an agreement contract status.
 - Reviewing Canada’s equivocal position on the intent/objective tests for identifying treaties, while also noting its characterization of the test for identifying a political commitment as one of party intent.
10. In addition to its own response, Canada made available responses to a questionnaire of its own on topics relevant to this project with the understanding that these could be made public.¹² Those responses include further views from two OAS Member States (Canada and Mexico) as well as explanations from Finland, Germany, Israel, Japan,

¹² Treaty Law Division, Global Affairs Canada, *Working Group on Treaty Practice, Survey on Binding and Non-Binding International Instruments* (18 Sept. 2019) (“Working Group on Treaty Practice”).

the Republic of Korea, and Spain. Where relevant, those responses have been incorporated into the *Guidelines*, including by

- Citing all 8 States surveyed – Canada, Finland, Germany, Israel, Japan, Korea, Mexico and Spain – for the idea that title of an agreement is not determinative of its binding or non-binding legal status.
- Flagging that all 8 States agreed on the rising number and significance of political commitments in international relations.
- Noting that South Korea treats its agency-to-agency agreements as non-binding.
- Referencing the different internal approval and archiving procedures States have adopted for their political commitments, while noting a general sense within the working group that there is a need to improve internal coordination on the quality and effectiveness of non-binding agreements.

11. Annex I contains a complete revised draft of *OAS Guidelines for Binding and Non-Binding Agreements*. Annex II provides the *Guidelines* along with accompanying *Commentary*.

12. I would welcome any additional Committee feedback on each of the *Draft Guidelines* and the accompanying *Commentary* in terms of both substance and structure.

13. With the Committee's approval, I believe the time has come to seek more formal feedback. I would suggest that the Committee approve either (a) forwarding these guidelines to the OAS General Assembly for review and (hopefully) approval; or (b) as an alternative, interim step, approving the formal circulation of the current draft to OAS Member States for reactions and suggestions. In the latter case, I would undertake to synthesize and respond to any further suggested edits, amendments, or adjustments, with an eye to obtaining final Committee approval at our next regular session meeting in July-August 2020.

* * *

ANNEX I

DRAFT OAS GUIDELINES FOR BINDING AND NON-BINDING AGREEMENTS

States and other international actors currently form and apply a diverse range of international agreements. At the broadest level, current practice divides between (i) agreements that are “binding” and thus governed by law, whether international law (treaties) or domestic law (contracts), and (ii) agreements that are not binding (“political commitments”) and for which law provides no normative force. States also increasingly sanction agreement-making by their national ministries or sub-national territorial units (*e.g.*, provinces, regions).

The current range of binding and non-binding agreements offers great flexibility; agreements can be crafted to correspond to the context presented, including the authors' interests, legal authorities, and resources. At the same time, international law and practice suggests significant ambiguities (or outright differences) in how States authorize or understand their different international agreements.

This current state of affairs has generated substantial confusion among States' representatives and a potential for misunderstandings and disputes. Two States may conclude an agreement that one State regards as a non-binding political commitment and the other regards as a treaty (or a contract). The potential for confusion and disputes is compounded where State ministries or sub-national territorial units conclude agreements. Some States authorize these entities to conclude treaties (that is, binding agreements governed by international law) while others deny that they may do so (either because of a lack of authority or on the premise that international law does not afford these actors a treaty-making capacity).

The present Guidelines seek to alleviate current confusion and the potential for conflict among States and other stakeholders with respect to binding and non-binding agreements. They

provide a set of working definitions, understandings, and best practices on who makes such agreements, how they may do so, and to what, if any, legal effects. The aim is to assist States in understanding the contours and consequences of pursuing and concluding different types of international agreements. Increasing knowledge and awareness of best practices may allow States to avoid or mitigate the risks for confusion or conflict they currently face.

At the same time, these Guidelines in no way aspire to a legal status of their own. They are not intended to codify international law nor offer a path to its progressive development. Indeed, in several places they note areas where existing international law is unclear or disputed. The Guidelines leave such issues unresolved. Their aim is more modest—to provide a set of voluntary understandings and practices that Member States may employ among themselves (and perhaps globally) to improve understanding of how international agreements are formed, interpreted, and implemented, thereby reducing the risk of future disagreements or difficulties.

1. Definitions for Binding and Non-Binding Agreements

1.1 Agreement – although its usage in a text is often indicative of a treaty, the concept may be defined more broadly to encompass mutual consent by participants to a commitment regarding future behavior.

1.2 Treaty – a binding international agreement concluded between States, State institutions, or other appropriate subjects that is recorded in writing and governed by international law, regardless of its designation, registration, or the domestic legal procedures States employ to consent to be bound by it.

1.3 Political Commitment – A non-legally binding agreement between States, State institutions, or other actors intended to establish commitments of an exclusively political or moral nature.

1.4 Contract – A voluntary arrangement between two or more parties that constitutes a binding agreement governed by national law or non-State law.

1.5 Inter-Institutional Agreement – An agreement concluded between two or more State institutions, including national ministries or sub-national territorial units. Depending on its terms, the surrounding circumstances, and subsequent conduct, an inter-institutional agreement may qualify as a treaty, a political commitment, or a contract.

2. The Capacity to Conclude International Agreements

2.1 The Treaty-Making Capacity of States: States have the capacity to conclude treaties and should do so in accordance with the treaty’s terms and whatever domestic laws and procedures regulate their ability to consent to be bound.

2.2 The Treaty-Making Capacity of State Institutions: States may—but are not required to—authorize their institutions to make treaties on matters within their competence and with the consent of all treaty partners.

2.3 Confirming Treaty-Making Capacity: States or authorized State institutions contemplating a treaty with another State’s institution should endeavor to confirm that the institution has sufficient competence over the treaty’s subject-matter and authorization from the State of which it forms a part to enter into a treaty on such matters.

2.4 The Capacity to Make Political Commitments: States or State institutions should be able to make political commitments to the extent political circumstances allow.

2.5 Inter-State Contracting Capacity: A State should conclude contracts with other willing States in accordance with the contract’s governing law.

2.6 Inter-Institutional Contracting Capacity: A State institution should conclude contracts with willing foreign State institutions in accordance with its own domestic law and, if different, the contract’s governing law.

3. Methods for Identifying Binding and Non-Binding Agreements

3.1 Identifying Agreements: States and other agreement-makers should conclude their international agreements knowingly rather than inadvertently. As a threshold matter, this means States must differentiate their agreements (whether binding or non-binding) from all other commitments and instruments. The following best practices may help States do so:

3.1.1 States should rely on the actual terms used and the surrounding circumstances to discern whether or not an agreement will arise (or has already come into existence).

3.1.2 When in doubt, a State should confer with any potential partner(s) to confirm whether a statement or instrument will—or will not—constitute an agreement (and, ideally, what type of agreement it will be).

3.1.3 A State should refrain from affiliating itself with a statement or instrument if its own views as to its status as an agreement diverge from those of any potential partner(s) until such time as they may reconcile such differences.

3.2 Identifying the type of agreement concluded: The practice of States, international organizations, international courts and tribunals, and other subjects of international law currently suggests two different approaches to distinguishing binding from non-binding agreements.

- First, some actors employ an “intent test”, a subjective analysis looking to the authors’ manifest intentions to determine if an agreement is binding or not (and if it is binding, whether it is a treaty or a contract).
- Second, other actors employ an “objective test” where the agreement’s subject-matter, text, and context determine its binding or non-binding status independent of other evidence as to one or more of its authors’ intentions.

The two methods often lead to the same conclusion. Both tests look to (a) text, (b) surrounding circumstances, and (c) subsequent conduct to identify different types of binding and non-binding agreements. Nonetheless, different results are possible particularly where the text objectively favors one conclusion (e.g., a treaty) but external evidence suggests another (e.g., contemporaneous statements by one or more participants that a treaty was not intended). The objective test would prioritize the text and language used in contrast to the intent test’s emphasis on what the parties’ intended. Such different outcomes may, in turn, lead to confusion or conflicts. Certain practices can mitigate such risks:

3.2.1 If a State has not already done so, it should decide whether it will employ the intent test or the objective test in identifying its binding and non-binding agreements.

3.2.2 A State should be open with other States and stakeholders as to the test it employs. It should, moreover, be consistent in applying it, not oscillating between the two tests as suits its preferred outcome in individual cases. Consistent application of a test will help settle other actors’ expectations and allow more predictable interactions among them.

3.2.3 A State should not, however, presume that all other States or actors (including international courts and tribunals) will use the same test as it does for identifying binding and non-binding agreements. A State should thus conclude—and apply—its international agreements in ways that mitigate or even eliminate problems that might lead these two tests to generate inconsistent conclusions. States can do this by aligning subjective and objective evidence to point towards the same outcome.

3.3 Specifying the Type of Agreement Concluded: To avoid inconsistent views on the binding status of an agreement or its governing law, participants should endeavor to specify expressly the type of agreement reached whether in the agreement text or in communications connected to its conclusion. In terms of text, States may use the sample provisions listed in Table 1 to specify an agreement’s status. Given the diversity of international agreements, however, States may also adapt other standard formulations as well.

Table 1: Specifying the Type of Agreement Concluded	
Type of Agreement	Sample Text
Treaty	<i>This agreement shall establish relationships among the parties governed by international law and is intended to give rise to rights and obligations according to its terms.</i>
Political Commitment	<i>“This [title] is not binding under international law and creates no legally binding rights or obligations for its Participants.”</i>
	<i>“This [title] is a political commitment whose provisions are not eligible for registration under Article 102 of the Charter of the United Nations.”</i>
Contract	<i>“This agreement shall be governed by the law of [list State] [and/or list non-State source of law].”</i>

3.4 Evidence Indicative of an Agreement’s Status as Binding or Non-Binding: Where agreement participants do not specify or otherwise agree on its status, States should use (or rely on) certain evidence to indicate the existence of a treaty or a non-binding political commitment, including:

- (a) the actual language employed;
- (b) the inclusion of certain final clauses;
- (c) the circumstances surrounding the agreement’s conclusion; and
- (d) the subsequent conduct of agreement participants.

Table 2 lists the language and clauses States should most often associate with treaties as well as those they may most often associate with political commitments.

3.5 Evidence indicative of a contract: Where agreement participants do not specify or otherwise agree on its status, States should use (or rely on) a governing law clause to establish the existence of a contract. States should presume that a clearly binding text among States that is silent as to its status is a treaty rather than a contract.

3.6 Ambiguous or inconsistent evidence of an agreement’s status: Where evidence indicative of an agreement’s status is ambiguous or inconsistent, the agreement’s status should depend on a holistic analysis that seeks to reconcile both the objective evidence and the participants’ shared intentions. States should seek to share the results of their holistic analysis with agreement partners. In some cases, States may wish to consider more formal dispute resolution options to clarify or resolve the binding or non-binding status of their agreement(s).

Table 2: Identifying Binding and Non-Binding Agreements		
Agreement Features	Evidence Indicative of a Treaty	Evidence Indicative of a Political Commitment
Titles	Treaty Convention Agreement Covenant Protocol	Understanding Statement of Intent Arrangement Declaration
Authors	Parties	participants
Terms	articles obligations undertakings rights	commitments expectations principles paragraphs understandings
Language of Commitment (verbs)	shall agree must undertake Done at [place] this [date]	should seek promote intend expect carry out take understand accept
Language of Commitment (adjectives)	binding authentic authoritative	political voluntary effective equally valid
Clauses	Consent to be Bound Entry into Force Depositary Amendment Termination Compulsory Dispute Settlement	Coming into Effect (or Coming into Operation) Differences Modifications

4. Procedures for Making Binding and Non-Binding Agreements

4.1 Different Domestic Procedures for Treaties. Every State should remain free to develop and maintain one or multiple domestic processes for authorizing the negotiation and conclusion of treaties by the State or its institutions. These procedures may be derived from the State's constitution, its laws, or its practice. Different States may employ different domestic procedures for the same treaty.

4.2 Developing Domestic Procedures for Political Commitments. States should develop and maintain procedures for authorizing the conclusion of political commitments by the State or its institutions. Although non-binding agreements, political commitments could benefit from a practice where States have procedures that confirm:

- (a) a commitment's non-binding status;

- (b) the appropriateness of using a non-binding form in lieu of a binding one, such as where time constraints or uncertainty counsel against locking the State into a legal agreement; and
- (c) notification to—and coordination with—relevant State institutions, including a State’s Foreign Ministry.

4.3 Developing Domestic Approval Procedures for Inter-State Contracts. For States that engage in inter-state contracting, they should develop and maintain procedures for approving the conclusion of any such contracts. As a best practice, States should include:

- (a) information on how the State will identify the governing law of the contract, and
- (b) mechanisms for confirming that governing law with the other contracting State(s) to avoid future conflicts.

4.4. Domestic Approval Procedures for Binding Inter-Institutional Agreements. States should have procedures by which they can assure appropriate authorization for any institutions (whether government ministries, sub-national units, or both) with the capacity to conclude a treaty governed by international law. States should also have procedures by which they can assure appropriate authorization for their institutions (whether government ministries, sub-national units, or both) to conclude a contract, whether under that State’s own domestic law, the domestic law of another State, or non-State law.

4.4.1 Such procedures should identify how a State differentiates for itself whether the institution is concluding a treaty or a contract; and

4.4.2 Such procedures should include mechanisms for confirming in advance that the other foreign institution concurs as to the type and legally binding status of the inter-institutional agreement to be concluded.

4.5 Publicizing Institutional Capacities to Conclude Binding Agreements.

4.5.1 A State should make public which, if any, of its institutions may be authorized to conclude treaties, including specifying whether it may do so on behalf of the State as a whole or in its own name.

4.5.2 A State should make public which, if any, of its institutions may be authorized to conclude contracts, including specifying whether it may do so on behalf of the State as a whole, or in its own name.

4.5.3 A State may make this information public generally, such as by posting its procedures on-line, or specifically, by communicating with other States or State institutions as to its institutions’ capacities and the relevant procedures under which they operate.

4.6 Publicizing Registries of Binding and Non-Binding Agreements

4.6.1 *National Registries of Binding Agreements.* States should create and maintain public registries for all binding agreements of the State and State institutions.

4.6.2 *National Registries of Political Commitments.* States should maintain a national registry of all, or at least the most significant, political commitments of the State and State institutions.

5. Legal Effects of Binding and Non-Binding Agreements

5.1 The Legal Effects of State treaty-making: States and their institutions should approach their treaty-making understanding that their consent to a treaty will generate at least three different sets of legal effects:

5.1.1 *Primary International Legal Effects* – Pursuant to the fundamental principle of *pacta sunt servanda* treaties impose an obligation to observe their terms in good faith.

5.1.2 *Secondary International Legal Effects* – the existence of a treaty triggers the application of several secondary international legal regimes, including the law of treaties, state responsibility, and any other specific regimes tied to the treaty’s subject-matter.

5.1.3 Domestic Legal Effects – A State’s domestic legal order may, but is not required to, accord domestic legal effects to the State’s treaties. States should be prepared to explain to other States and stakeholders what domestic legal effects follow its own treaty-making.

5.2 The Legal Effects of Contracts. States and their institutions should approach their agreement-making understanding that the legal effects of a contract will depend on the contract’s governing law, including issues of performance, displacement of otherwise applicable domestic law, and enforcement.

5.3 The Effects of Political Commitments. States and their institutions should approach their agreement-making understanding that a political commitment will not produce any direct legal effects under international or domestic law; political commitments are not legally binding.

5.3.1 States and their institutions should honor their political commitments and apply them with the understanding that other States will expect performance of a State’s political commitment whether due to their moral force or the political context in which they were made.

5.3.2 States and their institutions should be aware that, even if non-binding, a political commitment may still have legal relevance to a State. For example, political commitments may be:

- (i) incorporated into other international legal acts such as treaties or decisions of international organizations;
- (ii) incorporated into domestic legal acts such as statutes or other regulations; or
- (iii) the basis for interpretation or guidance of other legally binding agreements.

5.4 Legal Effects of an Inter-Institutional Agreement. States should expect the legal effects of an inter-institutional agreement to track to whatever category of agreement—a treaty, a political commitment, or a contract—it belongs.

5.4.1 States may presume that inter-institutional treaties and contracts will trigger the responsibility of the State as a whole.

5.4.2 Nonetheless, States should be sensitive to the fact that in certain cases, a State or its institution may claim that legal responsibility for an inter-institutional agreement extends only to the State institution entering into the agreement.

5.4.3 Where States have differing views of the legal responsibility accompanying a binding inter-institutional agreement, they should align their views, whether by both agreeing to have the States bear responsibility under the inter-institutional agreement or agreeing to limit responsibility to the institutions concluding it.

5.4.4 States should exercise any available discretion to avoid giving legal effects to an inter-institutional agreement where one or more of the institutions involved did not have the requisite authority (or general capacity) to make such an agreement from the State of which it forms a part.

6. Training and Education Concerning Binding and Non-Binding Agreements

6.1 Training and Education relating to Binding and Non-Binding Agreements by States. States should undertake efforts to train and educate relevant officials within a Foreign Ministry and other relevant ministries or agencies to ensure that they are capable of:

- (i) identifying and differentiating among the various types of binding and non-binding agreements;
- (ii) understanding who within the State has the capacity to negotiate and conclude which agreements;
- (iii) following any and all domestic procedures involved in such agreement making; and
- (iv) appreciating the legal and non-legal effects that can flow from different types of international agreements.

6.2 Training and Education relating to Inter-Institutional Agreements. Where a State authorizes inter-institutional agreements, it should undertake efforts to train and educate relevant officials of a government agency or sub-national territorial unit to ensure that they are capable of:

- (i) identifying and differentiating among the various types of binding and non-binding agreements;
- (ii) understanding who within the State has the capacity to negotiate and conclude which agreements;
- (iii) following any and all domestic procedures involved in such agreement making; and
- (iv) appreciating the legal and non-legal effects that can flow from different types of international agreements.

* * *

ANNEX II

DRAFT OAS GUIDELINES FOR BINDING AND NON-BINDING AGREEMENTS (WITH COMMENTARY)

States and other international actors currently form and apply a diverse range of international agreements. At the broadest level, current practice divides between (i) agreements that are “binding” and thus governed by law, whether international law (treaties) or domestic law (contracts), and (ii) agreements that are not binding (“political commitments”) and for which law provides no normative force. States also increasingly sanction agreement-making by their national ministries or sub-national territorial units (*e.g.*, provinces, regions).

The current range of binding and non-binding agreements offers great flexibility; agreements can be crafted to correspond to the context presented, including the authors’ interests, legal authorities, and resources. At the same time, international law and practice suggests significant ambiguities (or outright differences) in how States authorize or understand their different international agreements.

This current state of affairs has generated substantial confusion among States’ representatives and a potential for misunderstandings and disputes. Two States may conclude an agreement that one State regards as a non-binding political commitment and the other regards as a treaty (or a contract). The potential for confusion and disputes is compounded where State ministries or sub-national territorial units conclude agreements. Some States authorize these entities to conclude treaties (that is, binding agreements governed by international law) while others deny that they may do so (either because of a lack of authority or on the premise that international law does not afford these actors a treaty-making capacity).

The present Guidelines seek to alleviate current confusion and the potential for conflict among States and other stakeholders with respect to binding and non-binding agreements. They provide a set of working definitions, understandings, and best practices on who makes such agreements, how they may do so, and to what, if any, legal effects. The aim is to assist States in understanding the contours and consequences of pursuing and concluding different types of international agreements. Increasing knowledge and awareness of best practices may allow States to avoid or mitigate the risks for confusion or conflict they currently face.

At the same time, these guidelines in no way aspire to a legal status of their own. They are not intended to codify international law nor offer a path to its progressive development. Indeed, in several places they note areas where existing international law is unclear or disputed. The Guidelines leave such issues unresolved. Their aim is more modest—to provide a set of voluntary understandings and practices that Member States may employ among themselves (and perhaps

globally) to improve understanding of how international agreements are formed, interpreted, and implemented, thereby reducing the risk of future disagreements or difficulties.

1. Definitions for Binding and Non-Binding Agreements

1.1 Agreement – *although its usage in a text is often indicative of a treaty, the concept may be defined more broadly to encompass mutual consent by participants to a commitment regarding future behavior.*

Commentary: The concept of an agreement has not been well defined in international law. In preparing the draft that became the 1969 Vienna Convention on the Law of Treaties (VCLT), the International Law Commission (ILC) gave the idea little attention even as they used it regularly throughout their discussions.¹ Nor did any of the OAS Member States responding to the Committee’s Questionnaire address it. Nonetheless, there are at least two core elements to any agreement: *mutuality* and *commitment*.

In terms of *mutuality*, the First ILC Rapporteur for the Law of Treaties, J.L. Brierly, noted that defining treaties as “agreements” excludes “unilateral declarations.”² Agreements thus do not arise *sua sponte* from a single actor, but are the product of a mutual interchange or communication.³ Brierly also identified the “essence of a ‘treaty’” not in the instrument or document recording it, but in the “agreement or *consensus* brought into existence by the act of its

¹ Although they used the term “agreement” throughout their work, none of the four ILC Special Rapporteurs offered a specific definition for the term. See J.L. Brierly, *First Report on the Law of Treaties* [1950] YBILC, vol. II, 227 (¶¶19-20); Hersch Lauterpacht, *First Report on the Law of Treaties* [1953] YBILC, vol. II, 90, 93-94 (Art. 1); Gerald G. Fitzmaurice, *First Report on the Law of Treaties* [1956] YBILC, vol. II, 117; Humphrey Waldock, *First Report on the Law of Treaties* [1962] YBILC, vol. II, 31 (Art. 1(a)).

² Brierly, *supra* note 1, at 227, ¶¶19-20. International law has come to treat certain unilateral declarations as a form of international legal commitment. In the *Nuclear Tests* case, the ICJ found that France was bound under international law by public statements of its President and Foreign and Defense Ministers to cease nuclear tests in the South Pacific, obviating the need for the Court to rule on the case at hand. *Nuclear Tests (Australia/New Zealand v. France)* [1974] I.C.J. Rep. 267-8, ¶¶43-50. Based on this ruling, in 2006, the ILC articulated a basic *Guiding Principle*—“Declarations publicly made and manifesting the will to be bound may have the effect of creating legal obligations.” ILC, *Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations, with commentaries thereto* (2006) 58th Session, U.N. Doc. A/61/10, Guiding Principle 1. Examples of unilateral declarations include Egypt’s 1957 Declaration on the Suez Canal, Jordan’s 1988 waiver of claims to the West Bank, U.S. representations before the WTO Dispute Settlement Body in the *1974 Trade Act* case, and (at least potentially) Cuba’s 2002 declarations about the supply of vaccines to Uruguay. VR Cedeño, ‘Eighth Report on Unilateral Acts of States’ (26 May 2005) U.N. Doc. A/CN.4/557; *United States—Sections 301-310 of the Trade Act of 1974* (Report of the Panel) (1999) WT/DS152/R [7.118]–[7.123].

Sources are divided, however, on whether unilateral declarations depend on the intent of the declaring State or a principle of estoppel in cases of good faith, *i.e.*, reasonable reliance by the statement’s intended audience. *Compare Case concerning the Frontier Dispute (Burkina Faso v. Republic of Mali)* (Judgment) [1986] I.C.J. Rep. 573-4, ¶39; *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v Chile)* (Judgment) (1 Oct 2018), General List 153, 47, ¶148 (existence of a binding unilateral declaration “all depends on the intention of the State in question”); with ILC, *Report of the Working Group on Unilateral Acts of States* (20 July 2006) U.N. Doc. A/CN.4/L.703, Introductory note, Preamble (noting intent and estoppel as two competing theories of the source of obligation for unilateral declarations).

³ Duncan B. Hollis and Joshua J. Newcomer, “Political” Commitments and the Constitution, 49 VIRG. J. INT’L L. 507, 522 (2009); JAN KLABBERS, THE CONCEPT OF TREATY IN INTERNATIONAL LAW 51-53 (1996).

formal conclusion.”⁴ By linking agreement to a “consensus,” the concept is thus tied to having a “meeting of the minds” or *consensus ad idem*.⁵

Beyond mutuality, the *consensus ad idem* must also incorporate some commitment. *Commitment* refers to the idea that an agreement encompasses shared expectations of future behavior. It is not enough for an agreement’s participants to explain their respective positions or even list an “agreed view” – commitments elaborate how participants will change their behavior from the status quo or continue existing behavior.⁶ Of course, the precision of commitments can vary; some encompass clear rules that participants are able to fully implement *ex ante* while others are standards where compliance requires an *ex post* analysis in light of all the circumstances. Nor should the mutuality of commitments be confused with reciprocity. Agreements can be one-sided; they do not require an exchange of commitments (or what the common law calls “consideration”); a single commitment by one participant to another participant (or participants) can suffice.⁷

1.2 Treaty – *an international agreement concluded between States, State institutions, or other appropriate subjects that is recorded in writing and governed by international law, regardless of its designation, registration, or the domestic legal procedures States employ to consent to be bound by it.*

Commentary: The *Guidelines*’ definition of a treaty derives from the one employed in VCLT Article 2(1)(a):

For the purposes of the present Convention: (a) “treaty” means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.⁸

This definition is widely accepted. The International Court of Justice (ICJ) has suggested it reflects customary international law.⁹ Most States endorse it.¹⁰ And scholars regularly cite it when defining the treaty concept.¹¹

⁴ [1950] YBILC, vol. II, 227, ¶19-20.

⁵ See, e.g., J.L. Weinstein, *Exchange of Notes*, 29 BRITISH YBK INT’L L. 205, 226 (1952) (“It is the consensus of the parties which is the essence of the agreement and not the instrument, no matter what form it takes”); MARK E. VILLIGER, COMMENTARY ON THE 1969 VIENNA CONVENTION ON THE LAW OF TREATIES 77 (2009) (same); Kelvin Widdows, *What is an Agreement in International Law?*, 50 BRITISH YBK INT’L L. 117, 119 (1979) (same).

⁶ See, e.g., Hollis and Newcomer, *supra* note 3, at 522; KLABBERS, *supra* note 3, at 51-53; Kal Raustiala, *Form and Substance in International Agreements*, 99 AM. J. INT’L L. 581, 584-85 (2005).

⁷ See Duncan B. Hollis, *Defining Treaties*, in THE OXFORD GUIDE TO TREATIES 20 (Duncan B. Hollis, ed., 2012).

⁸ Vienna Convention on the Law of Treaties (opened for signature 23 May 1969, entered into force 27 January 1980) 1155 U.N.T.S. 331, Art. 2(1)(a) (“VCLT”).

⁹ See *Maritime Delimitation in the Indian Ocean (Somalia v. Kenya)* (Judgement) [2017] I.C.J. Rep. 3, 21, ¶42; *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria; Equatorial Guinea Intervening)* [2002] I.C.J. Rep. 249, ¶263. Other international tribunals take a similar position. See, e.g., *Texaco v. Libyan Arab Republic*, 53 INT’L L. REP. 389, 474 (1977).

¹⁰ Duncan B. Hollis, *Second Report on Binding and Non-Binding Agreements*, OEA/Ser. Q, CJI/doc. 553/18 (6 February 2018) ¶8 (“Hollis, Second Report”) (9 of 10 OAS Member States responding accept VCLT definition in their own treaty law and practice, while the tenth State did not address the issue); Duncan B. Hollis, *A Comparative Approach to Treaty Law and Practice*, in NATIONAL TREATY LAW & PRACTICE 9 (Duncan B. Hollis et al., eds., 2005) (among 19 representative States, “virtually every state surveyed” accepts the VCLT treaty definition).

¹¹ See, e.g., ANTHONY AUST, MODERN TREATY LAW & PRACTICE 14 (3rd ed., 2013); MALGOSIA FITZMAURICE AND OLUFEMI ELIAS, CONTEMPORARY ISSUES IN THE LAW OF TREATIES 6-25 (2005); KLABBERS, *supra* note 3, at 40.

At the same time, the VCLT treaty definition is widely recognized as incomplete. It fails to include agreements by other subjects of international law. And yet, no one seriously disputes that agreements with or among international organizations qualify as treaties.¹² The VCLT definition also references issues that once were controversial (*i.e.*, that an exchange of notes may constitute a treaty) that are no longer open to serious question.¹³ Treaties can exist in a single instrument or two or more related instruments.¹⁴

The *Guidelines*' treaty definition thus expands upon the VCLT definition to accommodate modern treaty law and practice. For the purposes of these *Guidelines*, a treaty has the following elements: (i) an international agreement; (ii) concluded; (iii) among States, State institutions or other appropriate subjects; (iv) that is recorded in writing; (v) governed by international law; and without regard to (vi) its designation; (vii) registration; or (viii) the domestic legal procedures States employ to consent to be bound by it.

- (i) *An international agreement.* A treaty constitutes a specific type of agreement: *all treaties are agreements, but not all agreements qualify as treaties.*¹⁵ It is not clear, however, what other work the “international” qualifier does. It has not been employed to limit the subject-matter for treaty-making. Today, requiring an “international” agreement may best be read to reinforce the treaty’s scope, whether in terms of cabining who can conclude one (*i.e.*, those actors with international legal personality) or the international legal basis for the obligations that result.¹⁶
- (ii) *... concluded ...* When is an international agreement concluded? The term may be used loosely to refer to any point from the negotiations’ end to a “definitive engagement that the parties are bound by the instrument under international law.”¹⁷ Both the VCLT and State practice define conclusion as the point at which parties adopt the treaty text or when it is opened for signature.¹⁸ For purposes of these *Guidelines*, it is important to emphasize that a treaty can be “concluded” even if it has not entered into force (or never will).¹⁹ Conclusion and entry into force are not synonymous.²⁰ Thus, it is important to

¹² See Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (adopted 21 March 1986, not yet in force), 25 ILM 543 (1986) (“1986 VCLT”); A. MCNAIR, *THE LAW OF TREATIES* 755 (1961) (“Fifty years ago it might have been possible to say that only States could conclude treaties, but today any such statement would be out of date.”).

¹³ The 1935 *Harvard Draft Convention on the Law of Treaties*, for example, originally excluded exchanges of notes from its treaty definition. 29 AM. J. INT’L L. (SUPP.) 653, 698 (1935). Today, however, treaties can be comprised by single or repeated exchanges of notes. See, e.g., Philippe Gautier, *Article 2, Convention of 1969*, in *THE VIENNA CONVENTION ON THE LAW OF TREATIES* 35 (Oliver Corten and Pierre Klein, eds., 2011); VILLIGER, *supra* note 5, at 200.

¹⁴ VCLT Art. 2(1)(a).

¹⁵ See VILLIGER, *supra* note 5, at 77. This point was repeated throughout the ILC’s preparatory work. See Brierly, *First Report*, *supra* note 1, at 227, ¶19; Humphrey Waldock, *Fourth Report on the Law of Treaties* [1965] YBILC, vol. II, 11, ¶1; [1965] YBILC, vol. I, 10, ¶10 (Briggs).

¹⁶ This follows from Waldock’s earlier understanding. Waldock, *First Report*, *supra* note 1, at 31 (Art. 1(a)); see also VILLIGER, *supra* note 5, at 78.

¹⁷ Waldock adopted the latter view. Waldock, *First Report*, *supra* note 1, at 30, ¶9. Brierly supported linking a treaty’s conclusion to the establishment of the agreed text in final form. J.L. Brierly, *Second Report on the Law of Treaties* [1951] YBILC, vol. II, 70-71; see also VILLIGER, *supra* note 5, at 78-9.

¹⁸ The VCLT’s structure favors this view – VCLT Articles 7-10 discuss the “text of the treaty” when referring to full powers, adoption and authentication of a treaty text, but to the “treaty” in those articles (Arts. 11-18) elaborating various means of expressing consent to be bound. The 1986 VCLT adopts the same approach. See RICHARD GARDINER, *TREATY INTERPRETATION* 232-33 (2nd ed., 2015); AUST, *supra* note 11, at 86.

¹⁹ Unperfected treaties—those that do not enter into force—are thus still considered treaties. See, e.g., 1986 VCLT, *supra* note 12 (not yet in force).

differentiate the legal effects that arise when a treaty merely exists from those effects imposed upon its entry into force (*i.e.*, *pacta sunt servanda* only applies to the latter sub-set of treaties).²¹

- (iii)... *among States, State institutions and other appropriate subjects* ... The VCLT defines a treaty as an agreement between States. In practice, a State may conclude a treaty directly in its own name (an inter-State agreement) or via one of its institutions – whether the national government as a whole (a government-to-government agreement), a national ministry (an agency-to-agency agreement), or via a sub-national territorial unit (*e.g.*, a province-to-province agreement).²² At the same time, the VCLT recognizes that “other subjects of international law” may also conclude treaties.²³ This category encompasses entities such as international organizations, which form the subject of the 1986 Vienna Convention.²⁴ In addition, other subjects of international law may have sufficient legal personality to conclude treaties on certain subjects (*i.e.*, insurgent groups can conclude treaties regarding the conduct of hostilities).²⁵ These *Guidelines* employ the label “appropriate subjects” to acknowledge that not all entities that aspire to be subjects of international law may qualify as such. Some States claim that a State institution (*e.g.*, overseas territory, regional government) can be treated as an “other subject” of international law, that is, capable of concluding a treaty directly in their own name. That position is, however, disputed and these *Guidelines* do not purport to resolve that dispute.²⁶ Thus, the treaty definition simply lists State institutions among the actors that conclude treaties without clarifying whether they can do so independently or only as agents of a State.
- (iv)... *that is recorded in writing* ... The VCLT requires all treaties to be in writing – with permanent and readable evidence of the agreement. But it does not impose any particular requirements of form.²⁷ There is, for example, no requirement that treaties be signed.²⁸ Nor must they be published.²⁹ There are, moreover, many different ways to record a treaty, including the most obvious, traditional means – typewriting and printing. Modern communication methods, including e-mail, texts, social media accounts (*e.g.*, Twitter), may provide additional mechanisms for recording future treaties.³⁰

²⁰ AUST, *supra* note 11, at 86; VILLIGER, *supra* note 5, at 79.

²¹ *See, e.g.*, VCLT Art. 24(4) (noting various provisions of “a treaty” that “apply from the time of the adoption of its text” rather than on entry into force).

²² *See, e.g.*, Hollis, Second Report, *supra* note 10, at 8, ¶24 (United States and Jamaica report support for agency-level agreements as treaties); *id* at ¶26 (Mexican law permits federal entities to conclude inter-institutional agreements governed by international law).

²³ *See* VCLT Art. 3 (VCLT’s treaty definition does not preclude the legal force of agreements concluded by States with other subjects of international law or among such subjects); Waldock, *First Report*, *supra* note 1, at 30.

²⁴ 1986 VCLT, *supra* note 12.

²⁵ *See* Tom Grant, *Who Can Make Treaties? Other Subjects of International Law*, in THE OXFORD GUIDE TO TREATIES 125-26 (Duncan B. Hollis, ed., 2012).

²⁶ Hollis, Second Report, *supra* note 10, at 8, ¶25 (Argentina denies government ministries can conclude treaties since they do not qualify as subjects of international law).

²⁷ AUST, *supra* note 11, at 16.

²⁸ *Pulp Mills on the River Uruguay (Argentina v. Uruguay)* (Judgment, 20 April 2010) [2010] I.C.J. Rep. ¶¶132-50 (treating an unsigned joint press communique as an “agreement”); Gautier, *supra* note 13, at 38; AUST, *supra* note 11, at 20-21.

²⁹ FITZMAURICE AND ELIAS, *supra* note 11, at 23-24; KLABBERS, *supra* note 3, at 85-86.

³⁰ AUST, *supra* note 11, at 16 (supporting the idea that a treaty could be concluded via e-mail).

The VCLT excludes oral agreements from its ambit (primarily for practical reasons).³¹ Today, many—but not all—States understand customary international law to allow for oral treaties.³² U.S. domestic law, for example, provides that oral international agreements, once made, must be committed to writing.³³ By providing that a treaty be “*recorded* in writing,” these *Guidelines* avoid endorsing the oral treaty concept specifically. At the same time, however, the definition may include any oral treaties once they are subsequently recorded in written form.

(v) ... *and governed by international law*, ... This is the essential criterion of the treaty definition. Simply put, *if an international agreement is governed by international law, it is a treaty*. The challenge, however, lies in understanding what this phrase means. Using the “governed by international law” qualifier clearly distinguishes treaties from two other categories of international agreement: contracts (agreements governed by national law) and political commitments (agreements not governed by law at all).³⁴ But it is not clear precisely how it does so. For starters, the idea that treaties are governed by international law may be read as more of a consequence of treaty-making rather than a constitutive element of the concept.³⁵ And, as discussed further below, States and scholars have never fully resolved how to decide which agreements are governed by international law. Today, there are two different camps. The first favors subjective indicators to discern when an agreement is governed by international law based on the intention of the States (or other subjects) who make it. In other words, an agreement is a treaty where that reflects the shared intentions of its authors. In contrast, a second camp contemplates an agreement’s objective markers (whether its subject-matter or the use of certain text) as more indicative of when it is governed by international law. As a practical matter, therefore, applying this treaty criterion evidences an “oscillation between subjective and objective approaches.”³⁶

³¹ See VCLT Art. 3. The ILC emphasized it focused exclusively on written agreements “in the interests of clarity and simplicity” and had “not intended to deny the legal force of oral agreements under international law or to imply that some of the principles contained in later parts of the Commission’s draft articles on the law of treaties may not have relevance in regard to oral agreements.” [1966] YBILC, vol. II, 189, ¶7.

³² See, e.g., Hollis, *A Comparative Approach*, *supra* note 10, at 12-13 (surveying treaty law and practice of Canada, Germany, Japan, Switzerland, and the United Kingdom); Jan G. Brower, *The Netherlands*, in NATIONAL TREATY LAW & PRACTICE 486 (Duncan B. Hollis et al., eds., 2005) (Dutch Government has opposed practice of oral agreements since 1983); K. Thakore, *India*, in NATIONAL TREATY LAW & PRACTICE 352 (Duncan B. Hollis et al., eds., 2005) (oral agreements “are not resorted to in Indian practice”); Neville Botha, *South Africa*, in NATIONAL TREATY LAW & PRACTICE 583 (Duncan B. Hollis et al., eds., 2005) (neither South African law nor practice makes any provision for oral agreements and they lack official sanction).

³³ See 1 U.S.C. §112b.

³⁴ Both distinctions were raised at the ILC and in the Vienna Conference. On the distinction between treaties and contracts, see [1966] YBILC, vol. II, 189, ¶6; [1959] YBILC, vol. II, 95, ¶3; U.N. Conference on the Law of Treaties, *Official Records: Documents of the Conference*, U.N. Doc. A/CONF.39/11/Add.2, 9, ¶6 (“Vienna Conference, Official Records”). On the distinction between treaties and political commitments see [1959] YBILC, vol. II, 96-97, ¶8 (“instruments which, although they might look like treaties, merely contained declarations of principle or statements of policy, or expressions of opinion, or *voeux*, would not be treaties”); Vienna Conference, *Official Records*, *supra*, at 111-112; U.N. Conference on the Law of Treaties, *Summary Records of First Session*, U.N. Doc. A/CONF.39/11, 23, ¶26 (“Vienna Conference, First Session”) (Mexican delegate distinguishes treaties from “declarations of principle or political instruments”); *id* at 28, ¶65.

³⁵ That perspective was clearly at work in the ILC’s origination of the phrase. See [1959] YBILC, vol. II, 95, ¶3.

³⁶ Martti Koskenniemi, *Theory: implications for the practitioner*, in THEORY AND INTERNATIONAL LAW: AN INTRODUCTION 19-20 (Philip Allott et al., eds., 1991).

(vi)... *regardless of its designation* ... International law has not imposed any requirements of form or formalities for concluding treaties.³⁷ Thus, a treaty need not bear the title “treaty.” In practice, treaties bear many different titles, including “act,” “agreed minute,” “charter,” “convention,” “covenant,” “declaration,” “memorandum,” “note verbale,” “protocol,” “statute,” and, of course, “treaty.” International tribunals have classified instruments as treaties notwithstanding the agreement being housed in very different forms. In *Qatar v. Bahrain*, the International Court of Justice analyzed the 1990 “Agreed Minutes” of a meeting among Foreign Ministers as a treaty.³⁸ More recently, in the *Pulp Mills* case, the Court concluded that a press release constituted a binding agreement for the parties.³⁹

At most, an agreement’s title may provide some indication of its status. It may, for example, indicate its authors’ intentions. When two States use the title “treaty,” it suggests that they anticipated making one. But, the fact an agreement bears a particular title is not determinative of whether it is (or is not) a treaty. Thus, although some States like Canada prefer to use “Memorandum of Understanding” (MOU) as the title for their political commitments, the fact that an agreement bears that heading does not automatically make it non-binding. MOUs can still be treaties.⁴⁰

(vii) ... *registration* ... UN Charter Article 102(1) requires that “[e]very treaty and every international agreement entered into by any Member of the United Nations after the present Charter comes into force shall as soon as possible be registered with the Secretariat and published by it.”⁴¹ Does this mean all unregistered agreements are not

³⁷ See, e.g., *An Arbitral Tribunal Constituted Under Annex VII to the 1982 United Nations Convention on the Law of the Sea (The Republic of Philippines v. The People’s Republic of China)*, Award on Jurisdiction, PCA Case No. 2013-19 (Oct. 29, 2015) ¶214 (“*South China Sea Arbitration*”) (“The form or designation of an instrument is ... not decisive of its status as an agreement.”); *South West Africa (Ethiopia/Liberia v. South Africa)* (Preliminary Objections) [1962] I.C.J. Rep. 319, 331 (“terminology is not a determinant factor as to the character of an international agreement”).

³⁸ *Maritime Delimitation and Territorial Questions (Qatar v. Bahrain)* (Jurisdiction and Admissibility) [1994] I.C.J. Rep. 112, ¶21-30.

³⁹ *Pulp Mills*, *supra* note 28, at 138.

⁴⁰ Global Affairs Canada, *Policy on Tabling of Treaties in Parliament*, at <https://treaty-accord.gc.ca/procedures.aspx?lang=eng>, Annex C (“Canada Treaty Policy”) (“while Canadian recent practice dictates that Memorandum of Understanding or Arrangements are not legally binding, not all States view these instruments as such. Simply labeling a document as a “Memorandum of Understanding” or “Arrangement” is not enough to ensure that it will not be considered as an agreement governed by public international law”); Canada, Treaty Law Division, Global Affairs Canada, *Binding and Non-Binding Agreements: A Questionnaire for OAS Member States—Submission by Canada* (9 September 2019) (“Canada Response”); Treaty Law Division, Global Affairs Canada, *Working Group on Treaty Practice, Survey on Binding and Non-Binding International Instruments* (18 Sept. 2019) 5, 23 (“Working Group on Treaty Practice”) (Canada, Finland, Germany, Israel, Japan, Korea, Mexico, and Spain all indicate that the title of an agreement is not determinative of its binding or non-binding status, although Spain noted that it does not consider MOUs to be legally binding in accordance with Article 43 of its Treaty Law 25/2014).

Moreover, States may ascribe a different status to the same MOU as the United States and its treaty partners did with respect to certain defense-related MOUs. The United States considered them treaties, while its partners (Australia, Canada, and the United Kingdom) regarded them as non-binding, political commitments. See J. McNeill, *International Agreements: Recent US-UK Practice Concerning the Memorandum of Understanding*, 88 AM. J. INT’L L. 821 (1994).

⁴¹ UN Charter, Art. 102(1); see also VCLT Art. 80(1) (“Treaties shall, after their entry into force, be transmitted to the Secretariat of the United Nations for registration or filing and recording, as the case may be, and publication”). In contrast, Article 18 of the League of Nations’ Covenant

treaties? The answer is clearly in the negative.⁴² Neither the U.N. Charter nor the VCLT explicitly tie treaty registration to an agreement's legal status. For its part, the United Nations is careful to regularly indicate that the Secretariat's acceptance of an instrument for registration "does not confer on the instrument the status of a treaty or an international agreement if it does not already have that status."⁴³ Similarly, a failure to register will generally not deny an agreement the status of a treaty. As the ICJ noted in *Qatar v. Bahrain*, "[n]on-registration or late registration ... does not have any consequence for the actual validity of the agreement, which remains no less binding upon the parties."⁴⁴ In short, registration is not a required criterion for defining treaties.

Even if it is not determinative, the fact of registration may be indicative of a treaty's existence. Like the title, registration indicates an intent (albeit of only the registering party) that the agreement will be a treaty. But since States do not regularly monitor treaty registrations, registration often says little, if anything, about the other State(s)' intentions. Nonetheless, the ICJ recently signaled in *Somalia v. Kenya* that registration is among the factors it considers in identifying treaties, particularly where the other party did not subsequently object to registration.⁴⁵

(viii) ... or the domestic legal procedures States employ to consent to be bound by it. The definition of a "treaty" may vary depending on the context in which is used. For purposes of these *Guidelines*, it is important to differentiate how Member States may define treaties for purposes of their domestic law and how international law and practice define the concept. As a matter of domestic law, some States limit the definition of a treaty within their domestic legal order to agreements authorized through specific domestic procedures, most often legislative approval.⁴⁶ International agreements that do not require or receive legislative approval will not be defined as treaties for domestic

went further, indicating that "a treaty or international engagement" was not binding until registered.

⁴² Accord AUST, *supra* note 11, at 302-03; FITZMAURICE AND ELIAS, *supra* note 11, at 23; KLABBERS, *supra* note 3, at 84; D.N. Hutchinson, *The Significance of the Registration or Non-Registration of an International Agreement in Determining Whether or Not it is a Treaty*, CURRENT LEGAL PROBLEMS 257, 265-276 (1993).

⁴³ U.N. Secretary-General, *Note by the Secretariat*, in 2856 TREATIES AND INTERNATIONAL AGREEMENTS REGISTERED OR FILED AND RECORDED WITH THE SECRETARIAT OF THE UNITED NATIONS VII (2012). In cases of doubt, the United Nations favors registration. But it has occasionally refused to register a text that it did not consider a treaty.

⁴⁴ *Qatar v. Bahrain*, *supra* note 38, at ¶29. The failure to register or publish a 1983 U.S.-U.K. MOU was, however, a factor in the Heathrow Arbitration's decision to regard it as non-legally binding. *Award on the First Question, US/UK Arbitration concerning Heathrow Airport User Charges* (1992) ch. 5 155, ¶6.5.

⁴⁵ See *Somalia v. Kenya*, *supra* note 9, at 21, ¶42 (citing Kenya's registration and the lack of any Somali objection for five years as among the reasons the MOU qualified as a treaty).

⁴⁶ Which agreements require legislative approval—if any—varies from State to State. See, e.g., Hollis, *A Comparative Approach*, *supra* note 10 (surveying how nineteen states address a legislative role in treaty-making). Some States (e.g., Dominican Republic) require legislative approval for all their international agreements; other States like Canada do not require legislative approval to conclude any international agreement (legislation may, however, be required to implement certain agreements domestically). Canada Response, *supra* note 40, at 6. Other States adopt different domestic procedures for international agreements on different subjects or in light of other domestic authorities. See, e.g., Dominican Republic, Legal Department, Ministry of Foreign Affairs, *Replies to the Questionnaire on Binding and Non-Binding Agreements*, 29 Nov. 2017 (citing Art. 93 of the 2015 Constitution) ("Dominican Republic Response"); Government of Ecuador, Department of Foreign Affairs and Trade, *Questionnaire: Binding and Non-Binding Agreements* ("Ecuador Response") (legislative approval required for certain international agreements on topics involving, for example, territorial or border delimitations, alliances, and trade agreements).

law purposes, but rather comprise a discrete category. Many States refer to these as “executive agreements.”⁴⁷ Other States, particularly those belonging to the Commonwealth, use the term “treaty” to refer to their international agreements even though they do not require any advance legislative authorization.⁴⁸ Thus, the fact that a State mandates a particular set of domestic procedures for an international agreement will not accurately predict its status as a binding agreement under international law. Hence, these *Guidelines* adhere to the broader formulation where a treaty encompasses *all* binding agreements governed by international law independent of how States decide to authorize their consent to it.

1.3 Political Commitment – *A non-legally binding agreement between States, State institutions or other actors intended to establish commitments of an exclusively political or moral nature.*

Commentary: Unlike the treaty, international law lacks a widely accepted definition for political commitments. Nonetheless, States and scholars have recognized these non-binding agreements for more than a century, albeit under different headers: *e.g.*, gentleman’s agreements, informal agreements, *de facto* agreements, non-binding agreements, political texts, extra-legal agreements, non-legal agreements, international understandings, and political commitments.⁴⁹ The “political commitment” label captures all of these variations and corresponds to the category of non-binding international agreements generally.

Today, States clearly support the practice of concluding mutual commitments whose normative force lies outside of any sense of legal obligation.⁵⁰ The practice, moreover, appears to reflect increasing State usage of this vehicle for agreement.⁵¹ Political commitments are, by definition, non-binding. These are commitments for which compliance derives not from law, but rather a sense of moral duty or the political relations from which the agreement originated. Political commitments stand in contrast to binding agreements governed by law whether international (for treaties) or national (for contracts). The difference is an important one as the U.S. State Department described it in referencing several political commitments concluded alongside the START Treaty:

An undertaking or commitment that is understood to be legally binding carries with it both the obligation of each Party to comply with the undertaking and the right of each Party to enforce the obligation under international law. A “political” undertaking is not governed by international law Until and unless a party extricates itself from its

⁴⁷ In the United States, for example, only agreements that receive “advice and consent” from a two thirds majority of the upper chamber of its legislature (the Senate) are called treaties; agreements approved by a simple majority of both chambers are called “congressional-executive agreements” while those done under the President’s own constitutional powers are titled “sole executive agreements.”

⁴⁸ See Canada Treaty Policy, *supra* note 40 (adopting a treaty definition that applies to “any type of instrument governed by public international law”).

⁴⁹ See KLABBERS, *supra* note 3, at 18; see also Hollis and Newcomer, *supra* note 3, at 516-24; Michael Bothe, *Legal and Non-Legal Norms—A Meaningful Distinction in International Relations*, 11 NETH. Y.B. INT’L L. 65, 95 (1980); Oscar Schachter, *The Twilight Existence of Nonbinding International Agreements*, 71 AM. J. INT’L L. 296 (1977).

⁵⁰ See, *e.g.*, AUST, *supra* note 11, at 28-29, 35-39; MCNAIR, *supra* note 12, at 6; Bothe, *supra* note 49, at 66 (using empirical approach to reveal political commitment practice); PAUL REUTER, AN INTRODUCTION TO THE LAW OF TREATIES ¶74 (J. Mico and P. Haggemacher, trans., 1989). Debates continue from a jurisprudential view as to whether States can choose to form non-binding agreements. See KLABBERS, *supra* note 3, at 119 (“[I]f states wish to become bound, they have no choice but to become legally bound.”); Ian Sinclair, *Book Review—The Concept of Treaty in International Law*, 81 AM. J. INT’L L. 748 (1997) (disputing Klabbbers’s views).

⁵¹ Working Group on Treaty Practice, *supra* note 40, at 13, 31 (all 8 states surveyed – Canada, Finland, Germany, Israel, Japan, Korea, Mexico, and Spain – agree that the frequency and significance of political commitments is increasing).

“political” undertaking, which it may do without legal penalty, it has given a promise to honor that commitment, and the other Party has every reason to be concerned about compliance with such undertakings. If a Party contravenes a political commitment, it will be subject to an appropriate political response.⁵²

Of course, political force may also attach to legal norms. A treaty breach can, for example, generate *both* legal and political consequences. Thus, what separates treaties from political commitments is the *additional* application of international law to treaties (e.g., the law of State responsibility).

The concept of a political commitment should not, however, be confused with “soft law.” Although the term “soft law” has multiple meanings, it essentially views law not as a binary phenomenon—where something is/is not law—but as existing along a spectrum of different degrees of bindingness or enforceability ranging from soft to hard.⁵³ Soft law thus incorporates two different ideas: (a) norms that, while precise, are not intended to give rise to obligations under international law; and (b) legal norms incapable of enforcement because they are too vague or lack monitoring or enforcement mechanisms.⁵⁴ Political commitments involve agreements on norms of the first, but not the second, type.

Moreover, as elaborated in Part 2 below, because political commitments do not depend on international or national law for their authority, they are not constrained by legal rules on capacity. States can, of course, conclude political commitments. So too can sub-national territorial units.⁵⁵ But since political commitments do not derive from international law, there is no reason to limit political commitment-making to the entities that can conclude treaties.⁵⁶

Thus, the *Guidelines*’ definition of a political commitment includes all other actors who have the capacity to engage in a political or moral undertaking. This would presumably include business firms and/or individuals. Political commitments can be concluded, moreover, among a group of participants with a shared identity (i.e., only States, or only firms). Or, they can be concluded by a range of different actors in a multi-stakeholder framework. For a recent example, see the 1000-plus signatories of the Paris Call for Trust and Security in Cyberspace, including States, firms, academic institutions, and various representatives of civil society.⁵⁷

1.4 Contract: *A voluntary arrangement between two or more parties that constitutes a binding agreement governed by national or non-State law.*

⁵² Transmittal of the Treaty with the U.S.S.R. on the Reduction and Limitation of Strategic Offensive Arms (START Treaty), Nov. 25, 1991, S. TREATY DOC. NO. 102-20, at 1086; CONG. RESEARCH SERV., COMM. ON FOREIGN RELATIONS, 106TH CONG., TREATIES AND OTHER INTERNATIONAL AGREEMENTS: THE ROLE OF THE UNITED STATES SENATE 58-59 (Comm. Print 2001); see also Canada Response, *supra* note 40, at 3.

⁵³ See, e.g., Alan Boyle, *Some Reflections on the Relationship of Treaties and Soft Law*, 48 INT’L & COMP. L. Q. 901 (1999); Christine M. Chinkin, *The Challenges of Soft Law: Development and Change in International Law*, 38 INT’L & COMP. L. Q. 850, 865-66 (1989).

⁵⁴ See Prosper Weil, *Towards Relative Normativity in International Law*, 77 AM. J. INT’L L. 413, 414-415, n7 (1983). Others have offered a narrow definition limiting soft law to non-legally binding normative agreements. See, e.g., Wolfgang H. Reinicke & Jan M. Witte, *Interdependence, Globalization and Sovereignty: The Role of Non-Binding International Legal Accords*, in COMMITMENT AND COMPLIANCE: THE ROLE OF NON-BINDING NORMS IN THE INTERNATIONAL LEGAL SYSTEM 76 n3 (Dinah Shelton, ed., 2000).

⁵⁵ See Duncan B. Hollis, *Unpacking the Compact Clause*, 88 TEXAS L. REV. 741 (2010) (surveying U.S. state agreements with foreign counterparts and noting that they have “heartily endorsed the political commitment form”).

⁵⁶ See Hollis & Newcomer, *supra* note 3, at 521.

⁵⁷ See Paris Call for Trust and Security in Cyberspace (12 November 2018) <https://www.diplomatie.gouv.fr/en/french-foreign-policy/digital-diplomacy/france-and-cyber-security/article/cybersecurity-paris-call-of-12-november-2018-for-trust-and-security-in>.

Commentary: Like treaties (and unlike political commitments), contracts generate legally binding obligations. Instead of international law, however, a national legal system usually governs the formation, interpretation, and operation of the contract.⁵⁸ Alternatively, in a number of commercial contexts, parties may select non-State law (e.g., customs, usages and practices, principles, and *lex mercatoria*) to govern their contracts in lieu of—or in addition to—a national legal system. The OAS Inter-American Juridical Committee recently prepared a *Guide on the Law applicable to International Commercial Contracts in the Americas* that elaborates on the concept of a “contract.”⁵⁹ The definition used here is meant to parallel the definition in that *Guide*.⁶⁰

Contracts are usually defined as agreements by private actors (firms or individuals) that are governed by the relevant national legal system or private international law.⁶¹ But as the ILC acknowledged, States may choose to use laws other than international law to govern their agreements.⁶² Thus, public actors, whether States as a whole or their various institutions, may choose to conclude their agreements as contracts.

The existence of an inter-State (or inter-institutional) contract will often be a function of intent – did the parties intend their agreement to be governed by national law (and, if so, which one)? At the same time, however, the relevant national legal system will have its own rules on which agreements qualify as contracts and how to choose which law governs them.⁶³ Thus, there is a possibility that States could desire to create a contract that is invalid under the selected (or otherwise applicable) governing law. In such cases, there is an open question whether international law would step in to govern the agreement.⁶⁴

⁵⁸ Widdows, *supra* note 5, at 144-49. To say a contract is governed by domestic law does not mean it can never have international legal effect. Depending on the circumstances, international legal responsibility may follow a State’s breach of contract. But, as the ILC noted, “this did not entail the consequence that the undertaking itself, or rather the instrument embodying it, was ... a treaty or international agreement. While the obligation to carry out the undertaking might be an international law obligation, the incidents of its execution would not be governed by international law.” [1959] YBILC, vol. II, 95, ¶3.

⁵⁹ See GUIDE ON THE LAW APPLICABLE TO INTERNATIONAL COMMERCIAL CONTRACTS IN THE AMERICAS, OAS/Ser. Q, CJI/RES. 249 (XCIV-O/19) (21 February 2019).

⁶⁰ *Id.* The one difference is that in the international commercial context, the definition emphasized the need for contracts to be “enforceable.” *Id.* at ¶108. Where, however, States conclude contracts *inter-se* (or even contracts among State agencies or sub-national institutions) enforceability may not be guaranteed; issues of sovereign immunity, for example may preclude a court from taking jurisdiction over a dispute under such contracts. As such, the current definition does not require enforceability for a contract to exist.

⁶¹ Each nation’s legal system dictates which contracts fall within its jurisdiction, whether because the parties choose that legal system or because of that system’s contacts with the parties. Where contracts involve actors from different States, multiple States may assume jurisdiction over that agreement. In such cases, conflict of law rules dictate which legal system takes priority in cases of conflict.

⁶² [1966] YBILC, vol. II, 189, ¶6.

⁶³ In Paraguay, for example, Law No. 5393/201 governs the law applicable to international contracts. See *Note from the Permanent Mission of Paraguay to the Department of Law of the Secretariat for Legal Affairs, OAS General Secretariat*, No. 635-18/MPP/OEA (12 June 2018) (“Paraguay Response”). The Inter-American Juridical Committee has recently concluded a *Guide on the Law Applicable to International Commercial Contracts* that extensively addresses international contracting. Although it focuses on commercial contracts (rather than those involving States and State institutions with which these *Guidelines* deal), it contains extensive guidance of general utility for all international contracts. See INTERNATIONAL COMMERCIAL CONTRACTS GUIDE, *supra* note 59.

⁶⁴ Lauterpacht was of this view, as was the ILC, at least initially. Lauterpacht, *First Report*, *supra* note 1, 100; [1959] YBILC, vol. II, 95.

1.5 Inter-Institutional Agreement – *An agreement concluded between two or more State institutions, including national ministries or sub-national territorial units. Depending on its terms, the surrounding circumstances, and subsequent conduct, an inter-institutional agreement may qualify as a treaty, a political commitment, or a contract.*

Commentary: States currently use the term inter-institutional agreement to reference international agreements concluded among State institutions, whether (i) national ministries or agencies or (ii) sub-national territorial units like regions or provinces. Mexico, for example, defines the scope of its inter-institutional agreements as those “concluded in written form between any area or decentralized entity of the federal, state, or municipal public administration and one or more foreign government entities or international entities ...”⁶⁵ Peru indicates “‘interinstitutional agreements’... may be concluded, within their purview, by Peruvian governmental entities, including municipalities and regional governments, with their foreign counterparts or even with international organizations.”⁶⁶

The concept of inter-institutional agreements has received relatively little attention from international law. Practice, moreover, appears quite diverse in terms of whether these agreements are viewed as binding or non-binding. Some States, like Mexico, classify inter-institutional agreements as “governed by public international law,” making them binding treaties as that term is defined in these *Guidelines*.⁶⁷ Ecuador, in contrast, indicates that its “lower-level state institutions usually sign with their counterparts or with international organizations *non-binding* understandings known as inter-institutional instruments.”⁶⁸ Other States take a hybrid approach. Uruguay provides that inter-institutional agreements may be *either* binding or non-binding.⁶⁹ Peru suggests that inter-institutional agreements may be “governed by international law” if “they develop international commitments established under treaties in force”; otherwise inter-institutional agreements may be political commitments or contracts.⁷⁰ Jamaica, in contrast, does not view its institution’s

⁶⁵ See *Law Regarding the Making of Treaties*, reprinted in 31 I.L.M. 390 (1992), CDLX *Diario Oficial de la Federación* 2 (2 Jan. 1992) (1992 Mexican Law Regarding the Making of Treaties).

⁶⁶ Peru, General Directorate of Treaties of the Ministry of Foreign Affairs, *Report of the Inter-American Juridical Committee, Binding and Non-Binding Agreements: Questionnaire for the Member States* (“Peru Response”); see also Hollis, Second Report, *supra* note 10, at ¶14.

⁶⁷ 1992 Mexican Law Regarding the Making of Treaties, *supra* note 65. Labeling inter-institutional agreements as treaties may not accord with the label they have within a domestic legal order. In both Mexico and the United States, for example, only instruments that receive parliamentary approval are called treaties even as both states conclude other “international agreements” that would qualify as treaties as a matter of international law. Thus, these *Guidelines* refer to certain inter-institutional agreements as treaties in the international law sense of that term, notwithstanding that as a matter of constitutional law they would not bear such a label.

⁶⁸ Ecuador Response, *supra* note 46 (emphasis added); Hollis, Second Report, *supra* note 10, at ¶13; see also Canada Response, *supra* note 40, at 6 (non-binding MOUs “and similar arrangements can be between Canada and another sovereign State, but more commonly are between a Canadian government department, agency, province, other subnational government, or para-statal organization, and a similar body in another country.”).

⁶⁹ See Uruguay, *Reply to questionnaire on “binding and non-binding agreements”* (“Uruguay Response”) (listing “Inter-Institutional Agreements” as non-binding agreements, but later noting inter-institutional agreements may “bind not the State but themselves.”). Panama advises that representatives of its territorial units may enter into treaties if they receive full powers from the Foreign Ministry. *Note from the Republic of Panama, Ministry of Foreign Affairs – International Legal Affairs and Treaties Directorate to the Department of International Law of the Secretariat for Legal Affairs of the Organization of the American States*, N.V.-A.J._MIRE-201813176 (“Panama Response”).

⁷⁰ Peru Response *supra* note 66 (citing Article 6 of Supreme Decree No. 031-2007-RE). Peru notes “‘nonbinding’ agreements ... coming into increasing use ... at the interinstitutional level (between Peruvian governmental entities—including municipalities and regional governments—and their

agreements as treaties, but notes that “[s]ub-national territorial units and agencies may conclude non-binding agreements *or* contracts ...”⁷¹ The United States, meanwhile, indicates that its national ministries may conclude inter-institutional agreements that can be either treaties, “non-binding” political commitments, or contracts.⁷²

The diversity of State practice suggests that the category of inter-institutional agreements cannot be exclusively associated with any single category of binding (or non-binding) agreements. Simply put, an inter-institutional agreement may be a binding treaty or a binding contract, or it may be a non-binding political commitment. Its legal (or non-legal) status should, therefore, be determined by reference to the institution’s capacity to conclude international agreements and the same methods of identification employed to differentiate among inter-State agreements (i.e., the text, the surrounding circumstances, and subsequent conduct).

2. The Capacity to Conclude International Agreements

2.1 The Treaty-Making Capacity of States: *States have the capacity to conclude treaties and should do so in accordance with the treaty’s terms and whatever domestic laws and procedures regulate their ability to consent to be bound.*

Commentary: By virtue of their sovereignty, all States have the capacity to enter into treaties.⁷³ Through both the VCLT and custom, international law has devised a robust set of default rules on the treaty-making capacities of States. VCLT Article 7, for example, indicates who can consent to a treaty on a State’s behalf – its head of government, head of state, foreign minister, and anyone else granted “full powers” to do so.

A treaty’s terms may, however, limit which States are capable of joining. Multilateral treaties, for example, may be open to all States, only to States from a specific region,⁷⁴ or only to

foreign counterparts)” at the same time these entities “are authorized to conclude contracts for the procurement of goods and services.” *Id.*

⁷¹ Jamaica, *Note from the Mission of Jamaica to the O.A.S. to the Department of International Law, O.A.S. Secretariat for International Affairs*, Ref. 06/10/12, 14 Dec. 2017 (“Jamaica Response”) (emphasis added).

⁷² See United States, *Inter-American Juridical Report: Questionnaire for the Member States* (“U.S. Response”) (“Departments and agencies of the United States may enter into agreements with agencies of other states that fall within the definition of a treaty contained in Article 2 of the Vienna Convention on the Law of Treaties. Departments and agencies of the United States also enter into non-legally binding instruments and contracts governed by domestic law with agencies of other states.”). U.S. practice with respect to its sub-national territorial units (that is, U.S. states) is more complex. U.S. states are denied a treaty-making capacity under the U.S. Constitution but can conclude agreements or compacts with foreign counterparts where authorized by its Congress. *Id.* In contrast, Argentina allows its sub-national territorial units to conclude some “partial” treaties but denies that capacity to its national ministries or agencies. Argentina, *OAS Questionnaire Answer: Binding and Non-Binding Agreements* (“Argentina Response”).

⁷³ See, e.g., *Case of the SS Wimbledon (Great Britain v. Germany)* [1923] P.C.I.J. Rep. Ser. A No. 1 25, ¶35 (“the right of entering into international engagements is an attribute of State sovereignty”).

⁷⁴ See, e.g., *Inter-American Convention to Prevent and Punish Torture* (1985) OAS Treaty Series No. 67, Arts. 18, 20 (participation limited to American States).

States engaged in a specific activity.⁷⁵ States only have the capacity to join treaties where the treaty's terms allow them to do so.⁷⁶

International law also recognizes that every State has domestic laws and procedures governing its treaty-making. In theory, these rules may only rarely (if ever, in practice) override a State's consent to be bound to a particular treaty. To date, VCLT Article 46 has not provided legal grounds for a State to walk back its consent to be bound to a treaty (even in the face of allegations of significant breaches of domestic law or procedures).⁷⁷ That said, a State should—as a best practice—only exercise its capacity to join treaties that have been approved through its domestic laws and procedures. In other words, if a State's constitution requires a particular treaty to receive prior legislative approval, the State should not exercise its capacity to consent to be bound to that treaty until after the legislature has given that approval.

States should be sensitive, moreover, to the fact that other States' domestic laws and procedures may either facilitate or restrict their capacity to conclude treaties. States should not assume equivalence between their own domestic rules and those of prospective treaty partners. One State may only have the capacity to conclude a particular treaty with prior legislative approval, while another State's domestic law or practice may authorize the conclusion of the same treaty without any legislative involvement. States should thus exercise their treaty-making capacity in ways that ensure each of the participating States is given an opportunity to complete the necessary domestic approvals before it gives its consent to be bound by a treaty.

2.2 The Treaty-Making Capacity of State Institutions: *States may—but are not required to—authorize their institutions to make treaties on matters within their competence and with the consent of all treaty partners.*

Commentary: Unlike questions surrounding the treaty-making capacity of international organizations, international law has devoted little attention to treaty-making by a State's institutions.⁷⁸ Nonetheless, State institutions – whether national ministries or sub-national territorial units – clearly do conclude instruments that at least some States (including those States of which these institutions form a part) regard as treaties (*i.e.*, agreements governed by international law).⁷⁹ When should these institutions have the capacity to do so? For starters, the subject-matter of the agreement should be one over which the institution has competence. For example, a State's Finance Ministry may have the competence to engage in tax information sharing with its counterparts but would not have the competence to share defense related data. In

⁷⁵ See Constitution of the Association of Natural Rubber Producing Countries (1968) 1045 U.N.T.S. 173, ¶21 (treaty open to “countries producing natural rubber”). In addition, some treaties are open to additional States only by invitation. See International Sugar Agreement (1992) 1703 U.N.T.S. 203, Art. 37 (Agreement open to governments “invited to the United Nations Sugar Conference, 1992”).

⁷⁶ A treaty's terms may, of course, empower existing States parties to decide whether or not to admit a new State as a party; this is often the case with respect to the constituent treaties of international organizations.

⁷⁷ See VCLT Art. 46(1) (“A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.”). Efforts to invoke Article 46 in practice have not proved terribly successful. See *Somalia v. Kenya*, *supra* note 9, at 21 ¶¶48-50. (rejecting Somalia's arguments that the MOU's failure to receive approvals required under its domestic law allowed it to invoke VCLT Article 46 or otherwise deny its consent to be bound); *accord Cameroon v. Nigeria*, *supra* note 9, at ¶¶265-67; KLABBERS, *supra* note 3, at 564 (“Whether Article 46 qualifies as customary international law would seem debatable. There is little practice, after all, and while the rule is sometimes invoked, it is rarely honoured.”)

⁷⁸ Compare 1986 VCLT, *supra* note 12.

⁷⁹ See, e.g., Grant, *supra* note 25, at 127-131; Duncan B. Hollis, *Why State Consent Still Matters—Non-State Actors, Treaties, and the Changing Sources of International Law*, 23 BERKELEY J INTL L 137, 146-47 (2005).

federal States, moreover, some matters fall within the exclusive competence of a sub-national territorial unit (e.g., a province or region), which may create incentives for that territorial unit to conclude a treaty directly rather than having the State consent to doing so on the unit's behalf.

It would be a mistake, however, to conflate competence over a treaty's subject-matter with the capacity to make treaties on that matter. For institutions to enter into treaties, States appear to endorse two additional conditions: (1) the State responsible for the institution should consent to it making a treaty on matters within the institution's competence; and (2) the potential treaty partners should be willing to enter into that treaty with the institution.⁸⁰

As a first order consideration, it is up to each State to decide whether to authorize any of its institutions to engage in treaty-making. Some States like Canada and Paraguay may opt not to do so at all.⁸¹ In such cases, the institution should presumptively lack any treaty-making capacity.

When States do authorize treaty-making by their institutions, they can do so for all their institutions or only some of them. Mexico, for example, has authorized treaty-making by all types of State institutions.⁸² Other States have focused on authorizing (or denying authority) to make treaties to specific categories of institutions. For example, several States in the region (e.g., Jamaica, Panama, the United States) report authorizing their national ministries to conclude treaties, while other States (e.g., Colombia, the Dominican Republic, Peru) report a lack of any domestic authority for those ministries to do so.⁸³ Meanwhile, States like Argentina authorize their sub-national territorial units to conclude certain types of "partial" treaties, but deny their ministries can do so.⁸⁴ Other Member States, in contrast, have not authorized sub-national territorial units to engage in any treaty-making.⁸⁵

States may, moreover, authorize their institutions to negotiate and conclude treaties in various ways. Some – particularly European States – have constitutional provisions delineating the authority of certain State institutions to make treaties with respect to matters falling within their

⁸⁰ Oliver J. Lissitzyn, *Territorial Entities in the Law of Treaties*, III RECUEIL DES COURS 66-71, 84 (1968); see also [1962] YBILC, vol. I, 59, ¶20 (Briggs) (laying out a similar two part test); Grant, *supra* note 25, at 131.

⁸¹ See Canada Response, *supra* note 40, at 7-8 (indicating that "only the Canadian federal government can bind Canada" to treaties rather than government ministries or provinces; "provinces and territories can only conclude non-binding instruments"); Paraguay Response, *supra* note 63 ("Under domestic law, the Ministry of Foreign Affairs is the only agency with the capacity to conclude treaties governed by international law").

⁸² See *supra* note 65, and accompanying text.

⁸³ Hollis, Second Report, *supra* note 10, at ¶¶24-25; See also Panama Response, *supra* note 69. Similar State practice exists outside the region; South Korea, for example, reports limiting its agency-to-agency agreements to those that do not create binding rights or obligations for nations under international law." Working Group on Treaty Practice, *supra* note 40, at 21.

⁸⁴ See Argentina Response, *supra* note 72 (suggesting that since Argentina's ministries are not subjects of international law, they cannot conclude treaties while noting that under Article 12[5] of Argentina's Constitution its provinces and the Autonomous City of Buenos Aires can enter into "international agreements provided that they are not incompatible with the foreign policy of the Nation and do not affect the powers delegated to the Federal Government or the public credit of the Nation"); see also Argentina Constitution of 1853, Reinstated in 1983, with Amendments through 1994, Arts. 125-26, *English translation available at* www.constituteproject.org.

⁸⁵ See, e.g., Brazil, *Binding and Non-Binding Agreements: Questionnaire for the Member States* ("Brazil Response") ("Subnational entities (states, municipalities, and the Federal District) do not have the power, under the Brazilian Constitution, to conclude international legal acts that bind the Brazilian state"); Colombia, *Responses to the Questionnaire for the Member States of the Organization of American States (OAS) Binding and Non-Binding Agreements: Practice of the Colombian State* ("Colombia Response") (domestic Colombian legislation does not authorize "sub-national territorial units" (e.g., Colombian departments, districts, municipalities and indigenous territories) to conclude treaties governed by international law.").

exclusive competence.⁸⁶ Others, like Mexico, have used a statute to lay out procedures for authorizing certain treaty-making by federal agencies and sub-national territorial units. Several states offer their consent on a more *ad hoc* basis. Under a 1981 Social Security treaty with the United States, for example, Canada authorized its province, Quebec, to conclude a separate subsidiary agreement with the United States in light of Quebec's distinct pension system.⁸⁷ And in 1986 the United States authorized Puerto Rico to join the Caribbean Development Bank.⁸⁸

Second, in addition to having the "internal" consent from the State of which it forms a part, an institution's capacity to make treaties should also turn on the "external" consent of the other State(s) or institution(s) with which it seeks to form a treaty. Just because one State has authorized a national ministry (or a province) to conclude treaties on certain matters should not mean potential treaty-partners must accept that authority. States can—and do—regularly decline to conclude such treaties or insist that the other State conclude the treaty on the institution's behalf (*i.e.*, in the form of a state-to-state treaty or a government-to-government one). To avoid unaligned expectations, a State authorizing its own institution to conclude treaties should ensure that it or its institution obtains the consent of other treaty parties that the State's institution will join such treaties (rather than the State itself doing so).

In addition to inter-institutional agreements, States may conclude bilateral treaties with a foreign State institution. Hong Kong, for example, has a number of treaties with OAS Member States.⁸⁹ In the multilateral treaty context, such authorizations are infrequent, but there are several cases where States have agreed to accept a treaty relationship with sub-state actors. For example, Article 305 of the 1982 United Nations Convention on the Law of the Sea (UNCLOS) allows three categories of associated States and territories to sign and ratify the Convention with all the attendant rights and obligations the Convention provides.⁹⁰ And the Agreement Establishing the

⁸⁶ See, *e.g.*, Austria Constitution 1920 (reinst. 1945, rev. 2013), B-VG Art. 16 (Eng. trans. from www.constituteproject.org) ("In matters within their own sphere of competence, the Länder can conclude treaties with states, or their constituent states, bordering on Austria to conclude treaties with states, or their constituent states"); Belgian Constitution 1883 (rev. 2014), Art. 167(3) (Eng. trans. from www.constituteproject.org) ("The Community and Regional Governments described in Article 121 conclude, each one in so far as it is concerned, treaties regarding matters that fall within the competence of their Parliament. These treaties take effect only after they have received the approval of the Parliament."); Germany, Basic Law of 1949 (rev. 2014) Art. 32(3) (Eng. trans. from www.constituteproject.org) ("Insofar as the Länder have power to legislate, they may conclude treaties with foreign states with the consent of the Federal Government."); Swiss Constitution (1999), Art. 56(1) (Eng. trans. from www.constituteproject.org) ("A Canton may conclude treaties with foreign states on matters that lie within the scope of its powers."). Such authorization is not an entirely European phenomena; States like Russia also authorize treaty-making by certain sub-state units (*e.g.*, Yaroslav, Tatarstan). See W.E. Butler, *Russia*, in NATIONAL TREATY LAW AND PRACTICE 151, 152-53 (D. Hollis et al., eds., 2005); Babak Nikravesh, *Quebec and Tatarstan in International Law*, 23 FLETCHER F. WORLD AFF. 227, 239 (1999).

⁸⁷ See Agreement with Respect to Social Security, 11 Mar. 1981, U.S.-Can., Art. XX, 35 U.S.T. 3403, 3417. Quebec and the United States concluded that agreement in 1983, which the United States includes in its official treaty series. See Understanding and Administrative Arrangement with the Government of Quebec, 30 Mar. 1983, U.S.-Quebec, T.I.A.S. No. 10,863.

⁸⁸ *Self-Governing and Non-Self-Governing Territories*, 1981-1988 CUMULATIVE DIGEST OF U.S. PRACTICE ON INTERNATIONAL LAW, vol. 1, § 5, at 436, 438-40 (July 17, 1986 testimony of Michael G. Kozak, then-Principal Deputy Legal Adviser to the U.S. Department of State, before the House Committee on Interior and Insular Affairs). Subsequently, Puerto Rico withdrew from the Bank.

⁸⁹ See Agreement between the Government of Canada and the Government of Hong Kong for the surrender of fugitive offenders, 7 September 1993, U.K.-Hong Kong, 2313 U.N.T.S. 415.

⁹⁰ United Nations Convention on the Law of the Sea, 10 Dec. 1982, 1833 U.N.T.S. 396, Arts. 305(1)(c)-(e), ("UNCLOS") (authorizing ratification or acceptance of the Convention by (1) "self-

World Trade Organization is open to any “customs territory possessing full autonomy in the conduct of its external commercial relations and of the other matters provided for in this Agreement and the Multilateral Trade Agreements.”⁹¹

2.3 Confirming Treaty-Making Capacity: *States or authorized State institutions contemplating a treaty with another State’s institution should endeavor to confirm that the institution has sufficient competence over the treaty’s subject-matter and authorization from the State of which it forms a part to enter into a treaty on such matters.*

Commentary: States currently have very different views on whether State institutions have the capacity to conclude inter-institutional agreements as treaties.⁹² Some States clearly contemplate their national ministries and/or their sub-national territorial units having such a capacity. Other States just as firmly deny any authority to one or both types of their own institutions. As such, there is a risk of unaligned expectations in inter-institutional agreements, where one side assumes both institutions have a treaty-making capacity and the other assumes that one or both institutions do not. Such an event can not only cause confusion but can also lead to diplomatic tensions and disputes if the two institutions conclude an agreement.

One way to avoid such problems is to increase transparency and an understanding of the respective capacities of an agreement’s participants. As *Guideline 2.2* suggests, some of this transparency may flow from actions of the authorizing State or its institution. A State contemplating authorizing its institution to conclude a treaty should inquire (or have its institution inquire) whether the potential agreement partner shares the view that the agreement will constitute a treaty. But treaty partners need not just be passive recipients awaiting requests from foreign States or their institutions. The current guideline proposes a separate best practice where treaty partners (be they States or State institutions) should engage in their own due diligence; *i.e.*, States faced with the prospect of an inter-institutional agreement should affirmatively verify what capacities are accorded to the foreign institution(s) involved.

Such verifications could be formal or informal. In 2001, for example, the United States asked the United Kingdom to confirm that the Governments of Guernsey, the Isle of Man, and Jersey had the authority to conclude bilateral tax information exchange agreements with the United States. The United Kingdom provided an instrument of “entrustment” verifying the sub-national territorial units of the United Kingdom had the requisite competence and authority to conclude such treaties.⁹³

What happens if the potential partner cannot confirm the foreign institution’s treaty-making capacity? A State (or its institution) has several options. It could opt not to conclude the treaty at all. Or, it could revise the treaty to make it with the foreign State responsible for the institution in question. For example, when the United States determined that the Cayman Islands lacked the necessary entrustment to sign a tax information exchange agreement in its own name, the United States concluded the agreement with the United Kingdom, which acted on behalf of the Cayman

governing associated States which have chosen that status in an act of self-determination supervised and approved by the United Nations” ... and (3) “territories that enjoy full internal self-government, recognized as such by the United Nations, but [which] have not attained full independence”). The same approach was followed in the U.N. Fish Stocks Agreement. *See* Agreement for the Implementation of the Provisions of the United Nations Convention of the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, 4 Aug. 1995, 2167 U.N.T.S. 88, Arts. 1(2)(b), 37-40.

⁹¹ Marrakesh Agreement Establishing the World Trade Organization, 15 Apr. 1994, 1867 U.N.T.S. 3, Art. XII.

⁹² *See supra* notes 67-72, and accompanying text. This confusion likely extends beyond wholly inter-institutional agreements to those between a State and a foreign State’s institution. *See supra* notes 89-91 and accompanying text.

⁹³ *See, e.g.*, Press Release, U.S. Treasury Department, *Treasury Secretary O’Neill Signing Ceremony Statement: United States and Jersey Sign Agreement to Exchange Tax Information* (4 Nov. 2002).

Islands.⁹⁴ And when the United States and Canada discovered that the city of Seattle and the Province of British Columbia had concluded a significant agreement concerning the Skagit River, they stepped in to “consent” to and indemnify that agreement via a treaty of their own.⁹⁵

Can a State institution authorized to conclude a treaty with a foreign institution enter into that treaty if it cannot confirm the foreign institution’s capacity to do so? Unfortunately, there is substantial evidence of inter-institutional agreements arising without clear authorization from one or more responsible State(s).⁹⁶ Many of these agreements may be best regarded as political commitments or contracts. At least some of them, however, bear the markers of a treaty. For example, in 2000, the U.S. state of Missouri concluded a Memorandum of Agreement with the Canadian province of Manitoba where they agreed to jointly cooperate in opposing certain inter-basin water transfer projects contemplated by U.S. federal law.⁹⁷ Other States have experienced similar problems. By the end of the twentieth century, for example, the Canadian province of Quebec had reportedly concluded some 230 unauthorized “ententes” with foreign governments, nearly 60% of which were with foreign states.⁹⁸ At present, it does not seem a good practice to regard such agreements as treaties, especially if it later becomes clear one or more of the institution’s involved had no capacity to conclude treaties in its own name. Nonetheless, it is an area worthy of further State attention and discussion.

2.4 The Capacity to Make Political Commitments: *States or State institutions should be able to make political commitments to the extent political circumstances allow.*

Commentary: Political commitments are, by definition, free of any legal force under international or domestic law. As such, international law imposes no capacity conditions for which actors can conclude them. Similarly, domestic legal systems usually do not regulate which actors may conclude such commitments.⁹⁹ Unlike treaties, therefore, there are no concrete distinctions between the capacity of States and State institutions to conclude these non-binding agreements.

Politics, rather than law, serves as the guiding criterion for who within a State may enter into political commitments and on which subjects. Most States have little experience with regulating the capacity to make non-binding commitments on behalf of the State or State institutions. On some occasions, however, States have adopted policies organizing the capacity of the State or State institutions to enter into political commitments. In Colombia, for example, only those with the legal capacity to represent the State institution can sign memoranda of understanding or letters of intent even where these instruments are regarded as non-binding (and even then, only after the instrument has undergone a legal review).¹⁰⁰ And, of course, international

⁹⁴ See, e.g., Agreement Between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland, Including the Government of the Cayman Islands, For the Exchange of Information Relating to Taxes, 21 Nov. 2001, U.S.-U.K., T.I.A.S., CTIA No. 15989.000.

⁹⁵ See Treaty Between the United States of America and Canada Relating to the Skagit River and Ross Lake, and the Seven Mile Reservoir on the Pend D’Oreille River, 2 Apr. 1984, U.S.-Can., T.I.A.S. No. 11,088.

⁹⁶ See Hollis, *Unpacking the Compact Clause*, *supra* note 55 (identifying 340 binding and non-binding agreements concluded by U.S. states with foreign powers).

⁹⁷ See *Role of Individual States of the United States: Analysis of Memorandum of Understanding Between Missouri and Manitoba*, 2001 CUMULATIVE DIGEST OF U.S. PRACTICE ON INTERNATIONAL LAW, § A, at 179-98.

⁹⁸ Nikravesh, *supra* note 86, at 239. France, moreover, reportedly regards its ententes with Quebec as instruments governed by international law. See *id.* at 242.

⁹⁹ This is the case so long as the commitment does not infringe on the constitution or domestic law. Of course, should an agreement do so, its status as a political commitment would likely be called into question since the category, by definition, only covers agreements lacking legal force.

¹⁰⁰ Colombia Response, *supra* note 85. Thus, among Colombia’s government ministries, only the Ministry of Foreign Affairs is authorized to sign political commitments on behalf of the State as a whole. *Id.*

politics can have a significant influence on which States or State institutions can conclude political commitments and on what subjects.

In a few high-profile cases, a State may impose domestic legal constraints that limit the capacity to enter into a non-binding political commitment. As part of the controversy over the Joint Comprehensive Plan of Action (JCPOA), for example, the U.S. Congress passed a statute, the Iran Nuclear Review Act, requiring the U.S. President to submit “any agreement with Iran” (*i.e.*, not just a legally binding one) to Congress for review and an opportunity for disapproval.¹⁰¹ President Obama submitted the JCPOA as required under the Act, although Congress eventually declined to approve or disapprove of that instrument.¹⁰² Canada, Ecuador, and Peru have reported similar practices of coordinating and reviewing their political commitments, with Peru reporting different policies for the review of inter-State and inter-institutional political commitments.¹⁰³

2.5 Inter-State Contracting Capacity: *A State should conclude contracts with other willing States in accordance with the contract’s governing law.*

Commentary: Consistent with the earlier views of the ILC, some States in the region assert a capacity to enter into contracts with other States.¹⁰⁴ At the same time, other States indicate that they do not engage in inter-State contracting.¹⁰⁵ Thus, it appears that nothing in international law precludes a State from having a practice of concluding contracts with a foreign State likewise willing to conclude such contracts. A State’s own legal system could, in theory, limit its capacity to conclude inter-State contracts, but there are no examples of such limitations to date.

Any capacity constraints to inter-State contracting are more likely to come from either the choice—or content—of the contract’s governing law. The choice of a single governing domestic law may, as a practical matter, limit the frequency of such contracts since it requires at least one (if not both) contracting States to agree to a governing domestic law other than their own.¹⁰⁶ Contracting capacity is, moreover, a function of the law of the contract. Domestic legal systems (and certain non-State laws) each have their own rules for who can form a contract and on which subjects. As such, whether a foreign State can conclude a contract governed by a State’s domestic law depends on a legal analysis of the applicable law (whether the one selected by the parties, or, in appropriate circumstances, the governing law determined according to the application of conflict of law rules).

¹⁰¹ See Pub. L. No. 114-17, 129 Stat. 201 (2015). The JCPOA was a political commitment relating to Iran’s nuclear program between Iran, the 5 Permanent Members of the U.N. Security Council, Germany and the European Union. U.S. President Trump gave notice of U.S. withdrawal from the JCPOA on May 8, 2018.

¹⁰² Kristina Daugirdas & Julian Davis Mortensen, *Contemporary Practice of the United States relating to International Law*, 109 AM. J. INT’L L. 873, 874-78 (2015) (due to a minority filibuster, Congress failed to take any action on the JCPOA to approve or disapprove it).

¹⁰³ Peru Response, *supra* note 66 (assessment of political commitments “made by the Ministry of Foreign Affairs focuses on verifying their consistency with foreign policy, as well as their wording ...”); see also Canada Response, *supra* note 40, at 4; Ecuador Response, *supra* note 46.

¹⁰⁴ See [1966] YBILC, vol. II, 189, ¶6. In responding to the OAS Questionnaire, Canada, Ecuador, Jamaica, Mexico and the United States all acknowledged the possibility of inter-State contracting. See Hollis, Second Report, *supra* note 10, ¶15; Canada Response, *supra* note 40, at 4.

¹⁰⁵ Hollis, Second Report, *supra* note 10, ¶15 (Argentina, Colombia, the Dominican Republic, Peru and Uruguay report no practice of concluding contracts governed by domestic law for binding agreements among States.).

¹⁰⁶ Selecting non-State law to govern such contracts, however, could (at least in theory) sidestep such difficulties. See note 59 and accompanying text. Canada recounts a practice where inter-State contracts include a waiver of privileges and immunities; indeed, where there is “no such waiver, and no subordination to a chosen law and chosen forum, the instrument may be seen as something other than an enforceable contract.” Canada Response, *supra* note 40, at 4.

2.6 Inter-Institutional Contracting Capacity: *A State Institution should conclude contracts with willing foreign State institutions in accordance with its own domestic law and, if different, the contract's governing law.*

Commentary: The capacity of State institutions to conclude contracts with foreign State institutions appears less controversial than inter-State contracting. Many of the States that disclaim any role in inter-State contracting admit the capacity of their institutions to do so.¹⁰⁷ Unlike inter-State contracting, however, the capacity of State institutions to conclude inter-institutional contractual agreements is not solely a function of the choice and contents of the contract's governing law. As creatures of a State's legal system, the contracting capacity of a State institution will be governed by that State's domestic law, whether or not it is the same as the contract's governing law. Colombia, for example, authorizes its "public legal entities or public bodies with the capacity to enter into contracts" but does so "subject to the authorities those entities are accorded under the Constitution and by law."¹⁰⁸

Indeed, in some cases, States from the region appear to have constitutional or legislative mandates requiring the use of their own law as the governing law for certain public contracts, which would appear to include inter-institutional ones. Mexico's Constitution, for example, requires public tenders for certain types of behavior (e.g., procurement, leasing of assets, and public services) via "contracts that must follow the procedures and observe the formalities established in the applicable national legal framework (federal, state, and municipal)."¹⁰⁹ States like Peru and Ecuador have procurement laws that provide similar authorizations and conditions for contracts by State institutions.¹¹⁰

Thus, the domestic law of the State institution may direct its capacity to conclude contracts with foreign State institutions directly through authorizations or indirectly through governing law mandates. That said, an inter-institutional agreement may be concluded that selects one State's governing law over the others. Article 9 of the 1998 Agreement between the National Aeronautics and Space Administration (NASA) and the Brazilian Space Agency (AEB) on Training of NA AEB Mission Specialist, provides, for example, that "[t]he Parties hereby designate the United States Federal Law to govern this Agreement for all purposes, including but not limited to determining the validity of this Agreement ..."¹¹¹ It is possible, moreover, that two State institutions could select a third State's domestic law to govern their contract (subject to the caveat that the third State's law permits such a selection). Similarly, inter-institutional agreements might select non-State law to govern the contract in addition to—or in lieu of—a national legal system.

3. Methods for Identifying Binding and Non-Binding Agreements

3.1 Identifying Agreements: *States and other agreement-makers should conclude their international agreements knowingly rather than inadvertently. As a threshold matter, this means States must differentiate their agreements (whether binding or non-binding) from all other commitments and instruments. The following best practices may help States do so:*

3.1.1. *States should rely on the actual terms used and the surrounding circumstances to discern whether or not an agreement will arise (or has already come into existence).*

3.1.2 *When in doubt, a State should confer with any potential partner(s) to confirm whether a statement or instrument will—or will not—constitute an agreement (and, ideally, what type of agreement it will be).*

¹⁰⁷ See Hollis, Second Report, *supra* note 10, ¶30 (Argentina, Colombia and Peru, each of which declined any practice of inter-state contracting, reported significant experience with inter-institutional contracting).

¹⁰⁸ *Id.* at ¶30.

¹⁰⁹ See Reply of Mexico, *Report of the Inter-American Juridical Committee, Binding and Non-Binding Agreements: Questionnaire for the Member States* ("Mexico Response") (discussing Mexico Constitution 1917 (rev. 2015) Art. 134).

¹¹⁰ Hollis, Second Report, *supra* note 10, ¶¶15, 30.

¹¹¹ An excerpt of the contract, including Article 9, is reprinted in BARRY CARTER ET AL, *INTERNATIONAL LAW* 86-87 (7th ed., 2018).

3.1.3 *A State should refrain from affiliating itself with a statement or instrument if its own views as to its status as an agreement diverge from those of any potential partner(s) until such time as they may reconcile such differences.*

Commentary: How can States and others determine whether any particular text will (or already) comprises a treaty, a political commitment, or a contract? There are two steps involved. First, there must be a discernable agreement. Second, there needs to be some method(s) for differentiating within the category of agreements: which ones are treaties? which ones are political commitments? and which ones are contracts?

Guideline 3.1 offers best practices for the first step – identifying agreements generally. In some cases, the participants make it easy and jointly concede an agreement’s existence. In the *Pulp Mills* case, for example, neither Argentina nor Uruguay disputed that their Presidents had reached an agreement expressed via a 31 May 2005 press release; their dispute revolved around whether the agreement was binding (*i.e.*, governed by international law) or not.¹¹² Similarly, in the *Iron Rhine (“Ijzeren Rijn”) Railway* arbitration, both Belgium and the Netherlands acknowledged that they had reached an agreement in a Memorandum of Understanding (MOU) *and* that the MOU was not a “binding instrument.”¹¹³

In many cases, however, there will not be any “agreement to agree.” In these circumstances States should follow the ICJ’s lead from the *Aegean Sea* case and examine any proposed or existing statement with “regard above all to *its actual terms and to the particular circumstances* in which it was drawn up.”¹¹⁴ That test provides a useful framework for identifying the conditions of any agreement – *i.e.*, mutuality and commitment. In the *Aegean Sea* case, for example, Greece and Turkey disputed both the existence of an agreement and its particular type. To resolve the issue, the Court reviewed both prior communications and the language used in a Joint Communiqué between Greece and Turkey’s Prime Ministers, concluding that the Communiqué did not constitute a “commitment” to submit the States’ dispute to the Court.¹¹⁵ The ICJ affirmed this approach in *Qatar v. Bahrain*, examining a set of “Agreed Minutes” signed by Qatar and Bahrain’s Foreign Ministers and finding that they did constitute an agreement; they were “not a simple record of a meeting ... they do not merely give an account of discussions and summarize points of agreement and disagreement. They enumerate the commitments to which the Parties have consented.”¹¹⁶ The ICJ continued this approach in the *Case Concerning Kasikili/Sedudu Island*, reading the varying views contained in exchanges of notes and letters between South Africa and Bechuanaland with regard to a boundary location and finding that they “demonstrate the absence of agreement.”¹¹⁷

For its part, the International Tribunal for the Law of the Sea (ITLOS) has suggested that otherwise “conditional” language in a shared text can preclude assigning it the status of an agreement.¹¹⁸ International tribunals have also declined to identify an agreement where one side is non-responsive to an offer made by the other side. Thus, ITLOS refused to find Japan had, by its silence, agreed to a methodology for setting bonds that Russia presented in certain joint meetings

¹¹² See *Pulp Mills*, *supra* note 28, at ¶¶132-33.

¹¹³ *Award in the Arbitration regarding the Iron Rhine (“Ijzeren Rijn”) Railway between the Kingdom of Belgium and the Kingdom of the Netherlands* (2005) 27 RIAA 35, ¶156.

¹¹⁴ *Aegean Sea Continental Shelf (Greece v. Turkey)* (Judgment) [1978] I.C.J. Rep. 3, ¶95 (emphasis added).

¹¹⁵ *Id.* at ¶107.

¹¹⁶ *Qatar v. Bahrain*, *supra* note 38, at ¶24.

¹¹⁷ *Case Concerning Kasikili/Sedudu Island (Botswana v. Namibia)* (Judgment) [1999] I.C.J. Rep. 1045, ¶63.

¹¹⁸ *Delimitation of the Maritime Boundary in the Bay of Bengal (Bangladesh/Myanmar)* (Judgment of Mar. 14, 2012) 2012 ITLOS Rep. 4, ¶92 (“The Tribunal considers that the terms of the 1974 Agreed Minutes confirm that these Minutes are a record of a conditional understanding reached during the course of negotiations, and not an agreement within the meaning of article 15 of the Convention. This is supported by the language of these Minutes, in particular, in light of the condition expressly contained therein that the delimitation of the territorial sea boundary was to be part of a comprehensive maritime boundary treaty.”).

and recorded subsequently in written Protocols between the two States.¹¹⁹ Similarly, a PCA Tribunal declined to find that Jordan had reached an agreement to arbitrate when it failed to respond to two letters from an Italian Ambassador asserting that the two States had concluded an oral agreement to that effect.¹²⁰

Of course, there may be cases where the text and surrounding circumstances are ambiguous as to whether a particular proposed statement or instrument will comprise an agreement. In such cases, this guideline advocates a direct approach – encouraging States to confer and convey to each other their respective understandings as to whether or not an agreement exists (or will result). Such discussions may confirm that there is an agreement or that none will (or does) exist. In some cases, however, these discussions may reveal a divergence of views with one side viewing a statement or instrument as constituting an agreement while the other denies it has such status. In such cases, it is best for all involved to take a step back and refrain from relevant activity until further discussions can seek some reconciliation of views. Doing so will reduce the risk of unaligned expectations or disputes among those involved (or others) that risk escalation, implicate third party dispute resolution mechanisms, or otherwise complicate international relations.

3.2 Identifying the type of agreement concluded: *The practice of States, international organizations, international courts and tribunals, and other subjects of international law currently suggests two different approaches to distinguishing binding from non-binding agreements.*

- *First, some actors employ an “intent test”, a subjective analysis looking to the authors’ manifest intentions to determine if an agreement is binding or not (and if it is binding, whether it is a treaty or a contract).*
- *Second, other actors employ an “objective test” where the agreement’s subject-matter, text, and context determine its binding or non-binding status independent of other evidence as to one or more of its authors’ intentions.*

The two methods often lead to the same conclusion. Both tests look to (a) text, (b) surrounding circumstances, and (c) subsequent conduct to identify different types of binding and non-binding agreements. Nonetheless, different results are possible particularly where the text objectively favors one conclusion (e.g., a treaty) but external evidence suggests another (e.g., contemporaneous statements by one or more participants that a treaty was not intended). The objective test would prioritize the text and language used in contrast to the intent test’s emphasis on what the parties’ intended. Such different outcomes may, in turn, lead to confusion or conflicts. Certain practices can mitigate such risks:

3.2.1 *If a State has not already done so, it should decide whether it will employ the intent test or the objective test in identifying its binding and non-binding agreements.*

3.2.2 *A State should be open with other States and stakeholders as to the test it employs. It should, moreover, be consistent in applying it, not oscillating between the two tests as suits its preferred outcome in individual cases. Consistent application of a test will help settle other actors’ expectations and allow more predictable interactions among them.*

3.2.3 *A State should not, however, presume that all other States or actors (including international courts and tribunals) will use the same test as it does for identifying binding and non-binding agreements. A State should thus conclude—and apply—its international agreements in ways that mitigate or even eliminate problems that might lead these two tests to generate inconsistent conclusions. States can do this by aligning subjective and objective evidence to point towards the same outcome.*

Commentary: Where there is an existing agreement, one way to determine if it is binding (or not) involves asking what its authors intended. The ILC ended up endorsing this methodology to determine which agreements would meet the treaty requirement of being “governed by

¹¹⁹ See “*Hoshinmaru*” (*Japan v. Russian Federation*) (Prompt Release, Judgment) 2007 ITLOS Rep. 18 (Aug. 6), ¶¶85-87.

¹²⁰ *Salini Costruttori S.p.A. and Italstrade S.p.A. v. The Hashemite Kingdom of Jordan*, ICSID Case No. ARB/02/13, Award (31 Jan. 2006), ¶98.

international law.”¹²¹ The Vienna Conference delegates agreed.¹²² Today, a large number of States, scholars, and international tribunals regard intent as *the* essential criterion for identifying which agreements are treaties.¹²³ In the *South China Seas* arbitration, for example, the Tribunal emphasized that “[t]o constitute a binding agreement, an instrument must evince a clear intention to establish rights and obligations between the parties.”¹²⁴ Several OAS Member States have affiliated themselves with this approach as well.¹²⁵ Under this view, if the parties intend an agreement to be a treaty, it is a treaty. Similarly, if they do not intend their agreement to be binding, it will be a non-binding political commitment.

The ICJ has, however, signaled a more objective approach to identifying when an agreement is a treaty (*i.e.*, governed by international law). In *Qatar v. Bahrain*, the ICJ found that the parties *had* concluded a legally binding agreement accepting ICJ jurisdiction in the form of

¹²¹ [1966] YBILC, vol. II, 189, ¶6 (“The Commission concluded that, in so far as it may be relevant, the element of intention is embraced in the phrase ‘governed by international law’, and it decided not to make any mention of the element of intention in the definition”). Before reaching this conclusion, the ILC oscillated between subjective and objective approaches. Brierly proposed an objective look for agreements establishing “a relationship under international law” while his successor, Hersch Lauterpacht defined treaties as agreements “intended to create legal rights and obligations.” Compare Brierly, *First Report*, *supra* note 1, at 223 with Lauterpacht, *First Report*, *supra* note 1, at 93. The ILC’s Third Rapporteur, Gerald Fitzmaurice tried to combine the two approaches, defining a treaty as an agreement “intended to create legal rights and obligations, to establish relationships, governed by international law.” [1959] YBILC, vol. II, 96. He later fell back on just using the governed by international law formula as a stand in for a subjective test. See Fitzmaurice, *First Report*, *supra* note 1, at 117.

¹²² U.N. Conference on the Law of Treaties, Summary Records of Second Session, U.N. Doc. A/CONF.39/11, Add.1, 225, ¶13 (“Vienna Conference, Second Session”) (Drafting Committee “considered the expression ‘agreement ... governed by international law’ ... covered the element of intention to create obligations and rights in international law”).

¹²³ *South China Sea Arbitration*, *supra* note 37, at ¶213; *France v. Commission*, C-233/02 (E.C.J., 23 Mar. 2004) (“the intention of the parties must in principle be the decisive criterion for the purpose of determining whether or not the Guidelines are binding”); Switzerland, Federal Department of Foreign Affairs, *Practical Guide to International Treaties* 4 (2015) at https://www.eda.admin.ch/dam/eda/en/documents/publications/Voelkerrecht/Praxisleitfaden-Voelkerrechtliche-Vertraege_en.pdf (“Switzerland Guide to Treaties”) (“establishing whether the parties wish to make their agreement legally binding is essential. If this is not the intention, it is not a treaty”); see also AUST, *supra* note 11, at 20-21 (“It is the negotiating states which decide whether they will conclude a treaty, or something else”); KLABBERS, *supra* note 3, at 68 (“Notwithstanding its awkwardness, there is virtual unanimity among international lawyers that, at the very least, intent is one of the main determinants of international legal rights and obligations”); Widdows, *supra* note 5, at 120-39.

¹²⁴ *South China Seas Arbitration*, *supra* note 37, at ¶213.

¹²⁵ See Hollis, Second Report, *supra* note 10, ¶16 (Five Member States – Brazil, Colombia, Mexico, Peru, and the United States – specifically invoked “intent” as the deciding criterion for identifying a treaty); see Brazil Response, *supra* note 85 (relies “on the intention of the parties”); Colombia Response, *supra* note 85 (looks for “an expression of or an agreement/arrangement on the intent of the States to enter into legally binding obligations”); Mexico Response, *supra* note 109 (“‘Non-binding’ instruments, use words emphasizing the intent of the participants involved”); Peru Response, *supra* note 66 (describing efforts to ensure the agreement records “the common intent of the parties”); U.S. Response, *supra* note 72 (United States works to “ensure that the text of written instruments it concludes with other states accurately reflects the intentions of the states involved with respect to the legal character of the instrument and the law, if any, that governs it”). Canada’s response was more equivocal although it did indicate that “[a]n exchange of notes that is *intended* by the parties to be binding can also constitute a treaty” while political commitments involve “instruments that the participants *intend* to be non-legally binding.” Canada Response, *supra* note 40, at 4 (emphasis added).

Agreed Minutes, notwithstanding protestations by Bahrain's Foreign Minister that he had not intended to do so.¹²⁶ The Court viewed the Agreed Minutes as a treaty based on the "terms of the instrument itself and the circumstances of its conclusion, not from what the parties say afterwards was their intention."¹²⁷ Some suggest the Court might simply have been emphasizing the intention expressed in the Agreed Minutes over later, self-serving claims of intention issued in anticipation of litigation.¹²⁸ For others, however, the Court's approach suggests that objective criteria – e.g., the language and types of clauses included in the instrument, and perhaps even its very subject-matter – may dictate whether it is a treaty or not.¹²⁹ The Court's more recent cases – e.g., *Pulp Mills* and *Maritime Delimitation in the Indian Ocean* – have reinforced this objective approach.¹³⁰ The Court's opinion in *Maritime Delimitation in the Indian Ocean*, for example, reasoned that the "inclusion of a provision addressing the entry into force of the MOU is indicative of the instrument's binding character" without any mention of the parties' intentions.¹³¹

The objective test is not, however, merely an ICJ formulation. The *Chagos Arbitration* Tribunal emphasize the need for an "objective determination" in sorting binding and non-binding agreements.¹³² Meanwhile, a number of OAS Member States have likewise emphasized the structure and language used in a text as determinative of its legal (or non-legal) status.¹³³

The purpose of these *Guidelines* is not to pronounce one of these methods superior to the other, let alone resolve which one more accurately reflects international law. Rather, these guidelines aim to advise States and others on how to create and differentiate among binding and non-binding international agreements in a world where different methods may be employed to do so. To that end, this guideline highlights how, in many respects, the intent and objective tests overlap in the evidence they use:

- (a) the text;
- (b) the surrounding circumstances; and
- (c) subsequent conduct.

For example, those adhering to the intent test regularly regard the structure and language of the agreed text as the best manifestation of the authors' intentions.¹³⁴ That same structure and language forms the crux of the objective test.

¹²⁶ *Qatar v. Bahrain*, *supra* note 38, at ¶27.

¹²⁷ *Id.* ("The two Ministers signed a text recording commitments accepted by their Governments, some of which were to be given immediate application. Having signed such a text, the Foreign Minister is not in a position to say that he intended to subscribe only to a 'statement recording a political understanding', and not to an international agreement"); see also *Maritime Delimitation and Territorial Questions (Qatar v. Bahrain)* (Judgment, 15 Feb. 1995) [1995] I.C.J. Rep. 6.

¹²⁸ AUST, *supra* note 11, at 51-52; *Accord Widdows*, *supra* note 5, at 94 (in determining an agreement's status, "the views of one party at the time of conclusion of the instrument will be of some assistance, subject to all other considerations being equal, but one party's statements made at a later stage should be disregarded . . . as self-serving").

¹²⁹ See Chinkin, *supra* note 53, at 236-37; KLABBERS, *supra* note 3, at 212-216.

¹³⁰ See, e.g., *Pulp Mills*, *supra* note 28, at ¶128, *Somalia v. Kenya*, *supra* note 9, at ¶42.

¹³¹ *Somalia v. Kenya*, *supra* note 9, ¶42.

¹³² *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, PCA Case 2011-03 (18 March 2015) at 168, ¶426 ("Tribunal readily accepts that States are free in their international relations to enter into even very detailed agreements that are intended to have only political effect, the intention for an agreement to be either binding or non-binding as a matter of law *must be clearly expressed or is otherwise a matter for objective determination*" (emphasis added)).

¹³³ See, e.g., Jamaica Response, *supra* note 71 ("The language used in an agreement characterizes the type of agreement"). The Dominican Republic endorsed the existence of an entry into force clause as determining a treaty's status as such. Dominican Republic Response, *supra* note 46.

¹³⁴ See, e.g., Brazil Response, *supra* note 85 ("language used in an instrument is key"); Colombia Response, *supra* note 85 ("treaties, as binding legal instruments, usually employ specific language creating obligations binding on the parties"); Mexico Response, *supra* note 109 (noting verbs and

Nonetheless, there are cases where the two approaches may produce divergent results; *i.e.*, where external manifestations of consent differ from those manifested in the language of the document. In the *South China Sea Arbitration*, for example, the agreement contained language – such as “undertake” and “agree” – that in other contexts is taken as objective evidence of a treaty.¹³⁵ Nonetheless, the Tribunal discounted such language given the context in which it was used and the parties' characterization of the instrument as a “political document.”¹³⁶ That Tribunal was, however, clearly engaged in a search for the parties' intentions. Tracking the objective approach of *Qatar v. Bahrain* or *Pulp Mills* might have produced a different result; *i.e.*, holding the language used in the agreement itself is sufficiently determinative to forgo any need to consult the *travaux préparatoires* or other statements by States of their intentions.¹³⁷

Thus, for some Member States, structure and terminology are determinative of treaty status, whereas for others, the presence of specific verbs, words, or clauses should not supersede the search for party intentions. This creates a risk that different participants will categorize their agreement differently (or that third parties such as international courts or tribunals might do so). Such disagreements can have important international and domestic law consequences. Whether an agreement is binding under international law or not, for example, determines whether countermeasures are an available option in cases of breach.¹³⁸ Domestic laws can also require certain agreements to take a treaty form, creating difficulties when other participants do not regard them as such.¹³⁹ Conversely, some States need an agreement to be non-binding because they do not (or cannot) get the requisite domestic approvals that would be required if the agreement were a treaty.

States may take several steps to alleviate such difficulties. For starters, this guideline proposes that Member States consciously adopt one test or the other and be transparent and consistent in doing so. Consistent application of a test will help settle other actors' expectations and allow more predictable interactions among them. Where a State knows that another State uses the same test for identifying binding and non-binding agreements, it will have greater certainty that its expectations as to the agreements status as a treaty (or a political commitment, or a contract) will hold.¹⁴⁰ And where a State knows in advance that another State identifies its binding and non-binding agreements using a different test, a State will know that it may need to take specific steps or use particular text to ensure it can produce the type of agreement it desires.

Whatever their view on the appropriate method for identifying international agreements, States should thus be sensitive to the possibility that others (including international courts and tribunals) may not share their view. Whenever possible, States (and their institutions) should take measures to reduce the risk of inconsistent views on the type of agreement reached. This may best be done expressly whether in the agreement text or communications related to its conclusion.

3.3 Specifying the Type of Agreement Concluded: *To avoid inconsistent views on the binding status of an agreement or its governing law, participants should endeavor to specify expressly the type of agreement reached whether in the agreement text or in communications*

words used to differentiate treaties from non-binding agreements); Peru Response, *supra* note 66 (recommending aspirational language for non-binding agreements and differentiating the structure and forms used to signal a treaty versus a political commitment); U.S. Response, *supra* note 72.

¹³⁵ *South China Sea Arbitration*, *supra* note 37, at ¶216.

¹³⁶ *Id.* at ¶¶217-218. The Tribunal undertook a similar analysis of several bilateral joint statements, finding that they were non-binding despite containing language like “agree.” *Id.* at ¶¶231, 242.

¹³⁷ See *Qatar v. Bahrain*, *supra* note 38, at ¶27 (“The Court does not consider it necessary to consider what might have been the intentions of the Foreign Minister of Bahrain or, for that matter, those of the Foreign Minister of Qatar.”).

¹³⁸ See ILC, “Draft Articles on the Responsibility of States for Internationally Wrongful Acts” in *Report on the Work of its Fifty-first Session* (3 May-23 July, 1999), U.N. Doc A/56/10 55 [3], Art. 22 [‘ASR’].

¹³⁹ See *supra* note 40 (discussing disagreement between the United States and its allies on the binding status of certain MOUs).

¹⁴⁰ That certainty may not be complete if third party dispute settlement is possible; a tribunal could, in theory, override both States' approach to identification in favor of its own.

connected to its conclusion. In terms of text, States may use the sample provisions listed in Table 1 to specify an agreement's status. Given the diversity of international agreements, however, States may also adapt other standard formulations as well.

Table 1: Specifying the Type of Agreement Concluded	
Type of Agreement	Sample Text
Treaty	<i>This agreement shall establish relationships among the parties governed by international law and is intended to give rise to rights and obligations according to its terms.</i>
Political Commitment	<i>"This [title] is not binding under international law and creates no legally binding rights or obligations for its Participants."</i>
	<i>"This [title] is a political commitment whose provisions are not eligible for registration under Article 102 of the Charter of the United Nations."</i>
Contract	<i>"This agreement shall be governed by the law of [list State] [and/or list non-State source of law]."</i>

Commentary: One way to mitigate the risk of disputes over the type of agreement reached lies in the participants' control – they can specify a shared understanding of its status. States can—and probably should—in the course of negotiations confirm if there is any doubt among the participants on the type of agreement envisioned. A record that the parties understood themselves to be forming a treaty, for example, can reduce the risk that its status as such will come into later dispute.

States and State institutions can, moreover, employ text in the agreement itself to specify its status. Treaty texts have rarely done so to date, but *Guideline 3.2* offers a sample formulation that might be used in future cases. It is a variation on Gerald Fitzmaurice's earlier treaty definition, which attempted to fuse intentional and objective approaches.¹⁴¹ Thus, it could be employed by adherents of both the intent and objective tests. I included a "shall" to provide further objective evidence of the agreement's binding status as well as a qualifier "according to its terms" to have the text be the reference point for interpreting what rights and obligations the treaty conveys.

States and State institutions more regularly use language to specify their shared view that an agreement is non-binding. In some cases, the title alone may be sufficient specification as in the appropriately titled, *Non-Legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of all Types of Forests*.¹⁴² Or, the specification may come via a clause that rejects the treaty label. In 2010, for example, the Republic of Moldova and the U.S. State of North Carolina concluded a "Memorandum of Principles and Procedures" on their mutual relations, which clarified in paragraph A that "This Memorandum does not create any obligations that constitute a legally binding agreement under international law."¹⁴³ In other cases, participants specify the political character of their commitments, affirmatively describing it as "politically binding" or a "political commitment."¹⁴⁴ Most famously, the Helsinki Accords specified the agreement as a political

¹⁴¹ See *supra* note 121.

¹⁴² 31 ILM 882 (1992) (emphasis added).

¹⁴³ Memorandum of Principles and Procedures between the Republic of Moldova and the State of North Carolina (USA) concerning their Desire to Strengthen their Good Relations (2010), excerpted in THE OXFORD GUIDE TO TREATIES 656 (D. Hollis, ed., 2012).

¹⁴⁴ See, e.g., Founding Act on Mutual Relations, Cooperation and Security (NATO-Russia) 36 ILM 1006, ¶1 (1996) (describing the declaration as an "enduring political commitment undertaken at the highest political level"); CSCE Document of the Stockholm Conference on Confidence- and

commitment by describing it as not “eligible for registration” under Article 102 of the U.N. Charter.¹⁴⁵ States in the region may wish to adopt such practices to make clear when they understand their agreements to be non-binding. Thus, this guideline provides two sample clauses for signaling a non-binding agreement, the first negatively and the second affirmatively. Neither sample clause specifies the title of the instrument, recognizing that these clauses could be employed for documents titled anything from “Memorandum of Understanding” to “Declaration” to “Code of Conduct.”

Finally, this guideline offers a choice of law clause to specify when a binding agreement constitutes a contract. It includes a possibility of referencing either a specific State’s national laws or some non-State law sources, such as UNIDROIT principles or *lex mercatoria* (however defined).

Explicit, shared, and transparent indications of the participants’ understanding of the type of agreement being concluded may go far to alleviating the confusion and conflicts that have occupied State practice recently. Nonetheless, it is important to recognize that an agreement’s authors may not always have complete control over what type of agreement they conclude. If the participants lack a treaty-making capacity, for example, they cannot create a treaty even if they use the sample clause included here or otherwise claim their agreement qualifies as such. And whatever specifications are employed, international law may disavow the treaty status of an agreement that results from coercion or violates *jus cogens*.¹⁴⁶ Similarly, even if States or State institutions adopt the contract label for their agreement, the governing law of that contract will have the last say on whether they may do so. Finally, although never litigated, there remain open questions about whether certain subjects require the treaty form, the parties’ views notwithstanding.¹⁴⁷

3.4 Evidence Indicative of an Agreement’s Status as Binding or Non-Binding: *Where agreement participants do not specify or otherwise agree on its status, States should use (or rely on) certain evidence to indicate the existence of a treaty or a non-binding political commitment, including:*

- (a) the actual language employed;*
- (b) the inclusion of certain final clauses;*
- (c) the circumstances surrounding the agreement’s conclusion; and*
- (d) the subsequent conduct of agreement participants.*

Table 2 lists the language and clauses States should most often associate with treaties as well as those they may most often associate with political commitments.

Security-Building Measures and Disarmament in Europe, 26 ILM 190, ¶101 (1986) (“The measures adopted in this document are politically binding ...”).

¹⁴⁵ Final Act of the Conference on Security & Co-operation in Europe, 14 ILM 1293 (1975).

¹⁴⁶ See, e.g., VCLT, Art. 52 (coercion) and Art. 53 (*jus cogens*).

¹⁴⁷ Roberto Ago, for example, famously suggested that commitments on certain subjects (e.g., territorial boundaries) must be treaties whatever the parties’ intentions. [1962] YBILC, vol. I, 52, ¶19.

Table 2: Identifying Binding and Non-Binding Agreements		
Agreement Features	Evidence Indicative of a Treaty	Evidence Indicative of a Political Commitment
Titles	Treaty Convention Agreement Covenant Protocol	Understanding Statement of Intent Arrangement Declaration
Authors	parties	participants
Terms	articles obligations undertakings rights	commitments expectations principles paragraphs understandings
Language of Commitment (verbs)	shall agree must undertake Done at [place] this [date]	should seek promote intend expect carry out take understand accept
Language of Commitment (adjectives)	binding authentic authoritative	political voluntary effective equally valid
Clauses	Consent to be Bound Entry into Force Depositary Amendment Termination Compulsory Dispute Settlement	Coming into Effect (or Coming into Operation) Differences Modifications

Commentary: Differentiating among treaties, political commitments, and contracts involves a holistic examination of the language used, the presence or absence of specific clauses, the circumstances surrounding the agreement's conclusion, and the subsequent practice of participants. Regardless of the method used, all such evidence is relevant to the identification of treaties.

Language. In practice, States and scholars have identified certain formulas to identify an agreement as a treaty. In the English language, for example, the use of the verb “shall” strongly suggests the commitment is a binding one. Several Member States have confirmed such usage along with verbs like “must” and “agree” and terms like “party” to describe agreement participants.¹⁴⁸

¹⁴⁸ Hollis, Second Report, *supra* note 10, at ¶18. Outside the region, several States have tables that lay out a glossary of language typical for treaties versus political commitments. *See, e.g.*, Switzerland, Guide to Treaties, *supra* note 123, at Annex B; Germany, Richtlinien für die Behandlung völkerrechtlicher Verträge (RvV) (1 July 2019) (in German, but Annex H includes examples in English of clauses and language differentiating treaties from political commitments), at http://www.verwaltungsvorschriften-im-internet.de/bsvwvbund_05032014_50150555.htm.

At the same time, State practice has developed a set of linguistic markers that are associated with non-binding agreements. In contrast to language of commitment like “shall,” political commitments often contain the more precatory “should.”¹⁴⁹ Other words and clauses are often employed to signal non-binding intent. For example, instead of treaty “parties,” political commitments often refer to “participants”; instead of “articles,” a political commitment is more likely to reference paragraphs; instead of describing “obligations” that are “binding,” political commitments may reference “principles” that are “voluntary.” *Guideline 3.4* thus offer a non-exhaustive list of the sort of language often used in treaties and political commitments in Table 2.

It is important to emphasize, however, that there are no “magic words” that guarantee an agreement the status of either a treaty or a political commitment. For starters, there is the divide between the intentional and objective methods discussed in *Guideline 3.3* above. Those who favor the intentional test emphasize a holistic approach, where all manifestations of party intention must be considered rather than allowing one word or phrase alone to dictate the result. But even those who ascribe to an objective analysis should be reluctant to treat any single verb or noun as outcome-determinative. Clever drafters can turn otherwise imperative language into precatory form. It matters for example, whether a verb like “agree” stands alone or is prefaced by language such as “intend to agree” or “hope to agree.” Thus, the language used is an important indicator of the agreement’s status, but decision-makers should be careful not to rely on any one single piece of evidence to reach their conclusion.

Clauses. Certain clauses are often standard in treaty texts and thus their presence may be indicative that an agreement qualifies as a treaty. Treaties often contain elaborate provisions on consenting to be bound via options such as definitive signature, simple signature followed by ratification, accession, acceptance, or approval. When treaties are concluded as an exchange of notes, State practice has devised a common formula both sides use to signal their consent to be legally bound. A paradigmatic example is found in an Exchange of Notes between the United Kingdom and Uruguay. The United Kingdom concluded its proposal by saying:

If the Government of Uruguay accepts this proposal, I have the honour to propose that this Note and your reply in the affirmative shall constitute an Agreement between our two governments.

And Uruguay’s reply note indicated:

With regard to the above, I wish to inform Your Excellency of the consent of the government of the Oriental Republic of Uruguay to the arrangements as set out, and therefore this Note and Your Excellency’s Note shall constitute an Agreement between our two Governments which will come into force today.¹⁵⁰

Other “final” clauses are regularly used in treaties and this guideline offers an illustrative list of those whose existence may be indicative of a treaty. Treaties often precede the parties’ signatures with standard phrasing (*i.e.*, “Done at [place], this [date] ...”). The use of a clause on “entry into force” is another well-recognized marker of a treaty. In the *Somalia v. Kenya* case, the ICJ found that “the inclusion of a provision addressing the entry into force of the MOU is indicative of the instrument’s binding character.”¹⁵¹ Treaties, moreover, regularly incorporate notice requirements for termination or withdrawal (for example, requiring six or twelve months advance written notice).

In contrast, political commitments may not be signed (the text may simply be released to the press or otherwise published), and when they are, they usually forgo the more formal signature

¹⁴⁹ It is possible for a treaty to contain a clause with precatory language; doing so limits the legal rights or obligations that a particular clause imposes on parties. But, assuming the agreement otherwise was intended to constitute a treaty (or has sufficient markers to so qualify) it will remain a treaty.

¹⁵⁰ AUST, *supra* note 11, at 425, 427; *see also* HOLLIS, THE OXFORD GUIDE TO TREATIES, *supra* note 7, at 678-79; HANS BLIX AND JIRINIA H. EMERSON, THE TREATY-MAKER’S HANDBOOK 80 (1973).

¹⁵¹ *Somalia v. Kenya*, *supra* note 9, at ¶42.

language employed in the treaty context. Instead of clauses on amendments or termination, a political commitment will (if it addresses the issue at all) sometimes use the term “modifications.”

Not all States employ the same linguistic markers, titles, or clauses to differentiate a treaty from a political commitment. As such, no single clause should guarantee an agreement treaty status (or the status of a political commitment). The VCLT, for example, acknowledges that treaties can lack a withdrawal or termination clause, providing default rules in such cases.¹⁵² As such, all of these clauses are better viewed as indicative, rather than determinative. Countervailing evidence, whether in the agreement or outside of it, may point to the existence of a political commitment rather than to a treaty (or vice versa). For example, the Conference on Security and Cooperation in Europe (now the OSCE) produced a “Document on Confidence and Security Building Measures in Europe” in 1986 that provided that it would “come into force on 1 January 1987” – the sort of entry into force clause usually associated with a treaty. Yet, the same sentence also clarified that the “measures adopted in this document are politically binding.”¹⁵³

Surrounding Circumstances. The effort to identify and differentiate binding and non-binding agreements is not limited to their text. Both the intentional and objective tests view similar external evidence – namely the surrounding circumstances and the participants’ subsequent conduct – in identifying agreements as treaties and political commitments. As noted, under the intentional test, the search for intention is a holistic one and thus includes the *travaux préparatoires* that precedes the agreement as well as any of the participants’ subsequent conduct relevant to identifying the nature of the agreement. In the *Bay of Bengal* case, for example, the ITLOS Tribunal emphasized that “the circumstances” in which the Agreed Minutes were adopted “do not suggest that they were intended to create legal obligations” where one of the participants, Myanmar, had made clear early on of its intention to only agree to a comprehensive agreement rather than a separate agreement like that alleged to be found in the Agreed Minutes.¹⁵⁴

At the same time, even as the objective test prioritizes text, it does not exclude analysis of external evidence, especially where the actual text is ambiguous or contradictory. Thus, the ICJ’s more objective analysis in *Qatar vs. Bahrain* was expressly contingent on considering the circumstances surrounding an agreement’s conclusion.¹⁵⁵

Subsequent Conduct. In addition to the surrounding circumstances, both intentional and objective methods may also invoke the parties’ subsequent conduct. For example, in searching for the parties’ intentions, the *South China Seas* Tribunal concluded that an agreement was not intended to be a treaty given China’s repeated use of the term “political document” to describe it after its conclusion.¹⁵⁶ The failure to submit an agreement to the domestic procedures required for treaties may also signal the parties’ intentions to conclude a political commitment.¹⁵⁷ That kind of behavior may, however, also be cast in a more objective light. Thus, the ICJ has found the parties’

¹⁵² See VCLT, Art. 56.

¹⁵³ CSCE Document of the Stockholm Conference on Confidence- and Security-Building Measures and Disarmament in Europe (1986) 26 ILM 190, ¶101 (1987).

¹⁵⁴ *Delimitation of the Maritime Boundary in the Bay of Bengal*, *supra* note 118, at ¶93; *Accord Aegean Sea* case, *supra* note 114, at ¶107. Similarly, in the *South China Seas Arbitration*, the Tribunal emphasized how China had repeatedly labeled the agreement at issue as a “political document” in the run-up to its conclusion. *South China Sea Arbitration*, *supra* note 37, at ¶216.

¹⁵⁵ *Qatar v. Bahrain*, *supra* note 38, at ¶23 (In order to ascertain whether an agreement of that kind has been concluded, “the Court must have regard above all to its actual terms and to the particular circumstances in which it was drawn up”).

¹⁵⁶ *South China Sea Arbitration*, *supra* note 37, at ¶218.

¹⁵⁷ *Delimitation of the Maritime Boundary in the Bay of Bengal*, *supra* note 118, at ¶97 (“[t]he fact that the Parties did not submit the 1974 Agreed Minutes to the procedure required by their respective constitutions for binding international agreements is an additional indication that the Agreed Minutes were not intended to be legally binding.”). On the other hand, the ICJ has suggested that a failure to follow domestic treaty-making procedures will not deny an agreement that otherwise looks like a treaty that status. *Somalia v. Kenya*, *supra* note 9, at 23-24, ¶¶48-50.

subsequent behavior – e.g., making technical corrections to an agreement – indicative of a binding commitment.¹⁵⁸

What about the fact that a participant registered an agreement with the United Nations pursuant to Article 102 of the U.N. Charter? As noted above, registration is not a requirement for treaties. In *Qatar v. Bahrain*, the ICJ emphasized that the failure to register the Agreed Minutes could not deprive what it otherwise viewed as a legally binding agreement of that status.¹⁵⁹ On the other hand, in the *Maritime Delimitation in the Indian Ocean* case, the ICJ emphasized that Kenya had intended the MOU in question to be a treaty, having requested its registration at the United Nations, and that Somalia did not object to that request for almost five years.¹⁶⁰ In other words, even if not determinative, registration (or non-registration) may still be somewhat indicative of an agreement's binding or non-binding character.

3.5 Evidence indicative of a contract: *Where agreement participants do not specify or otherwise agree on its status, States should use (or rely on) a governing law clause to establish the existence of a contract. States should presume that a clearly binding text among States that is silent as to its status is a treaty rather than a contract.*

Commentary: In differentiating among agreements, the possibility of a contract only emerges after two previous questions are answered affirmatively. First, is there an agreement? Second, is the agreement binding? Where there is a binding agreement, the question then arises whether it constitutes a treaty or a contract? The capacity of the participants may assist in this inquiry as certain participants may not be authorized to make treaties. See *Guideline 2.1-2.2* and the accompanying *Commentary* for how to identify which entities may have a treaty-making capacity.

As with the identification of treaties and political commitments, moreover, the language used in the agreement may be indicative of its contractual status. Contracts, for example, may be titled as such. Or, as indicated above, they may specify a governing law other than international law (thereby excluding the treaty option).¹⁶¹ Care should be taken, however, not to conclude that any agreement that references a State's laws or legal system is a contract. States may condition their treaty obligations, for example, to only extend so far as domestic law allows (or to disavow as obligatory behavior that would violate such law). In such cases, the domestic law reference serves to limit the scope of the obligation governed by international law rather than to re-define what law governs the agreement.

What happens when a text is clearly binding but silent as to its status as a treaty or a contract? Where the participants are subjects of international law, binding agreements are most often presumed to constitute treaties.¹⁶² Thus, States should assume binding inter-State agreements

¹⁵⁸ *Land and Maritime Boundary (Cameroon v. Nigeria)*, *supra* note 77, at ¶253 (concluding that the Maroua Declaration was legally binding where it was published (without any condition suggesting a need for further ratification); subsequent letters were exchanged making technical corrections to its contents; and the boundary line it contained was notified to the relevant U.N. Secretariat).

¹⁵⁹ *Qatar v. Bahrain*, *supra* note 38, at ¶¶28-29.

¹⁶⁰ *Somalia v Kenya*, *supra* note 9, at ¶19.

¹⁶¹ *See, e.g., supra* note 111 (governing law clause of 1998 NASA-AEB Agreement designated "United States Federal Law to govern this Agreement for all purposes, including but not limited to determining the validity of this Agreement ...").

¹⁶² Professor Jan Klabbbers devoted an entire book to establishing this presumption. *See* KLABBERS, *supra* note 3. For others favoring it, see Anthony Aust, *The Theory & Practice of Informal International Instruments*, 35 INT'L & COMP. L. Q 787, 798 (1986); Widdows, *supra* note 5, at 142; Hersch Lauterpacht, *Second Report on the Law of Treaties*, [1954] YBILC, vol. II, 125. These views have come to supplant earlier suggestions that the presumption should run the other way (against treaty-making absent a clearly manifested intent to do so). *See* Schachter, *supra* note 49, at 297; JES Fawcett, *The Legal Character of International Agreements*, 30 BRIT. YBK INT'L L. 381, 400 (1953).

will qualify as treaties absent evidence indicative of a contract (e.g., a governing law clause). Where the participant is a State institution, however, this presumption may not hold, requiring careful analysis of not just the agreed text, but also the surrounding context and the parties' subsequent conduct. There are, moreover, some academic suggestions that the two categories of binding agreement need not be mutually exclusive, *i.e.*, that some agreements could take a "hybrid" form where certain terms are governed by international law, while others are governed by national law.¹⁶³ As yet, however, there is insufficient State practice to support this as a new agreement form.

3.6 Ambiguous or inconsistent evidence of an agreement's status: *Where evidence indicative of an agreement's status is ambiguous or inconsistent, the agreement's status should depend on a holistic analysis that seeks to reconcile both the objective evidence and the participants' shared intentions. States should seek to share the results of their holistic analysis with agreement partners. In some cases, States may wish to consider more formal dispute resolution options to clarify or resolve the binding or non-binding status of their agreement(s).*

Commentary: In some cases, the evidence relating to the type of agreement concluded can be ambiguous. Consider, for example, the title "Memorandum of Understanding." For certain States, this title is indicative of a political commitment, rather than a treaty. But other States have not found this title preclusive of treaty status. Similar ambiguity surrounds the verb "will" in English. Among some States, particularly those associated with the British Commonwealth, the verb "will" is regarded as aspirational rather than mandatory. Hence, those States regularly use "will" in and associate it with non-binding agreement texts. For other States, however, "will" is synonymous with "shall" and can be read as conveying a binding commitment. Thus, States and State institutions should exercise caution in their assumptions that such language will be indicative of an agreement's status.

Some agreements contain a mix of clearly binding and clearly non-binding provisions. In such cases, the agreement should be treated as binding because a political commitment cannot, by definition, be binding in any part.¹⁶⁴ State practice appears to bear this out. Consider for example, the Paris Agreement on Climate Change—a treaty—that (famously) uses the verb "should" to define the parties' central obligation on emission reduction targets, while using the verb "shall" in other provisions on future meetings and reporting.¹⁶⁵ In other words, treaties can contain provisions that the parties do not intend to be binding alongside those they do. Of course, this possibility complicates any application of the intent test, since it requires evaluating the parties' intentions on a provision-by-provision basis.

In other cases, evidence may not be ambiguous but contradictory. States should, where possible, avoid such conflicting constructs. Where such cases nonetheless arise, the participants (or a third party) will need to carefully weigh all the evidence, whether in the text, the surrounding circumstances or subsequent conduct. If possible, in such cases, it would be good to determine whether the results of an intentional and objective approach reach the same conclusion. Where they do not, the participants may wish to pursue dispute settlement mechanisms, including possibilities of (a) clarifying or otherwise reaching an understanding on the agreement's status, (b) terminating the agreement, or (c) replacing it with a more clearly delineated agreement.

¹⁶³ See Paul Reuter, *Third report on the question of treaties concluded between States and international organizations or between two or more international organizations*, [1974] YBILC, vol. II(1), 139.

¹⁶⁴ See, e.g., Switzerland Guide to Treaties, *supra* note 123, at 6 (a non-binding "text in its entirety has to be drafted using terms which do not express legal commitment").

¹⁶⁵ Compare U.N. Framework Convention on Climate Change, Adoption of Paris Agreement, FCCC/CP/2015/L.9, Dec. 12, 2015 art. 4.4 *with* arts. 4.9 & 4.12. The Paris Agreement's intended treaty status is also evident in the presence of clauses on consent, entry into force, and withdrawal/termination.

4 Procedures for Making Binding and Non-Binding Agreements

4.1 Different Domestic Procedures for Treaties. *Every State should remain free to develop and maintain one or multiple domestic processes for authorizing the negotiation and conclusion of treaties by the State or its institutions. These procedures may be derived from the State's constitution, its laws, or its practice. Different States may employ different domestic procedures for the same treaty.*

Commentary: States have extensive—and often different—domestic procedures for authorizing treaty-making derived from each State's legal, historical, political, and cultural traditions. Despite their differences, these procedures serve similar functions. First, and foremost, they can confirm that the proposed agreement will constitute a treaty for the State (in the international law sense of that term employed in the *Guideline 1.2* definition above). Second, they confirm that the treaty is consistent with the State's domestic legal order, ensuring, for example, that the treaty's terms do not run afoul of any constitutional or statutory prohibitions or requirements. Third, they ensure appropriate coordination regarding the treaty's contents and/or its performance both within a State's executive branch and across the other branches of government.¹⁶⁶

The domestic procedures States use to authorize treaty-making emerge from various sources. Some are mandated by a State's constitution.¹⁶⁷ Others may be a product of national law.¹⁶⁸ In some cases, the procedures have no formal legal basis, but depend on a national practice or policy. In Canada, for example, although the Prime Minister has unilateral authority to make a treaty on any subject, there is a practice of refraining from consenting to treaties that require implementing legislation until that legislation is enacted (whether at federal or provincial levels).¹⁶⁹ As a result, States may have different levels of legal commitment to their treaty-making procedures; some States' procedure will be non-derogable; others may have more flexibility, capable of accommodating variations if the circumstances warrant.

In terms of the contents of these domestic treaty-making procedures, there is some uniformity in where the power to negotiate a treaty lies. Most treaty-making procedures assign the power to negotiate and conclude treaties to a State's executive, whether the Head of State (*e.g.*, the Monarch), the Head of Government (*e.g.*, the Prime Minister), or both (*e.g.*, the President). Often, the power is further delegated from the Head of State to the Head of Government and from the Head of Government to the Foreign Minister. There is also uniformity in States' commitment to having the legislature authorize the State's consent to at least some treaties.

¹⁶⁶ See, *e.g.*, Colombia Response, *supra* note 85 (“depending on the subject matter of the legal instrument to be negotiated ... the ministries or entities of that branch with technical knowledge of the matters to be agreed upon in the text of the instrument itself” are involved in authorizing it).

¹⁶⁷ See, *e.g.*, Argentina Response, *supra* note 72 (citing Article 99(11) of the Constitution for the President's authority to conclude treaties and Article 75(22) for the legislature's authority “[t]o approve or reject treaties concluded with other nations and with international organizations ...”); Colombia Response, *supra* note 85 (“treaties require adoption by the Congress of the Republic and a declaration of enforceability by the Constitutional Court, in fulfillment of the provisions of Articles 156 and 241 of the 1991 Political Constitution, respectively.”); Dominican Republic Response, *supra* note 46 (citing Art. 184 of the Constitution requiring the Constitutional Court to review all treaties and Art. 93 for providing for National Congress approval of all treaties); Ecuador Response, *supra* note 46 (citing Articles 416 to 422 and 438 of the Constitution regulating treaty-making); Mexico Response, *supra* note 109 (citing Art. 133 of the Mexican Constitution for treaties concluded by the President with Senate approval); U.S. Response, *supra* note 72 (citing Art. II, Sec. 2, cl. 2 of the U.S. Constitution).

¹⁶⁸ Brazil Response, *supra* note 85 (treaty making authority delegated to the Ministry of Foreign Affairs via Article 62.III of Federal Law No. 13.502/2017).

¹⁶⁹ See Canada Response, *supra* note 40, at 6: Maurice Copithorne, *National Treaty Law & Practice: Canada*, in NATIONAL TREATY LAW & PRACTICE 95-96 (D.B. Hollis et al, eds., 2005).

But there is extensive variation in both the breadth and depth of the required legislative role.¹⁷⁰ For some States, like the Dominican Republic, all treaties require legislative approval.¹⁷¹ Other States, like Ecuador, require legislative approval only for treaties that address certain subjects or perform certain functions.¹⁷² Several States have different sets of domestic procedures for different categories of treaties. Thus, although many of Colombia's treaties must receive legislative approval, Colombian law and practice also recognizes "executive agreements" and "simplified procedure agreements." The former fall within the exclusive authorities of the Colombian President as director of international affairs under Article 189.2 of the Colombian Constitution while the latter are concluded pursuant to a prior treaty (which did receive the assent of the national legislature).¹⁷³ Executive or simplified procedure agreements that exceed these parameters would be unconstitutional.

For States like the United States, law and practice have mixed to create no less than four different procedures for establishing when the Executive may consent to a treaty: (1) following the advice and consent of two-thirds of the U.S. Senate; (2) in accordance with a federal statute (enacted by a simple majority of both houses of Congress); (3) pursuant to those "sole" powers possessed exclusively by the Executive; and (4) where it is authorized by an earlier treaty that received Senate advice and consent.¹⁷⁴ In addition to legislative involvement, several Member States have a judicial review requirement, where the Constitutional Court reviews the constitutionality of a proposed treaty. Thus, in the Dominican Republic and Ecuador, the Constitutional Court must review all treaties before they can proceed through other domestic procedures.¹⁷⁵

¹⁷⁰ The level of legislative approval may vary. Some states require the entire legislature to approve a treaty. Others have both chambers of a legislature participate in the approval process, but one does so with greater rights than the other. A third approach involves having only one of two legislative chambers give its approval. Finally, some States affiliated with the Commonwealth do not grant their legislatures any role in approving a treaty, but they also disavow any domestic implementation without legislative authorization, which occurs via normal parliamentary procedures. See Hollis, *A Comparative Approach*, *supra* note 10, at 32-35 (surveying the treaty law and practice of nineteen representative States).

¹⁷¹ Dominican Republic Response, *supra* note 46 (per Art. 93 of the 2015 Constitution, the National Congress is empowered to "approve or reject international treaties and agreements signed by the Executive").

¹⁷² Ecuador Response, *supra* note 46 (National Assembly required to give prior approval to ratification of treaties involving territorial or border delimitation matters, political or military alliances, commitments to enact, amend or repeal a law, rights and guarantees provided for in the Constitution, the state's economic policies, integration and trade agreements, delegation of powers to an international or supranational organization, a compromise of the country's natural heritage and especially its water, biodiversity, and genetic assets).

¹⁷³ Colombia Response, *supra* note 85 (noting that for agreements developing a prior agreement, that prior agreement must be consistent with all constitutional requirements and that the implementing agreement itself must be consistent with—and cannot exceed—those in the framework treaty that serves as its basis).

¹⁷⁴ As a result, the United States domestically uses different terminology to refer to treaties (in the international law sense of that term) that proceed along these different paths. In U.S. law, the term "treaties" only refers to those agreements receiving Senate advice and consent; "congressional-executive agreements" are agreements approved by a federal statute; and "sole executive agreements" are agreements done under the President's executive authorities. Other States employ their own domestic lexicons to differentiate their treaties according to the different domestic procedures employed. See note 47 and accompanying text.

¹⁷⁵ See, e.g., Dominican Republic Response, *supra* note 46 (pursuant to Article 55 of Organic Law No. 137-11, the President must submit signed international treaties to the Constitutional Court for it to rule on their constitutionality); Ecuador Response, *supra* note 46 (citing Art. 110.1 of Ecuador's Organic Law on Judicial Guarantees and Constitutional Oversight – "International

States may also impose notification requirements for treaties that the Executive can conclude without legislative (or judicial) involvement. This way the legislature is apprised of what treaties the State is concluding independent of its own approval processes. Some States like the United States have even devised procedures to coordinate treaty-making *within* the executive branch, including by government agencies. The “Circular 175” (C-175) process implements a provision of U.S. law restricting U.S. Government agencies from signing or otherwise concluding treaties (in the international law sense of that term employed in these guidelines) unless they have first consulted with the U.S. Secretary of State.¹⁷⁶ In 2013, Peru’s Ministry of Foreign Affairs issued two Directives that “establish guidelines for the administration of treaties, including their negotiation, signature, adoption (domestic adoption and/or ratification), and procedures for the formulation of possible declarations, reservations, and objections to reservations, and registration ...”¹⁷⁷

The breadth and diversity of States’ domestic treaty-making procedures counsels against any efforts at harmonization. On the contrary, *Guideline 4.1* adopts a best practice of “freedom” – accepting and supporting the autonomy of each State to decide for itself how to authorize treaty-making. States may vest their treaty-making procedures in constitutional or other legal terms. Or, they may develop them through more informal, practical processes. A State may, moreover, adopt a single process for all its treaties under international law, or it may opt to develop several different approval procedures for different treaty types.

States should, moreover, be aware that the choice(s) they make to have a particular treaty proceed through one process, such as legislative approval, may not be followed by their treaty partners. In other words, States should not assume that simply because their own national procedures require a particular treaty receive legislative approval (or, conversely, that no such approval is required), its potential treaty partners will adopt a similar approach.

4.2 Developing Domestic Procedures for Political Commitments. *States should develop and maintain procedures for authorizing the conclusion of political commitments by the State or its institutions. Although non-binding agreements, political commitments could benefit from a practice where States have procedures that confirm:*

- (a) *a commitment’s non-binding status;*
- (b) *the appropriateness of using a non-binding form in lieu of a binding one, such as when time constraints or uncertainty counsel against locking a State into a legal agreement; and*
- (c) *notification to—and coordination with—relevant State institutions, including a State’s Foreign Ministry.*

Commentary: Political commitments, including many titled as MOUs, have become an increasing vehicle for inter-State and inter-institutional agreements. At least part of their appeal derives from the general absence of domestic procedures for their conclusion.¹⁷⁸ That has allowed

treaties requiring legislative approval will be automatically put to constitutional review before ratification, prior to the start of any legislative approval process.”).

¹⁷⁶ The Case-Zablocki Act, 1 U.S.C. §112b(c) (“Notwithstanding any other provision of law, an international agreement may not be signed or otherwise concluded on behalf of the United States without prior consultation with the Secretary of State.”). The C-175 process itself involves the Secretary of State authorizing the negotiation and/or conclusion of one or more international agreements by the State Department or another U.S. government agency. A copy of the C-175 procedures can be found at <https://fam.state.gov/FAM/11FAM/11FAM0720.html>.

¹⁷⁷ Peru, Ministry of Foreign Affairs, *General Internal Guidelines on the Signature, Domestic Adoption, and Registration of Treaties*, Directive No. 001-DGT/RE-2013 (covering the Ministry of Foreign Affairs itself); Peru, Ministry of Foreign Affairs, *General Guidelines on the Signature, Domestic Adoption, and Registration of Treaties*, Directive No. 002-DGT/RE-2013 (covering all Peruvian governmental entities).

¹⁷⁸ See Charles Lipson, *Why are Some International Agreements Informal?* 45 INT’L ORG. 495, 508 (1991); Raustiala, *supra* note 6, at 592.

these instruments to develop a reputation for greater *speed* (in terms of the timing of their formation), *flexibility* (in terms of adjustments or modifications), and *exit* (in terms of bringing the commitment to an end) than treaties.¹⁷⁹ Such benefits suggest that it would be a mistake to extend the same approval procedures for treaties to political commitments.

But it does not follow that States should have *no* procedures for authorizing these agreements simply because they are ill-suited for treaty-making procedures. Without some prior review or authorization, it is difficult to know if a purported political commitment is actually non-binding. Similarly, without some review or approval processes, political commitments might be concluded that do not comport with the State's laws or policies. In the inter-institutional context, it is even possible that one institution within a State might conclude a political commitment that runs counter to—or conflicts outright—with institutional interests or agreements elsewhere in the same State.

Such concerns help explain why some States have devised review mechanisms for their political commitments. Canada's published treaty policy, for example, includes a section mandating policy approvals of “non-legally binding instruments” by the national government or its institutions.¹⁸⁰ Colombia limits the capacity to sign non-binding agreements to those with legal capacity to represent the entity and subject to verification by the relevant legal office that the commitments assumed would not exceed the functions and authorities granted to that entity by the Constitution or laws.¹⁸¹ In Peru, non-binding political commitments by the State are coordinated with all the governmental entities within whose purview its contents fall. The legal office of the Ministry of Foreign Affairs is charged with deciding whether to issue approval for their signature. But where the nonbinding agreement is at the inter-institutional level, the negotiations are conducted by the institution concerned, and “[a]lthough under Peruvian legislation, there is no mandate to submit the draft instrument to the Ministry of Foreign Affairs for its consideration, many governmental entities do so.”¹⁸²

Mexico and the United States recount similar efforts to review proposed non-binding agreements to confirm that they have such a status and otherwise comport with their own treaty practice.¹⁸³ What is less clear, however, is how regularly this review occurs. Mexico's response indicates that it occurs “at the request of the signing Mexican entity” (although the relevant Mexican authority sends copies of the instrument once it “has been formalized”). In the United

¹⁷⁹ Duncan B. Hollis, *Preliminary Report on Binding and Non-Binding Agreements*, OEA/Ser.Q, CJI/doc.542/17, ¶15 (24 July 2017) (“Preliminary Report”).

¹⁸⁰ Canada Treaty Policy, *supra* note 48, Pt. 8 and Annex C (“each Department is responsible for ensuring that the proper distinction is made between treaties and non-binding instruments, in consultation with the Treaty Section” and requiring policy approval, including from Cabinet for a “non-legally binding instrument that would result in a major shift in Canadian policy” and archiving of all non-legally binding instruments with the Canadian Treaty Section); *see also* Canada Response, *supra* note 40 (“Although considered non-binding by Canada, such instruments do have a distinct form and must respect Canadian policies and practices, including the foreign policy of the Canadian government, Canadian and international law”).

¹⁸¹ Colombia Response, *supra* note 85. Thus, among Colombia's government ministries, only the Ministry of Foreign Affairs is authorized to sign political commitments on behalf of the State as a whole, subject to review by the Department of International Legal Affairs of the Ministry of Foreign Affairs. Inter-institutional political commitments are reviewed by the legal office of the institution concerned. *Id.*

¹⁸² Peru Response, *supra* note 66 (assessment of political commitments “made by the Ministry of Foreign Affairs focuses on verifying their consistency with foreign policy, as well as their wording ...”). Outside the region, States like Germany and Switzerland have also instituted formal procedures for approving the conclusion of political commitments, while States like Israel and Spain report more informal mechanisms for review. *See, e.g.*, Switzerland Guide to Treaties, *supra* note 123, at 25, 50 (noting different approvals required for different types of non-binding instruments); Working Group on Treaty Practice, *supra* note 40, at 10, 28.

¹⁸³ Mexico Response, *supra* note 109; U.S. Response, *supra* note 72.

States, although it reports no “formal procedures governing the conclusion of non-legally binding instruments, ... such instruments are reviewed both [with] respect to their content and drafting, including to ensure that they appropriately reflect the intention that the instrument not be governed by, or give rise to rights or obligations under, domestic or international law.”

Guideline 4.2 encourages States as a best practice to formalize and regularize their review of political commitments. Doing so would remove the *ad hoc* quality of existing review mechanisms, many of which are informal. At present, it is often unclear exactly how often and in what circumstances a State’s internal procedures generate a review of a political commitment before its conclusion. As the *Guideline* suggests, these procedures could be designed to confirm the non-binding nature of the agreements under review and their consistency with the State’s laws and foreign policies. These procedures would also alleviate concerns that a particular institution within a State (whether a government ministry or a sub-national territorial unit) could conclude a political commitment where the State’s government or other institutions are unaware of its existence, let alone its contents.

The *Guidelines* do not, however, attempt to elaborate any best practice with respect to the contents of the approval procedures themselves. States will most likely want to avoid imposing overly restrictive or onerous processes as that would deprive the political commitment of the speed and flexibility benefits on which their current popularity rests.

At the same time, however, by formalizing at least some procedural review of a State’s political commitments, the government can ensure that the executive branch is not concluding treaties under the guise of their being political commitments or otherwise attempting to circumvent domestic procedures required for treaty-making. States should all have an interest in making sure that political commitments are used only in appropriate circumstances and not as a way to bypass the legislative or judicial role required for the State’s conclusion of binding agreements. Having at least *some* procedures for approving inter-State and inter-institutional political commitments would help mitigate that risk.

4.3 Developing Domestic Approval Procedures for Inter-State Contracts. *For States that engage in inter-state contracting, they should develop and maintain procedures for approving the conclusion of any such contracts. As a best practice, States should include*

- (a) *information on how the State will identify the governing law of the contract, and*
- (b) *mechanisms for confirming that governing law with the other contracting State(s) to avoid future conflicts.*

Commentary: Some—but not all—States have a practice of entering into contracts with other States. See *Guideline 2.5* and accompanying *Commentary*. Of these, several States have developed procedures for reviewing or approving the conclusion of such contracts. Ecuador has a government procurement law that, while prioritizing the terms of any inter-state contract, regulates such agreements where they involve “international public enterprises” including other states’ public enterprises.¹⁸⁴ The United States has a foreign military sales program that includes a program with instructions on the requirements and steps to be followed.¹⁸⁵ Mexico’s Constitution (Art. 134) requires certain public tenders for certain types of behavior (*e.g.*, procurement, leasing of assets, and public services) which, in turn, require “contracts that must follow the procedures

¹⁸⁴ See, *e.g.*, Ecuador Response, *supra* note 46 (citing Article 100 of the General Regulations of the Organic Law on the National Government Procurement System which authorizes contracts with “international public enterprises” and provides for the application of domestic articles “in the event no specific contracting regime is provided for” in the terms and conditions of any relevant agreements); *id* (citing Organic Law on the National Government Procurement System, Art. 3, which requires compliance with the terms of the agreements and “[a]nything not provided for in those agreements shall be governed by the provisions of this Law”).

¹⁸⁵ See U.S. Foreign Military Sales program, available at <http://www.dsca.mil/programs/foreign-military-sales-fms>.

and observe the formalities established in the applicable national legal framework (federal, state, and municipal).”¹⁸⁶

Guideline 4.3 proposes as a best practice that *all* States with a practice of inter-State contracting should have procedures for authorizing the conclusion of such binding agreements. Having procedures for inter-State contracting would allow States to confirm the contractual status of the agreements proposed, and thus avoid inadvertent characterization of a treaty or political commitment as a contract.

Moreover, these procedures could help alleviate questions that may arise with respect to the contract’s governing law. States should have procedures indicating whether and when they would (i) insist on their own national law as the governing law, (ii) permit the other contracting State’s law to do so, or (iii) authorize the employment of a third State’s contract law or non-State law instead. Furthermore, States could have procedures that require communication on these governing law questions with the other contracting party. Doing so would help avoid problems where the contracting parties disagree on what domestic or non-State law governs the contract concluded.

4.4 Domestic Approval Procedures for Binding Inter-Institutional Agreements. *States should have procedures by which they can assure appropriate authorization for any institutions (whether government ministries, sub-national units, or both) with the capacity to conclude a treaty governed by international law. States should also have procedures by which they can assure appropriate authorization for their institutions (whether government ministries, sub-national units, or both) to conclude a contract, whether under that State’s own domestic law, the domestic law of another State, or non-State law.*

4.4.1 *Such procedures should identify how a State differentiates for itself whether the institution is concluding a treaty or a contract; and*

4.4.2 *Such procedures should include mechanisms for confirming in advance that the other foreign institution concurs as to the type and legally binding status of the inter-institutional agreement to be concluded.*

Commentary: Consistent with *Guideline 4.1*, States should decide for themselves whether and which sorts of binding agreements to authorize their institutions to conclude.¹⁸⁷ States may, moreover, authorize certain institutions to conclude treaties or contracts, but not others. A State, for example, may allow a government agency to conclude a treaty in its own name but not a sub-national entity, or vice versa. Article 125 of the Argentina Constitution, for example, authorizes subnational units to conclude “partial treaties”—which the government calls “international agreements”—with the “knowledge of Congress” and “provided that they are not incompatible with the foreign policy of the Nation and do not affect the powers delegated to the Federal Government or the public credit of the Nation.” At the same time, Argentina denies its national ministries a capacity to make treaties in their own name.¹⁸⁸

Several states already have regulations or approval procedures in place for their institutions’ agreements. Some States simply extend their existing procedures for the State’s agreements to their institutions. The United States, for example, requires the same consultation and approval by the U.S. Department of State for inter-agency agreements as it does for treaties concluded in the U.S. name.¹⁸⁹ Other States have devised procedures focused on one type of institution. Jamaica reports a practice of the relevant Ministry, Department, or Agency seeking Cabinet approval to negotiate a binding agreement and subsequently seeking further approval to sign it. Copies of signed inter-institutional agreements are then kept on file by the Foreign

¹⁸⁶ Mexico Response, *supra* note 109.

¹⁸⁷ Thus, States like Brazil, Colombia, the Dominican Republic, and Peru do not authorize *any* binding agreements by their government agencies, ministries or institutions. *See, e.g.*, Peru Response, *supra* note 66 (“Peruvian governmental entities, including municipalities and regional governments, are not authorized to enter into binding agreements under international law (treaties)”).

¹⁸⁸ *See supra* note 84.

¹⁸⁹ U.S. Response, *supra* note 72.

Ministry Legal Office. Mexico's 1992 Law on the Conclusion of Treaties regulates both the subject-matter and functional limits on inter-institutional agreements involving Mexican federal government ministries or its state or regional governments.¹⁹⁰ Mexican institutions can only conclude binding agreements (i) on subjects within the exclusive purview of the area or entity making the agreement; (ii) the agreement can only affect the concluding entity; (iii) the entity's regular budget must be sufficient to cover the agreement's financial obligations; (iv) the legal rights of individuals cannot be affected; and (v) existing legislation cannot be modified. In addition, Article 7 of the Law on the Conclusion of Treaties requires Mexican institutions to inform the Secretariat of Foreign Affairs of any binding inter-institutional agreement they are seeking to conclude, with a requirement that the Legal Department of the Secretariat of Foreign Affairs report on the lawfulness of signing such an agreement.¹⁹¹

States have sought further guidance regarding their inter-institutional agreements for three reasons.

- First, it is not always clear whether an institution can enter into *any* agreements.
- Second, even if the institution may have some agreement-making capacity, it does not follow that it can make all three types of agreements considered here (treaties, political commitments, and contracts).
- Third, in individual cases, it is often unclear what legal status an existing inter-institutional agreement currently has.

Guideline 4.4 endorses a best practice that addresses all three issues by calling on States that permit inter-institutional agreements to have procedures that ensure appropriate review or approval of such agreements. The *Guidelines* leave it to States whether such procedures should have a legal basis or exist as a matter of policy. Similarly, States should be free to decide whether to have procedures that authorize certain inter-institutional agreements generally or to devise a case-by-case system of notice or approval.

Moreover, *Guideline 4.4* suggests that States may include in their procedures one or more mechanisms for differentiating among the institutions' binding agreements. Some possible mechanisms to mitigate existing confusion and the risk of future misunderstandings or disagreements would include:

- a) a requirement that all contracts contain an explicit governing law clause to avoid any suggestion that they qualify for treaty status.
- b) a default presumption when two or more State institutions conclude a binding agreement, *i.e.*, establishing a presumption that the agreement qualifies as a treaty or, conversely, a presumption that binding inter-institutional agreements are contracts, not treaties.
- c) procedures requiring the institution involved to confirm with their agreement partners a shared understanding that (a) the agreement is binding (or not); and (b) what type of binding agreement will be concluded, be it a treaty or a contract.

4.5 Publicizing Institutional Capacities to Conclude Binding Agreements.

4.5.1 *A State should make public which, if any, of its institutions may be authorized to conclude treaties, including specifying whether it may do so on behalf of the State as a whole or in its own name.*

4.5.2 *A State should make public which, if any, of its institutions may be authorized to conclude contracts, including specifying whether it may do so on behalf of the State as a whole, or in its own name.*

4.5.3 *A State may make this information public generally, such as by posting its procedures on-line, or specifically, by communicating with other States or State institutions as to its institutions' capacities and the relevant procedures under which they operate.*

¹⁹⁰ 1992 Mexican Law Regarding the Making of Treaties, *supra* note 65.

¹⁹¹ Mexico Response, *supra* note 109.

Commentary: *Guideline 4.4* focuses on encouraging States to devise procedures to ensure that the State has sufficient self-awareness of whether and what types of binding agreements its institutions may conclude. *Guideline 4.5* promotes inter-State communication of the conclusions reached and procedures used by a State to approve or monitor inter-institutional agreement-making. Other States may benefit from learning:

- (i) which State institutions may conclude binding (or non-binding agreements) with foreign institutions;
- (ii) what types of binding and non-binding agreements may be authorized; and
- (iii) what the processes are for doing so.

This information may assist another State or its institutions in deciding whether to conclude an agreement with a State's institutions and what form that agreement should take.

Sharing information among States concerning their inter-institutional agreement authorities and practices should also pay off in existing cases to reduce confusion (or even conflicting views) as to what type of inter-institutional agreement has been concluded. Finally, publicizing procedures may offer useful models or examples of processes on which States with less experience with inter-institutional agreements may rely.

4.6 Publicizing Registries of Binding and Non-Binding Agreements

4.6.1 *National Registries of Binding Agreements: States should create and maintain public registries for all binding agreements of the State and State institutions.*

4.6.2 *National Registries of Political Commitments: States should maintain a national registry of all, or at least the most significant, political commitments of the State and State institutions.*

Commentary: All States are required to register their treaties with the United Nations under Article 102 of the UN Charter. Most States already have (and maintain) lists and archives with respect to their treaties and government contracts. In many cases, States make their treaty lists—or the agreements themselves—public, whether through publication in an Official Gazette, Bulletin, or a treaty-specific series. States may, however, limit which treaties they choose to publish, leaving out treaties dealing with matters deemed of less significance, or conversely, those containing commitments implicating classified information or programs. There is, moreover, much less publicity surrounding inter-State or inter-institutional contracts.

Guideline 4.6.1 suggests that States should have *public* registries of agreements binding the State and its institutions. Ideally, these registries could include, not just the fact of an agreement's existence, but its contents as well. Doing so would have several benefits:

- (i) Publicizing binding agreements by the State or its institutions comports with the rule of law and democratic values, affording the public a window into a key area of State behavior.
- (ii) Public registries might be beneficial to a State internally. Government-wide knowledge of a State's binding agreements can help ensure interested government agencies are aware of all binding agreements. That information should ensure more regular tracking of what binding agreements exist and better intra-governmental coordination in their formation.
- (iii) Public registries of treaties and contracts would also have external benefits. These registries would provide a regular information channel for other States, conveying the publicizing States' views on the existence and legal status of its binding agreements. This could lead to quicker (and hopefully easier) recognition of potential differences on the existence of an agreement and its status as a treaty or a contract.
- (iv) Such public registries may even create space for differences of opinion to be resolved in advance rather than in response to a concrete problem or crisis.

When it comes to non-binding agreements, States currently suffer from an information deficit. Both the number and contents of a State's political commitments, whether labeled as

MOUs or otherwise, are often unclear. And there is even greater ambiguity surrounding inter-institutional political commitments. Whatever informal procedures might exist to review or even approve political commitments, most States do not count or collect them.¹⁹² Thus, there is a real dearth of information available on the number and types of non-binding agreements reached by States and their institutions.

Guideline 4.6.2 aims to rectify this information gap by calling on States to accept a best practice by which they establish a centralized point of contact within the government where political commitments may be collected and retained. As with existing treaty registries, a political commitment registry would have valuable internal and external benefits.

- a) It would alert other actors within a State, such as the legislature or non-participating institutions, as to the existence of a political commitment. It might thus check incentives to use political commitments merely as a means to avoid the domestic approval procedures assigned to binding agreements.
- b) Externally, it would inform other States about the content and assumed non-binding legal status of the commitments listed, creating space for further inquiries or communications about such political commitments as these other States deem appropriate.
- c) It would, moreover, alert a State's public of *all* agreements a State has concluded, not just those that may generate legal effects. The public has a clear interest in learning more about agreements that may generate significant consequences for their State, even if those consequences will take a political (rather than legal) form.

5 Legal Effects of Binding and Non-Binding Agreements

5.1 The Legal Effects of State treaty-making: *States and their institutions should approach their treaty-making understanding that their consent to a treaty will generate at least three different sets of legal effects:*

5.1.1 Primary International Legal Effects – *Pursuant to the fundamental principle of *pacta sunt servanda* treaties impose an obligation to observe their terms in good faith.*

5.1.2 Secondary International Legal Effects – *the existence of a treaty triggers the application of several secondary international legal regimes, including the law of treaties, state responsibility, and any other specific regimes tied to the treaty's subject-matter.*

5.1.3 Domestic Legal Effects – *A State's domestic legal order may, but is not required to, accord domestic legal effects to the State's treaties. States should be prepared to explain to other States and stakeholders what domestic legal effects follow its own treaty-making.*

Commentary: One of a treaty's defining features is that it is *binding* under international law. Treaties trigger the foundational international legal principle of *pacta sunt servanda*: "Every treaty in force is binding upon the parties to it and must be performed by them in good faith."¹⁹³ Thus, a treaty's primary legal effects lie in its own terms. States must conform their behavior to whatever the treaty requires, prohibits, or permits. And if the treaty provides vehicles for its own

¹⁹² Canada and Ecuador are notable exceptions. See Canada Treaty Policy, *supra* note 48; Ecuador Response, *supra* note 46 (noting practice of recording "non-binding political agreements (joint declarations and communiqués)" with the Directorate for Legal Advice on Public International Law, some of which are accompanied by a "legal opinion from the Foreign Ministry's General Legal Coordination Office."). Outside the region, several States report having a database or archive for political commitments. Working Group on Treaty Practice, *supra* note 40, at 9, 27 (Canada, Germany (since 2014), Israel, Korea, Mexico, and Spain report archives or mandatory reporting of political commitments to their Foreign Ministries; Finland and Japan do not); *but see id.* at 14, 32 (the 8 States surveyed – Canada, Finland, Germany, Israel, Japan, Korea, Mexico, and Spain – all cite a need for further internal coordination on the quality and effectiveness of political commitments).

¹⁹³ VCLT, Art. 26. Some of a treaty's clauses—those on consent, provisional application, and entry into force—actually have legal effects before the treaty is in force.

enforcement—e.g., the American Convention on Human Rights—States are obligated to accept these as well.¹⁹⁴ Thus, Canada, Jamaica and Peru acknowledge that each State must comply with obligations assumed in their binding agreements while Colombia sources its compliance obligation to VCLT Article 26 and *pacta sunt servanda*.¹⁹⁵

Beyond a treaty's primary international legal effects, the existence of a treaty may also trigger a series of secondary international legal rules and regimes. Chief among these is the law of treaties itself. The VCLT (or international law more generally) will regulate the validity, interpretation, application, breach, and termination of all a State's treaties. For example, VCLT Article 29 provides that "unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory." This provision creates room, *if* all the parties agree, for treaties to contain "federal" or "territorial" clauses that allow a State to designate to which sub-national territorial units a treaty does (or does not) apply.¹⁹⁶ On the other hand, it is also possible for States to refuse any territorial clauses, as they have in many human rights treaties, insisting that States parties must apply the treaty across the entire territory.¹⁹⁷ The VCLT also authorizes termination or suspension of a treaty by an affected party in response to another party's "material breach."¹⁹⁸

The secondary legal effects of a treaty are not, however, limited to the law of treaties. State responsibility, for example, may also attach to "internationally wrongful acts," which include treaty violations. As detailed in the 2001 Articles on State Responsibility ("ASR"), the law of state responsibility affords States the right to engage in "countermeasures"—unlawful acts that are justified (*i.e.*, lawful) because that State was negatively impacted by a prior internationally wrongful act.¹⁹⁹ By authorizing otherwise unlawful behavior in response to a treaty breach, countermeasures provide treaty-makers with a significant remedy that is unavailable for other forms of binding agreement (contracts) let alone non-binding ones (political commitments).

The existence of treaties on specific topics (*e.g.*, human rights, the environment) may also trigger a range of specialized rules and principles that have emerged to regulate that particular sub-field of international law.²⁰⁰ Finally, the availability of certain dispute resolution procedures may depend on the existence of a treaty (either to establish the court or tribunal's jurisdiction or to give

¹⁹⁴ American Convention on Human Rights, 22 November 1969, 1144 U.N.T.S. 123, Chs. VI-IX (constituting the Inter-American Commission and Court of Human Rights).

¹⁹⁵ *See, e.g.*, Canada Response, *supra* note 40 ("The parties to treaties have a legal obligation to fulfill their duties"); Dominican Republic Response, *supra* note 46; Jamaica Response, *supra* note 71; Colombia Response, *supra* note 85 ("Article 26 of the 1969 Vienna Convention, imposes an obligation on the parties to comply with the treaties they ratify, and to do so in good faith.").

¹⁹⁶ *See, e.g.*, UN Convention on Contracts for the International Sale of Goods (CISG), 11 April 1980, 1489 U.N.T.S. 3, Art. 93(1); European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), Art. 56(1); Constitution of the International Labour Organization, 9 October 1946, 15 U.N.T.S. 35, Art. 19(7).

¹⁹⁷ *See, e.g.*, International Covenant on Civil and Political Rights ('ICCPR'), 16 December 1966, 999 U.N.T.S. 171, Art. 50; American Convention on Human Rights, *supra* note 194, Art. 28(2).

¹⁹⁸ VCLT Art. 60. In addition, States always remain free to engage in acts of *retorsion* – unfriendly, but intrinsically lawful behavior that a State might perform to incentivized a breaching State back into treaty compliance (say, for example, by halting the provision of financial assistance that a State otherwise has no obligation to provide). Since acts of retorsion may occur without any prior treaty breach, however, they do not technically fall under the banner of a treaty's legal effects. *See* ASR, *supra* note 138, at 128, ¶5.

¹⁹⁹ ASR, *supra* note 138, Ch. II. The ASR requires all countermeasures to be temporary, reversible, and proportionate (in the sense of being commensurate with the injury suffered). Moreover, countermeasures cannot violate *jus cogens*, nor can they unsettle prior dispute settlement resolution agreements.

²⁰⁰ Human Rights treaties, for example, are subject to specialized interpretative rules. *See, e.g.*, Başak Çalı, *Specialized Rules of Treaty Interpretation: Human Rights* in THE OXFORD GUIDE TO TREATIES 525 (D Hollis, ed., 2012).

the court material on which to resolve disputes). For example, under the heading of “international conventions”, treaties are specifically listed among the sources of law on which the ICJ can reach an opinion.²⁰¹

States should, moreover, recognize that the legal effects of a treaty may not be limited to the international sphere. A State’s domestic legal order can (but is not required to) accord domestic legal effects to the State’s treaties. Thus, some States’ domestic laws may supplement *pacta sunt servanda* by imposing their own obligation of treaty compliance. Under the Dominican Republic’s Constitution, for example, there is “an obligation, once the constitutional ratification procedure is concluded, to comply with a valid treaty or agreement.”²⁰² In Peru, this obligation is specifically imposed on those governmental departments under whose purview the treaty falls.²⁰³

Some States (e.g., Canada) do not accord their treaties any domestic legal status, and thus, the treaty’s existence will have little direct domestic impact.²⁰⁴ Other States’ domestic legal orders may accord treaty texts the same legal effects as a statute, or even in some cases, a constitutional provision (assuming the treaty otherwise comports with any domestic conditions regarding its formation or validity).²⁰⁵ In some States, different treaty categories generate different domestic legal effects, whether based on the treaty’s subject matter or the procedures used to authorize it. In Ecuador, for example, its human rights treaties that provide “rights that are more favorable than those enshrined in the Constitution” prevail over “any other legal regulatory system or act of public authorities.”²⁰⁶ Other treaties have significant weight within Ecuador’s domestic legal order, with the Constitution listing treaties in the “order of precedence for the application of the regulations” above other organic laws and other forms of domestic regulation.²⁰⁷

In addition, just as a treaty may trigger the law of treaties internationally, a treaty’s existence in domestic law may trigger various other domestic legal doctrines or regimes. Looking at Ecuador again, its Constitution assigns various domestic legal doctrines (e.g., direct applicability) to “treaties and other instruments for human rights.”²⁰⁸ States can also use their domestic legal system to afford treaties judicial enforcement.²⁰⁹

The *Guidelines* take existing legal effects as it finds them; there are, for example, no proposals of best practices on what domestic legal effects States should accord some—or all—

²⁰¹ ICJ Statute, Article 38(1)(a).

²⁰² Dominican Republic Response, *supra* note 46.

²⁰³ Peru Response, *supra* note 66.

²⁰⁴ See *supra* note 46.

²⁰⁵ See, e.g., Argentina Constitution, *supra* note 84, Art. 31 (“[T]reaties with foreign powers, are the supreme law of the Nation, and the authorities of every Province are bound to conform to it, notwithstanding any provision to the contrary which the Provincial laws or constitutions may contain ...”); *id.*, Art. 75(22) (giving treaties on human rights “standing on the same level as the Constitution”); Constitution of Peru, Art. 55, *English translation available at* https://www.constituteproject.org/constitution/Peru_2009#s202 (“Treaties formalized by the State and in force are part of national law.”).

²⁰⁶ Ecuador Response, *supra* note 46 (citing the Ecuador Constitution, Art. 424).

²⁰⁷ *Id.* (citing the Ecuador Constitution, Art. 425: “The order of precedence for the application of the regulations shall be as follows: The Constitution; international treaties and conventions; organic laws; regular laws; regional rules and district ordinances; decrees and regulations; ordinances; agreements and resolutions; and the other actions and decisions taken by public authorities.”).

²⁰⁸ *Id.* (Article 417 of the Constitution: “The international treaties ratified by Ecuador shall be subject to the provisions set forth in the Constitution. In the case of treaties and other international instruments for human rights, principles for the benefit of the human being, the non-restriction of rights, direct applicability, and the open clause as set forth in the Constitution shall be applied.”).

²⁰⁹ See David Sloss, *Domestic Application of Treaties*, in *THE OXFORD GUIDE TO TREATIES* 367 (D. Hollis, ed., 2012); Joost Pauwelyn, *Is it International Law or Not and Does it Even Matter?* in *INFORMAL INTERNATIONAL LAWMAKING* 145-46 (J. Pauwelyn, J. Wessel and J. Wouters, eds., 2012).

treaties. There is too much diversity in existing practice, and the reasons States have chosen their own path are often so unique as to counsel against harmonization.

Nonetheless, there is value in having States pay closer attention to the legal effects that follow from treaty-making under both international and domestic law. For example, a State contemplating a new treaty-relationship may have different positions on the treaty's contents depending on what—if any—domestic legal effects follow the treaty's conclusion not just in its own legal system, but that of its potential treaty partner(s) as well. A State might be content with a straightforward treaty provision where it and its potential partner give treaties direct domestic legal effect—*e.g.*, “the Parties shall not allow X to occur.” That same State might, however, prefer a different formulation with States that do not give treaties direct effect—*e.g.*, “the Parties agree to legislate to not allow X to occur.”

5.2 The Legal Effects of Contracts. *States and their institutions should approach their agreement-making understanding that the legal effects of a contract will depend on the contract's governing law, including issues of performance, displacement of otherwise applicable domestic law, and enforcement.*

Commentary: As with questions of validity and capacity, the primary effects of a contract will depend on the relevant governing law, which may be a State's national law or, if the parties select it, non-State law.²¹⁰ The governing law will establish whether and how contracts will operate as well as the available remedies for breach, including judicial means. In the case of non-State law, enforcement may occur through some international forum (*e.g.*, UNIDROIT, ICSID).

Among their legal effects, contracts may also have the legal effect of displacing other, default rules of domestic law that exist in the absence of agreement. Ultimately, therefore, the nature and extent of a contract's legal effects depends on the governing law, including any relevant conflicts of law rules.

Although a contract's legal effects will flow from the governing law, contracts could generate legal effects in the international arena. One contracting State could undertake behavior in reliance on the other contracting State continuing to perform its obligations. Given the binding nature of the contract, that reliance might be sufficiently reasonable to estop the other State from ceasing performance.²¹¹

Alternatively, it might be possible for a contract governed by, say, national law to become elevated into a binding agreement governed by international law. In the *Chagos Arbitration*, for example, the Tribunal reasoned that a 1965 Agreement between the British Government and Mauritius (a non-self-governing territory) was at “most ... a contract binding upon the Parties under domestic law.”²¹² It found, however, that Mauritius' independence, had “the effect of elevating the package deal reached with the Mauritius Ministers to the international plane and of transforming the commitments made in 1965 into an international agreement” governed by international law.²¹³ Although the Tribunal did not say so explicitly, one way to explain this result would be on the idea that Mauritius independence implicitly shifted the governing law of the “contract” from UK law to international law, which by definition, converted the agreement into a treaty.

²¹⁰ U.S. Response, *supra* note 72 (“The legal effects associated with contracts governed by domestic law are governed by the terms of the contract and the domestic law applicable to it.”).

²¹¹ On estoppel in international law, see Thomas Cottier and Jörg Paul Müller, *Estoppel* in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (April 2007); *Chagos Arbitration*, *supra* note 132, at 174, ¶438 (“estoppel may be invoked where (a) a State has made clear and consistent representations, by word, conduct, or silence; (b) such representations were made through an agent authorized to speak for the State with respect to the matter in question; (c) the State invoking estoppel was induced by such representations to act to its detriment, to suffer a prejudice, or to convey a benefit upon the representing State; and (d) such reliance was legitimate, as the representation was one on which that State was entitled to rely.”).

²¹² *Chagos Arbitration*, *supra* note 132, at 167, ¶424 (quoting Hendry and Dickson).

²¹³ *Id.* at 167-68, ¶¶425, 428.

5.3 The Effects of Political Commitments. *States and their institutions should approach their agreement-making understanding that a political commitment will not produce any direct legal effects under international or domestic law; political commitments are not legally binding.*

5.3.1 *States and their institutions should honor their political commitments and apply them with the understanding that other States will expect performance of a State's political commitment whether due to their moral force or the political context in which they were made.*

5.3.2 *States and their institutions should be aware that, even if non-binding, a political commitment may still have legal relevance to a State. For example, political commitments may be:*

- (i) incorporated into other international legal acts such as treaties or decisions of international organizations;*
- (ii) incorporated into domestic legal acts such as statutes or other regulations; or*
- (iii) the basis for interpretation or guidance of other legally binding agreements.*

Commentary: By definition, political commitments are not binding; they are incapable of producing any legal effects on their own. States and their institutions should adjust their expectations accordingly. As a matter of international law, political commitments will not trigger *pacta sunt servanda* nor any of the secondary international legal effects that follow treaty-making (e.g., the law of treaties, state responsibility, specialized regimes).²¹⁴

But it would be a mistake for States to assume this means that political commitments have no effects. Even if they are not themselves binding, political commitments still contain commitments and those commitments are often made in a State's name (or those of its institutions). Other States can—and often will—expect continued performance of their terms (even as they are aware that they will be incapable of invoking international legal tools in cases of non-performance).²¹⁵ Political commitments thus trigger the honor and reputation of the States and the State institutions that make them. State practice shows, moreover, that political commitments can have significant effects on State behavior, as for example, in implementing the commitments of the Financial Action Task Force to combat terrorist financing.²¹⁶

As a best practice, therefore, these *Guidelines* recommend that States should honor their political commitments. They are, of course, not legally bound to do so. Still, by performing its political commitments, a State fulfils the behavioral expectations of other political commitment participants. Where a State encounters difficulties in performance, dialogue and communication with other participants are likely to be more productive than ignoring agreed terms. And just because a State that ceases to perform its political commitments will not be subject to international legal remedies (e.g., treaty termination or counter-measures) does not mean that non-performance will be costless. Other States may respond with unfriendly—albeit still lawful—acts, including those that are labeled as retorsion by international law.²¹⁷ Indeed, other than countermeasures, the possible consequences from a political commitment violation may not differ too much from treaties. For example, when North Korea reneged on its political commitment to suspend uranium enrichment, the United States suspended aid it had promised to provide under the commitment and encouraged international sanctions.²¹⁸

²¹⁴ See, e.g., Canada Response, *supra* note 40, at 8 (“Non-binding instruments concluded at the agency or sub-national level are regarded to hold only political or moral commitments.”); Peru Response, *supra* note 66 (“Since “nonbinding” agreements concluded by Peruvian governmental entities with foreign counterparts do not seek to create a legal relationship, the *pacta sunt servanda* principle does not apply; only the good faith principle.”).

²¹⁵ See *supra* note 52 and accompanying text.

²¹⁶ See, e.g., The Financial Action Task Force (FATF), at http://www.fatf-gafi.org/pages/0,3417,en_32250379_32235720_1_1_1_1_1,00.html (FATF issues “recommendations” that are non-binding, but which have become the global standard for combating money laundering and terrorist financing).

²¹⁷ See *supra* note 198.

²¹⁸ Selig S. Harrison, *Time to Leave Korea?*, FOREIGN AFFAIRS (Mar./Apr. 2001).

Several Member States appear to view political commitments as incapable of generating *any* legal effects.²¹⁹ That view may, however, depend on how one defines “legal effects”. Practice suggests that political commitments may have *legal* relevance and, in certain cases, may even generate *indirect* legal effects in certain discrete ways:

- In terms of indirect international legal effects, States may eventually convert a political commitment into a treaty by additional, discretionary acts. The prior informed consent procedure at the heart of the Rotterdam Convention existed prior to that treaty’s conclusion via political commitments done under UNEP and FAO auspices.²²⁰ Alternatively, an international organization may incorporate a political commitment into an internationally legally binding form. In Resolution 2231, for example, the United Nations Security Council endorsed the so-called “Iran Deal” on nuclear non-proliferation, making certain of its terms obligatory via its Chapter VII authorities.²²¹
- In terms of indirect domestic legal effects, some political commitments—e.g., the Kimberly Process on Conflict Diamonds, the Wassenaar Arrangement—may have their terms codified into domestic law by additional discretionary acts on the part of a State’s legislature.²²²
- Political commitments may also be employed as vehicles for interpreting other legally binding agreements. The ILC, for example, has concluded that subsequent agreements or subsequent practice used for purposes of treaty interpretation under VCLT Article 31(3) “require[] a common understanding regarding the interpretation of a treaty which the parties are aware of and accept. Such an agreement may, but need not, be legally binding for it to be taken into account...”²²³ Interpreters may, moreover, employ political commitments without any of the additional discretionary acts that are necessary in converting political commitments into international or domestic legal commitments.
- Similarly, international courts and tribunals have shown a willingness to have political commitments set relevant standards of behavior that can be used to evaluate a State’s treaty compliance. In a 2011 WTO ruling, for example, a Dispute Settlement Panel found that several non-binding political commitments generated under the auspices of the International Dolphin Conservation Program constituted the “relevant international

²¹⁹ See, e.g., Colombia Response, *supra* note 85 (Non-binding agreements have “no legal implication for the Republic of Colombia as a subject of international law.”); Mexico Response, *supra* note 109 (“[N]on-binding’ instruments are eminently political in nature since they set forth the will and intent of the signing authorities, and therefore they DO NOT have legal implications.”); U.S. Response, *supra* note 72 (“As non-legally binding instruments are neither governed by, nor give rise to rights or obligations under, domestic or international law, there are no legal effects associated with them.”).

²²⁰ Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, 11 September 1998, 2244 U.N.T.S. 337 (“Rotterdam Convention”); see also Rotterdam Convention, “History of the Negotiation of the Rotterdam Convention,” at

<http://www.pic.int/TheConvention/Overview/History/Overview/tabid/1360/language/en-US/Default.aspx>.

²²¹ See UNSC Res. 2231 (July 2015).

²²² See, e.g., Clean Diamond Trade Act, Public Law 108-19 (Apr. 25, 2003) (implementing the “Kimberley Process,” which included a political commitment to regulate trade in conflict diamonds); Wassenaar Arrangement, at <http://www.wassenaar.org>.

²²³ ILC, Subsequent agreements and subsequent practice in relation to the interpretation of treaties, *Text of the draft conclusions adopted by the Drafting Committee on second reading*, Seventieth session, A/CN.4/L.907 (11 May 2018).

standard” for purposes of measuring U.S. compliance with its WTO Technical Barriers to Trade Agreement.²²⁴

What about using the international legal doctrine of estoppel to require continued State performance of its political commitments? Scholarship has long debated whether under the right circumstances a political commitment might cause others, to rely on its continuing the agreed behavior as a matter of good faith, even if not required by the (non-binding) agreement itself.²²⁵ This is the same logic, for example, that explains the legal force of certain unilateral declarations.²²⁶ Member States do not appear enthusiastic about this possibility.²²⁷ Moreover, where an agreement is clearly “non-binding” it will be difficult to establish that other States’ reliance on continued performance is reasonable (in a legal sense). As the *Chagos Arbitration Tribunal* emphasized: “Not all reliance, even to the clear detriment of a State, suffices to create grounds for estoppel. A State that elects to rely to its detriment upon an expressly non-binding agreement does not, by so doing, achieve a binding commitment by way of estoppel. Such reliance is not legitimate.”²²⁸ Still, the matter may remain open to debate, and States should at least be aware of the possibility that some might invoke estoppel in the context of certain political commitments.

5.4 Legal Effects of an Inter-Institutional Agreement. *States should expect the legal effects of an inter-institutional agreement to track to whatever category of agreement—a treaty, a political commitment, or a contract—it belongs.*

5.4.1 *States may presume that inter-institutional treaties and contracts will trigger the responsibility of the State as a whole.*

5.4.2 *Nonetheless, States should be sensitive to the fact that in certain cases, a State or its institution may claim that legal responsibility for an inter-institutional agreement extends only to the State institution entering into the agreement.*

5.4.3 *Where States have differing views of the legal responsibility accompanying a binding inter-institutional agreement, they should align their views, whether by both agreeing to have the States bear responsibility under the inter-institutional agreement or agreeing to limit responsibility to the institutions concluding it.*

5.4.4 *States should exercise any available discretion to avoid giving legal effects to an inter-institutional agreement where one or more of the institutions involved did not have the requisite authority (or general capacity) to make such an agreement from the State of which it forms a part.*

Commentary: Inter-institutional agreements are not, by definition, associated with any particular type of international agreement. They may be binding (whether as treaties or contracts) or non-binding, political commitments. Which type of agreement exists will be a function of the capacities of the institutions involved and the methods of identification employed.²²⁹ Once the

²²⁴ See WTO, *United States—Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products—Panel Report* (15 Sept 2011) WT/DS381/R, ¶¶7.707 and 7.716; see also Pauwelyn, *supra* note 209, at 155-56.

²²⁵ See, e.g., Schachter, *supra* note 49, at 301 (suggesting estoppel might apply where there is a gentleman’s agreement and reasonable reliance on it); Aust, *supra* note 162, at 807, 810-11 (suggesting estoppel may apply to certain political commitments, but not mere statements of political will); but see KLABBERS, *supra* note 3, at 138-40 (insisting an agreement cannot be non-binding if it has legal effects); see also *supra* note 211.

²²⁶ See *supra* note 2.

²²⁷ See, e.g., *supra* note 219. Peru, however, notes that political commitments may trigger a State’s good faith (rather than *pacta sunt servanda*) which might suggest some solicitude for an estoppel claim in the right circumstances. *Supra* note 214.

²²⁸ *Chagos Arbitration*, *supra* note 132, at 177, ¶445.

²²⁹ For a definition of inter-institutional agreements, see *Guideline 1.5* and accompanying commentary. On the capacity of State institutions to conclude treaties, political commitments, and contracts, see *Guidelines 2.2, 2.4, and 2.6*. The methods for identifying treaties, political

status of an inter-institutional agreement becomes clear, so too will its legal effects. Inter-institutional treaties may generate the same primary and secondary international legal effects as well as any domestic legal effects accorded by a State's legal system. The legal effects of inter-institutional contracts, like inter-State ones, will flow from the relevant governing law, while inter-institutional political commitments will not generate any direct legal effects, although States should be cognizant they could still generate some indirect ones.²³⁰

There is, however, one area where inter-institutional agreements—particularly inter-institutional treaties—raise a novel question. Specifically, to whom does an inter-institutional treaty's legal effects apply—the institution alone or the whole of the State with which it is associated? A number of Member States' practices suggest the latter view; even where the parties to a treaty are State institutions, its effects will still extend to the State as a whole.²³¹ This appears to be the case regardless of whether the State institution is part of the national government or a sub-national territorial unit. It is, moreover, the position taken by the ILC in the ASR. ASR Article 4(1) provides:

The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State and whatever its character as an organ of the central government or of a territorial unit of the State.²³²

Given these views, *Guideline 5.4.1* articulates a starting presumption: States may reasonably expect that an inter-institutional treaty will bind the States to which the institutions belong, not just the institutions themselves.

Such a presumption may generate at least three advantages for States. First, it may provide greater certainty to all States and institutions engaged in treaty-making. Knowing that a State is expected to stand behind commitments governed by international law and made by its institutions may encourage other States and their institutions to engage in such treaty-making. Second, it will ensure a more consistent set of direct legal effects for all treaties (rather than having to elaborate different effects for inter-State treaties from inter-institutional ones). Third, this approach comports with the basic architecture of public international law. If most State institutions are not discrete international legal persons, it follows that international law will resist according their activities direct legal effect, but rather attribute them to the State of which they form a part.

commitments and contracts are laid out in detail in Section 3 of these *Guidelines* and the accompanying Commentary.

²³⁰ Jamaica Response, *supra* note 71 (describing domestic legal effects of inter-institutional agreements including their being “open to the interpretation of domestic courts”); U.S. Response, *supra* note 72 (“The legal effects associated with contracts governed by domestic law are governed by the terms of the contract and the domestic law applicable to it.”); *see also* Dominican Republic Response, *supra* note 46 (non-binding agreements done at the agency or sub-national level “are in no sense binding”);

²³¹ *See, e.g.*, Jamaica Response, *supra* note 71 (“International legal responsibility lies with the State. At the domestic level however, the agency or sub-national territorial unit has a responsibility to the Government to ensure that its obligations are performed under the Agreement”); U.S. Response, *supra* note 72 (“The United States considers treaties (as defined in Article 2 of the VCLT) concluded by its agencies to create legal obligations applicable to the United States, though in practice performance of those agreements generally rests with the agency that enters into them.”). Argentina likewise professed a preference for state responsibility, while noting the law was not entirely clear. Argentina Response, *supra* note 72. Outside the region, several States have adopted a similar view. *See, e.g.*, Switzerland Guide to Treaties, *supra* note 123, at 25 (“Under international law, it is the Swiss Confederation (see art. 6 VCLT) – and not the administrative unit, which does not have any legal personality – that can be held responsible for the obligations undertaken.”).

²³² ASR, *supra* note 138, Art. 4(1); *see also id.*, Art. 4(2) (“Any organ includes any person or entity which has that status in accordance with the internal law of the State.”).

Despite such advantages, State practice on unitary State responsibility is not entirely uniform. Several States take the view that international legal responsibility could lie with the concluding institution, *not* the State as a whole, with one State—Mexico—adopting this view expressly.²³³ While accepting that treaties concluded by the Mexican State bind Mexico, Mexico cites its federal structure to suggest that “it would be unconstitutional for [Mexico] to assume responsibility for interinstitutional agreements concluded by state and municipal areas and entities since this would encroach on the authorities conferred upon them by the Constitution itself.”²³⁴ Instead, Mexico considers those inter-institutional agreements governed by international law only have effects for the institutions that conclude them.²³⁵ Other States admit the situation is not always clear; Panama, for example, views “the possibility that a new international custom has arisen” with respect to responsibility for inter-institutional agreements.²³⁶

These *Guidelines* are not designed to resolve the discrepancy in how far inter-institutional treaty obligations extend. They may, however, help raise awareness among States that this is an issue to look for when their institutions pursue binding international agreements. Moreover, the consensual nature of the international legal order suggests a practice that States may use to avoid the issue. In cases where two States hold different views of how far an inter-institutional treaty binds, they may agree to a uniform position.

- States could, for example, agree to treat their institution’s treaty commitment as equivalent to treaties made in the name of the two States; or
- States could specifically consent to having the effects of an inter-institutional treaty extend only to the institutions involved.

States could include such conditions in the inter-institutional treaty itself or they could agree to them separately, whether generally or on a case-by-case basis. They would ideally do so in advance, although it would be possible to reach such an accommodation after the inter-institutional treaty has come into existence. Such a practice might be novel, but it provides a way to bridge divergent views on responsibility that otherwise might lead to disagreements or the need for some form of dispute resolution.

Finally, there is a question of what, if any, legal effects States and other stakeholders should accord binding inter-institutional agreements concluded where one or more of the institutions involved did not follow the appropriate domestic procedures? In other words, how should States deal with unauthorized inter-institutional agreements? Giving such agreements domestic legal effects is likely to be problematic, especially within the State where the requisite procedures were not followed. In the Dominican Republic, for example, when its Deputy Secretary of State for Foreign Affairs concluded a Memorandum of Understanding (MOU) with the Inter-American Commission on Human Rights without following the constitutional rules for judicial review and National Congress approval, the Supreme Court treated the MOU as null and void.²³⁷

A number of Member States, moreover, believe that the failure to comport with domestic procedures may also preclude giving inter-institutional agreements international legal effects. Colombia, for example, has indicated that it “is not responsible for agreements concluded in

²³³ Hollis, Second Report, *supra* note 10, at ¶38-40 (describing views of Peru and Uruguay); Panama Response, *supra* note 69.

²³⁴ Mexico Response, *supra* note 109. In addition, Mexico claims that “[i]t would also be unlawful [under Mexican Law] for the federal government to assume that responsibility, since the interinstitutional agreement was concluded without observing the formalities established by the Law on the Conclusion of Treaties.” *Id.* Peru denies that its institutions can conclude “treaties” but acknowledges that its inter-institutional agreements may create “a legal relationship ... only for the institutions entering into them”. It does not, however, explain what law would govern that legal relationship. Peru Response, *supra* note 66.

²³⁵ Mexico Response, *supra* note 109.

²³⁶ Panama Response, *supra* note 69.

²³⁷ Dominican Republic Response, *supra* note 46.

violation” of domestic conditions for the legality of its international agreements.²³⁸ Mexico emphasizes the personal liability of those who sign an interinstitutional agreement where the Secretariat of Foreign Affairs’ Legal Department has not issued its views.²³⁹ Other States offer a more nuanced take, suggesting that international legal responsibility for an unauthorized inter-institutional agreement may best be determined based on the “nature of the agreement and circumstances surrounding its conclusion.”²⁴⁰

Guideline 5.4.4. proposes a best practice where States exercise any available discretion to decline to give legal effects to unauthorized inter-institutional agreements. The qualifier referencing “available discretion” is included to make clear that this guideline only applies where the State has a choice on whether or not to accord an agreement legal effects; it does not countenance avoiding legal effects that the State is required to afford, whether by international or domestic law. Still, where States have discretion, it would seem a best practice counsels against giving legal effects to unauthorized inter-institutional agreements. According inter-institutional treaties (or contracts) legal effects could incentivize State institutions to violate their own domestic laws and procedures if they perceive the benefits of reaching agreement with foreign actors outweigh the domestic consequences. These incentives would be especially perverse if the institution shared the costs of unauthorized agreements (in terms of responsibility and liability) with the State as a whole – the very State whose procedures were not followed.²⁴¹

6. Training and Education Concerning Binding and Non-Binding Agreements

6.1 Training and Education relating to Binding and Non-Binding Agreements by States. *States should undertake efforts to train and educate relevant officials within a Foreign Ministry and other relevant ministries or agencies to ensure that they are capable of:*

- (i) identifying and differentiating among the various types of binding and non-binding agreements;*
- (ii) understanding who within the State has the capacity to negotiate and conclude which agreements;*
- iii) following any and all domestic procedures involved in such agreement making; and*
- iv) appreciating the legal and non-legal effects that can flow from different types of international agreements.*

Commentary: As these guidelines make clear, existing State practice with respect to international agreements is of critical importance to international law and international relations. Yet, it is also clearly not some simple set of tools that States and their officials may apply intuitively. Extant variations in definitions, capacities, methods of identification, procedures, and effects, require expert knowledge and attention to ensure a State is able to advance its foreign policy interests while avoiding confusion, misunderstandings, and disputes (legal or otherwise). As such, it is important for States to devote the resources to educate relevant officials on these topics.²⁴²

²³⁸ See also Ecuador Response, *supra* note 46.

²³⁹ Mexico Response, *supra* note 109.

²⁴⁰ Jamaica Response, *supra* note 71; see also Peru Response, *supra* note 66.

²⁴¹ This would, however, run counter to the presumption of validity accorded treaties done in violation of domestic procedures in the inter-State context by VCLT Article 46. See *supra* note 77. That said it is not clear that Article 46 constitutes customary international law. See Jan Klabbbers, *The Validity and Invalidity of Treaties* in THE OXFORD GUIDE TO TREATIES 551, 564 (D. Hollis, ed., 2012).

²⁴² The Working Group on Treaty Practice solicited views on training relating to both binding and non-binding agreements. The responses revealed a diversity of formal and informal processes by which relevant treaty officials educate other officials, both in the Foreign Ministry itself and elsewhere in other ministries or agencies. See, e.g., Working Group on Treaty Practice, *supra* note 40, at 4, 6-7, 22, 24 (detailing training and guidance offered by treaty officials in Canada, Finland, Germany, Israel, Japan, Korea, Mexico, and Spain).

Guideline 6.1 focuses on ensuring suitable training and education for Foreign Ministry officials on the various aspects of international agreements. Foreign Ministry officials are often charged with overall responsibility for a State's treaty practice. It makes sense, therefore, that States ensure that they have sufficient expertise to differentiate the State's treaties from the rising practice of other forms of international agreements, including binding inter-State contracts and inter-institutional agreements. Where needed, such training should also be extended to other relevant officials and offices.

Having well-trained officials across the region will help improve existing practices and alleviate existing confusion over both the status of various agreements (such as those bearing the heading "MOU") as well as with which institutions other States may conclude binding and non-binding agreements. Increased knowledge around the various types and effects of binding and non-binding agreements may allow Foreign Ministry officials to advise decision-makers on the relative trade-offs in pursuing one type of agreement over another.

6.2 Training and Education relating to Inter-Institutional Agreements. *Where a State authorizes inter-institutional agreements, it should undertake efforts to train and educate relevant officials of a government agency or sub-national territorial unit to ensure that they are capable of:*

- i) identifying and differentiating among the various types of binding and non-binding agreements;*
- ii) understanding who within the State has the capacity to negotiate and conclude which agreements;*
- iii) following any and all domestic procedures involved in such agreement making; and*
- iv) appreciating the legal and non-legal effects that can flow from different types of international agreements.*

Commentary: Not all States will authorize inter-institutional agreements, whether as treaties, contracts, or political commitments.²⁴³ For those that do, however, it will be necessary to ensure that institutions with an agreement-making capacity are sufficiently trained to use that capacity appropriately. This training may involve national-level exercises where non-Foreign Ministry officials of the national government are educated in international agreements, and just as pertinently, the procedures to be followed domestically to authorize them. Where sub-national territorial units can make agreements, they would benefit from similar training and education. Such efforts may mitigate situations where an institution acts without authority or otherwise enters into commitments to the detriment of the State as a whole. Increased knowledge around the various types and effects of binding and non-binding agreements may allow State institutions to develop an agreement practice that aligns with its interests while also accommodating national foreign policies and procedures.

* * *

CJI/RES. 259 (XCVII-O/20)

GUIDELINES OF THE INTER-AMERICAN JURIDICAL COMMITTEE ON BINDING AND NON-BINDING AGREEMENTS

THE INTER-AMERICAN JURIDICAL COMMITTEE,

TAKING INTO ACCOUNT:

That the General Assembly of the OAS, in item i on "Observations and recommendations on the Annual Report of the Inter-American Juridical Committee", of the resolution AG/RES. 2930 (XLIX-O/19) "International Law", asked the CJI to provide permanent reports on all

²⁴³ See *Guideline 2.2* and accompanying commentary.

progress made on the themes included in its agenda, such as matters regarding binding and non-binding agreements;

FULLY AWARE that there is an increasing number of international agreements of a non-traditional nature, including non-binding agreements between States, as well as binding and non-binding agreements prepared by Government Ministries and sub-national territorial units;

CONSIDERING that the Guidelines for Binding and Non-binding Agreements can help Member States to have a clearer understanding of the various types of binding and non-binding international agreements that exist at present, and to better anticipate the preparation, application and interpretation of such agreements;

BEARING IN MIND the importance of having Guidelines available that can provide a concrete and detailed set of definitions, points of understanding, and best practices that Member States may employ in negotiating, concluding, or applying different types of international agreements and in their interaction with the various actors in charge of these matters (States, governmental entities and territorial units), thereby providing a deeper knowledge in these fields and lowering the risk of any future difficulties with other States in the region and around the world,

RESOLVES:

1. To adopt the “Guidelines of the Inter-American Juridical Committee for Binding and Non-binding Agreements” contained in the document “Binding and Non-binding Agreements: Final Report” (CJI/doc. 614/20 rev.1 corr.1), attached to this resolution.

2. To thank Dr. Duncan B. Hollis for his work as rapporteur of the theme and for presenting this report and the final version of the Guidelines.

3. To send this resolution and the Guidelines contained in the document “Binding and Non-binding Agreements: Final Report” (CJI/doc.614/20 rev.1 corr.1) to the General Assembly of the OAS for its due knowledge and consideration.

4. To request the Department of International Law, in its role as Technical Secretariat of the Inter-American Juridical Committee, to provide the “Guidelines of the Inter-American Juridical Committee for Binding and Non-binding Agreements” with the best possible dissemination and promotion among all interested parties.

This resolution was unanimously approved at the regular session on the 7th of August 2020, by the following Members: Drs. Luis García-Corrochano Moyano, Eric P. Rudge, Mariana Salazar Albornoz, José Antonio Moreno Rodríguez, Milenko Bertrand-Galindo Arriagada, Duncan B. Hollis, Alix Richard, George Rodrigo Bandeira Galindo, Miguel A. Espeche-Gil, Íñigo Salvador Crespo and Ruth Correa Palacio.

* * *

CJI/doc. 614/20 rev.1 corr.1

BINDING AND NON-BINDING AGREEMENTS: FINAL REPORT

(presented by professor Duncan B. Hollis)

INTRODUCTION

1. This is my seventh and final report on binding and non-binding agreements. It includes my final version of the *Guidelines on Binding and Non-Binding Agreements, with Commentaries*

(“*Guidelines*”). As such, it culminates a nearly four-year project that began at the behest of several OAS Member States’ foreign ministry legal advisers in October 2016.¹

2. The project found its impetus in the rising number of non-traditional international agreements, including non-binding agreements among States as well as agreements in both binding and non-binding form concluded by government ministries and sub-national territorial units. These agreements may be praised for offering States and other actors novel ways to coordinate and cooperate. At the same time, however, their diversity (and complexity) have generated significant questions over what legal status these agreements have, who can conclude them, how to identify them, and what legal effects, if any, they generate. Without further clarifications and elaboration, there are legitimate concerns that existing agreement practices may lead to inconsistent understandings, unaligned expectations, and even disputes among OAS Member States, to say nothing of the international community as a whole.

3. The *Guidelines* appended to this report aim to assist Member States in clarifying the various types of binding and non-binding international agreements in existence today and better aligning expectations with respect to making, implementing, and interpreting them. Thus, the *Guidelines* offer a concrete and detailed set of definitions, understandings and “best practices” for OAS Member States (and others) to employ in pursuing different types of international agreements and engaging with the various actors – States, government agencies, and sub-national territorial units – who make them. Their ambition, however, remains modest. The *Guidelines* do not aspire to codify or develop international law (although they do note several areas where existing international law is unclear or disputed). Rather, they provide a set of voluntary understandings and practices Member States may employ to improve knowledge in these areas and reduce the risk of future difficulties with other States in the region and beyond.

4. The focus of the *Guidelines* are international agreements – commitments regarding future behavior to which participants give their mutual consent. Such agreements may be divided into two basic categories: (i) agreements that are “binding” in the sense of being governed by law—whether international law (i.e., “treaties”) or domestic law (i.e., “contracts”)—and (ii) agreements that are not binding (i.e., “political commitments”) in the sense that law provides none of the normative force for the agreement’s formation or operation. The rule of law governs the first set of agreements, while the second is a matter of international politics or morality.

5. Although at least one Member State would only reference the term “agreement” as a synonym for treaties, I have declined to do so here precisely because of how important it is for Member States (and others) to appreciate the concept of agreement itself. Agreements take many forms, not all of which are legal. Individually, we regularly make agreements that are legally binding (e.g., a contract) and others that are not (e.g., to take a trip with friends). There are differences between these to be sure, but they also overlap in a key way: all agreements encompass commitments to some future behavior to which agreement participants offer their mutual consent. The present *Guidelines* employ the concept of agreement in just this sense – to identify the common element that unites treaties, contracts and political commitments (and distinguishes them from unilateral commitments or instruments that lack any commitments to future behavior).² In other words, all

¹ At that meeting, Brazil’s representative suggested that the Committee study “the practice of States regarding memorandum of understanding” with an eye to developing general principles or best practices. Chile and Peru suggested that the study should include agreements concluded by actors other than the State itself, whether institutions (or agencies) of the State’s government or sub-national actors such as provisional/municipal governments. See *Annual Report of the Inter-American Juridical Committee to the Forty-Seventh Regular Session of the General Assembly*, OEA/Ser.G CP/doc.5261/17 (31 Jan. 2017) 153, 160 (*Summarized Minute*, Meeting with the Legal Advisors of the Ministries of Foreign Affairs, 5 Oct. 2016).

² Thus, the topic of unilateral declarations forms a distinct subject of study (and practice) in international law. See, e.g., ILC, *Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations*, [2006] YBILC, vol. II, Pt. II, 369. I have also not been able to identify a single word that captures the concept as well as “agreement” itself. The term “instrument” is both under- and over-inclusive. Instruments can be unilateral, and even when concluded mutually, may lack the commitment (*consensus ad idem*) essential to all treaties, political commitments and contracts. Similar problems arise with the term “commitment” since it fails to encompass the concept of mutuality that all

treaties may be agreements, but not all agreements are treaties.³ This is not to suggest that States cannot employ the term “agreement” in other ways. Indeed, as the *Guidelines* note, States often employ the term as a signal of their intention to create a legally binding commitment. Still, these *Guidelines* aim to have Member States focus more on the under-examined concept of agreement itself and to separate that concept from the terminology States and other subjects of international law employ in practice. As a result, I have endeavored throughout the *Guidelines* to qualify the term “agreement” to allow its usage as *both* a broad-overarching concept *and* as a particular indicator of a treaty in practice.

6. Annex I includes a full set of the *Guidelines*. Annex II provides individual commentaries for each of these guidelines to contextualize them and assist Member States and others in understanding the relevant legal questions, issues, and practices. The *Guidelines* themselves are divided into six sections.

- i. **Definitions** – The *Guidelines* begin by defining the elements that comprise each of the three main categories of international agreement – treaties, political commitments and contracts. They also define an “inter-institutional agreement” based on the actors who form it.
- ii. **Capacity** – The *Guidelines* examine the capacities of “State institutions” (e.g., government ministries or agencies as well as sub-national territorial units such as provinces or regions) to conclude treaties, political commitments, and contracts. These guidelines propose best practices aimed at ensuring transparency and communication among States as to the extent of authority these State institutions have to make various forms of international agreement.
- iii. **Methods of Identification** – The *Guidelines* take the view that any agreement’s status should be identified on a case-by-case basis. They flag the possibility that different states may use different tests to determine whether their agreement constitutes a treaty. As a result, the *Guidelines* propose a best practice whereby States will be more transparent in their negotiations (or in the agreement text itself) as to their understanding of an agreement’s status. Moreover, the *Guidelines* offer a list of suggested terms, provisions, and features indicative of treaties, political commitments, and contracts. Note, however, these suggestions are merely indicative *not* determinative of an agreement’s status. There are no magic words to convert a text into a treaty (or a political commitment, or a contract). Still, the more States are aware of the usual terms and forms employed in each agreement type, the more they may avoid misaligned understandings on the nature of the agreement reached.
- iv. **Procedures:** These *Guidelines* confirm the freedom evidenced in State practice given the plurality of internal procedures used by States to approve the negotiation and conclusion of treaties (as that term is used in international law) and contracts. With respect to States willing to authorize their institutions to conclude treaties or contracts, the *Guidelines* propose a best practice where States put in place procedures not only for conferring such authority, but also for communicating it to other States with whose institutions such

these forms of agreement involve. Other potential terms like “accords” or “contracts” are either too obscure or already operate as terms of art in international relations, making them ill-suited substitutes.

³ The idea that treaties are *not* a synonym for—but rather a sub-category of—international agreements was a common refrain in the International Law Commission’s seminal work on the law of treaties. See Henry Waldock, *Fourth Report on the Law of Treaties* [1965] YBILC, vol. II, 11, ¶1; [1965] YBILC, vol. I, 10, ¶10 (Briggs); J.L. Brierly, *First Report on the Law of Treaties*, [1950] YBILC, vol. II, 227 (¶¶19-20). The 1969 Vienna Convention on the Law of Treaties that emerged from the ILC’s work is also widely understood to use the term “agreement” in a conceptual sense, rather than by reference to a particular instrument such as a treaty. See MARK E. VILLIGER, COMMENTARY ON THE 1969 VIENNA CONVENTION ON THE LAW OF TREATIES 77 (2009) (“The term ‘agreement’ can refer to (i) the concrete, i.e., a particular text in written form; or (ii) the abstract, i.e., the ‘meeting of the minds’ consisting of an offer and its acceptance between the parties (the *synallagma*). ‘Agreement’ in Article 2, subpara. 1(a) in itself contains no particular requirements and refers to the latter.”); see also J.L. Weinstein, *Exchange of Notes*, 29 BRITISH Y.B.K. INT’L L. 205, 226 (1952) (“It is the consensus of the parties which is the essence of the agreement and not the instrument, no matter what form it takes”).

agreements might be concluded. For non-binding agreements, the *Guidelines* endorse two best practices in particular: (i) that States develop and implement policies and procedures for authorizing the negotiation and conclusion of political commitments by the State, its ministries, or sub-national territorial units for which it is responsible; and (ii) that each State consider having a national registry or database for cataloging its political commitments.

- v. **Effects:** The *Guidelines* summarize the different legal effects, if any, that State practice suggests treaties, political commitments, and contracts may generate. These guidelines propose a best practice where States contemplate what effects, if any, they want to generate as one way to determine what type of agreement to pursue. Separately, these guidelines propose another best practice where the concluding institutions or the States who are responsible for them delineate to whom legal responsibility is owed under an inter-institutional agreement (whether by having both States agree that they are each legally responsible for the performance of the inter-institutional agreement *or* by having both States or the institutions involved agree to limit any responsibility to the concluding institutions themselves).
- vi. **Training and Education:** These guidelines recommend a set of concrete training and education efforts to ensure that relevant actors within a Foreign Ministry are capable of identifying and differentiating among the various types of binding and non-binding agreements. The *Guidelines* also recommend that training and education include any other institutional actors authorized to make international agreements by the State with which they are associated.

7. The *Guidelines* presented here have resulted from multiple rounds of careful analysis and communications with various OAS Member States as well as officials from other States and international organizations. My first, preliminary report to the Committee's 91st Regular Session, for example, relied heavily on existing scholarship and studies of State practice to explore the topic, identify the issues in need of attention, and elaborate a questionnaire for Member States.⁴ After the conclusion of that Session, I shortened and revised the draft questionnaire with able assistance from the OAS Secretariat for Legal Affairs' Department of International Law and the Committee's Chair. On 8 September 2017, the Department of International Law sent the questionnaire to all Member States in Note OEA/2.2./70/17. My second report reviewed the responses to that questionnaire.⁵ Specifically, it assessed responses received from Argentina, Brazil, Colombia, the Dominican

⁴ See Duncan B. Hollis, *Preliminary Report on Binding and Non-Binding Agreements*, OEA/Ser.Q, CJI/doc.542/17 (24 July 2017) ("Preliminary Report").

⁵ See Duncan B. Hollis, *Binding and Non-Binding Agreements: Second Report*, OEA/Ser.Q, CJI/doc.553/18 (6 February 2018) ("Second Report").

Republic, Ecuador, Jamaica, Mexico, Peru, Uruguay, and the United States.⁶ Since then, Canada, Panama, and Paraguay provided responses, which were reflected in my subsequent reports.⁷

8. My third report offered initial draft text for the first three sections of the *Guidelines*: (a) definitions; (b) the capacity to conclude different types of binding and non-binding agreements; and (c) methods for identifying agreement types.⁸ My fourth report continued that effort with additional guidelines on (d) domestic procedures; (e) the international legal effects, if any, of concluding different international agreements; and (f) training and education programs.⁹ My fifth report provided the first, complete “draft” of *The Guidelines for Binding and Non-Binding Agreements, with Commentary*.¹⁰ My previous report, the sixth provided a revised version of the *Guidelines*, which reflected the extensive questionnaire response received from the Government of Canada. After the meetings of the Committee’s 96th Regular Session in March 2020, the Committee agreed to circulate my sixth report and the attached *Guidelines* to Member States for any further views or feedback.¹¹ Three States—Argentina, Chile, and Colombia—took the opportunity to respond, and their additional views inspired several adjustments and clarifications to this final draft of the *Guidelines*.¹²

9. Thus, this final draft of the *Guidelines* makes several changes in response to the most recent round of inputs. Among the most prominent adjustments are the following:

- Following the suggestion of Colombia, I adopted a revised definition of inter-institutional agreement (*Guideline 1.5*) to make clear that it only covers agreements among institutions of different States. Inter-agency agreements within a single State lie outside the purview of

⁶ See Argentina, *OAS Questionnaire Answer: Binding and Non-Binding Agreements* (“Argentina Response”); Brazil, *Binding and Non-Binding Agreements: Questionnaire for the Member States* (“Brazil Response”); Colombia, *Responses to the Questionnaire for the Member States of the Organization of American States (OAS) Binding and Non-Binding Agreements: Practice of the Colombian State* (“Colombia Response”); Dominican Republic, Legal Department, Ministry of Foreign Affairs, *Replies to the Questionnaire on Binding and Non-Binding Agreements*, 29 Nov. 2017 (“Dominican Republic Response”); Government of Ecuador, Department of Foreign Affairs and Trade, *Questionnaire: Binding and Non-Binding Agreements* (“Ecuador Response”); Jamaica, *Note from the Mission of Jamaica to the O.A.S. to the Department of International Law, O.A.S. Secretariat for International Affairs*, Ref. 06/10/12, 14 December 2017 (“Jamaica Response”); Reply of Mexico, *Report of the Inter-American Juridical Committee, Binding and Non-Binding Agreements: Questionnaire for the Member States* (“Mexico Response”); Peru, General Directorate of Treaties of the Ministry of Foreign Affairs, *Report of the Inter-American Juridical Committee, Binding and Non-Binding Agreements: Questionnaire for the Member States* (“Peru Response”); Uruguay, *Reply to questionnaire on “binding and non-binding agreements”* (“Uruguay Response”); United States, *Inter-American Juridical Report: Questionnaire for the Member States* (“U.S. Response”).

⁷ See Canada, Treaty Law Division, Global Affairs Canada, *Binding and Non-Binding Agreements: A Questionnaire for OAS Member States—Submission by Canada* (9 Sept. 2019) (“Canada Response”); Panama, *Note from the Republic of Panama, Ministry of Foreign Affairs – International Legal Affairs and Treaties Directorate to the Department of International Law of the Secretariat for Legal Affairs of the Organization of the American States, N.V.-A.J._MIRE-201813176* (“Panama Response”); Paraguay, *Note from the Permanent Mission of Paraguay to the Department of Law of the Secretariat for Legal Affairs, OAS General Secretariat*, No. 635-18/MPP/OEA (12 June 2018) (“Paraguay Response”).

⁸ See Duncan B. Hollis, *Binding and Non-Binding Agreements: Third Report*, OEA/Ser.Q, CJI/doc.563/18 (15 July 2018) (“Third Report”).

⁹ See Duncan B. Hollis, *Binding and Non-Binding Agreements: Fourth Report*, OEA/Ser.Q, CJI/doc.580/19 (11 February 2019) (“Fourth Report”).

¹⁰ See Duncan B. Hollis, *Binding and Non-Binding Agreements: Fifth Report*, OEA/Ser.Q, CJI/doc.593/19 (22 July 2019) (“Fifth Report”).

¹¹ See Duncan B. Hollis, *Binding and Non-Binding Agreements: Sixth Report*, OEA/Ser.Q, CJI/doc.600/20 (3 February 2020) (“Sixth Report”).

¹² Directorate of International Legal Affairs, *Comments of the Republic of Colombia on the Document “Binding and Non-Binding Agreements: Sixth Report (CJI/Doc.600/20)* (May 2020); *Diplomatic Note from the Permanent Mission of the Argentine Republic to the Organization of American States*, OEA 074 (3 June 2020); Chile, *Comments on the Sixth Report of the Inter-American Juridical Committee on Binding and Non-Binding Agreements*, DIGEJUR-JFL 27.05.20 (27 May 2020).

these *Guidelines* (and can in any event be regulated adequately by the relevant State's domestic law and practice).

- I did not, however, adopt Colombia's suggestion to define a treaty in *Guideline 1.2* as an agreement "that generates legally binding obligations for its parties" on the theory that "the practice of subjects of international law confirms that this is the case." Although I agree that treaties can generate legally binding obligations, I do not believe that this is an inherent aspect of treaties. Treaties may bind States in other ways, whether by constituting new international organizations or permitting certain behaviors without requiring them. I have added additional text to footnote 35 to make these points explicitly.
- At the suggestion of Argentina, I reworked the Commentary to *Guideline 1.2* (re the definition of a treaty) to make clear that certain international courts and tribunals (as well as several scholars) have found that a treaty may exist via an unsigned document, rather than suggesting this as a blanket rule of international law. I did not, however, follow the request to remove all references to certain cases (e.g., *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*) (Judgment, 20 April 2010) [2010] I.C.J. Rep. ¶¶132-5) where they involved one or more OAS Member States. Even if the reasoning and/or holding of these cases is controversial, they remain relevant, subsidiary sources of international law. As such, States and other stakeholders should be aware of such decisions even if they do not agree with their reasoning or results. Thus, I have attempted to convey their contents just as I have other relevant international legal sources and materials that implicate binding and non-binding agreements. I continue to believe it is important for all States to be aware of the various (and sometimes conflicting or controversial) positions and doctrines to facilitate best practices that may avoid or limit future misunderstandings or conflicts.
- At the suggestion of a Committee Member, I clarified in several places that contracts may be governed by non-State law rather than only national law; I also made it clear that the parties *or* an adjudicator may decide to apply non-state law (the latter scenario being possible where the contracting parties do not select the contract's governing law).
- I added further details on Colombia's distribution of the treaty-making power in the Commentary to *Guideline 2.2*, including its President's exclusive capacity in matters concerning treaties. Similarly, I chose to emphasize that Colombia does not authorize (or recognize) inter-institutional agreements by its government ministries or sub-national territorial units as binding under international law.
- In response to a suggestion from a Committee Member, I added a reference to the contents of VCLT Art. 7(1)(b) in the commentary to *Guideline 2.1* and *2.2*, especially since in the latter case it is unclear how international law would empower State institutions to conclude agreements binding on the State as a whole.
- At Chile's request, I added them to the roster of States that employ the intent test to identify the existence of a treaty in the commentary accompanying *Guideline 3.2*.
- In addition, at Chile's suggestion, I added to the Chart accompanying *Guideline 3.4* certain additional clauses (on accession and denunciation) evidencing a treaty. I also added references to other evidence of a treaty in the accompanying Commentary. Similarly, at Colombia's suggestion I included a reference to "memoranda of intent" in the same Commentary as well. Finally, at the request of a Committee member, I added further discussion on how otherwise mandatory verbs like "shall" might be softened to avoid indicating an intent to be legally bound (e.g., "shall work towards").
- In the Commentary for *Guideline 4.1*, at the suggestion of Colombia, I added its name to the list of States that include review by a Constitutional Court among its national treaty-making procedures.
- I added a paragraph in the Commentary on *Guideline 4.5* to highlight different ways States might publicize their relevant procedures, including a proposal by Colombia that the OAS set up a web site to which States could provide relevant summaries of their treaty-making procedures and practices.

- In response to a comment from Chile, I made clear in the Commentary to *Guideline 4.6.1* that States' public registries of binding agreements should conform to the domestic regulations of each State for access to public information.
- I have continued to use the language of primary and secondary rules/regimes in the *Guidelines* although at least one Committee member suggested that this language was not necessary. Given recent scholarly disputes over whether other areas of international law (e.g., customary international law) have any secondary rules, I believe it is useful to highlight the availability of such rules for treaties.¹³
- In the Commentary for *Guideline 5.3*, I added clarifying language at the suggestion of Chile to make clear that in most scenarios where a political commitment has legal effects (e.g., incorporation into a treaty, or domestic law) there will be a need for an intervening, discretionary exercise of political will by the State concerned.
- At the suggestion of a Committee member, I added further discussion to the Commentary to *Guideline 5.4.2* to make it clear that normally it will be the State, rather than a State institution, that will decide whether and when to invoke international legal dispute settlement with regard to an inter-institutional agreement.
- In response to comments from Argentina, I deleted a reference in footnote 232 to their position on State responsibility for inter-institutional agreements since Argentina's position is that State institutions are not subjects of international law capable of concluding treaties. Rather, Argentina appears to regard any inter-institutional agreements as binding under the institutions' "respective competencies" not international law.
- In footnote 239, at Colombia's request, I added clarifying language to emphasize that since Colombia does not recognize any treaty-making capacity for its institutions, issues of international legal responsibility do not apply to inter-institutional agreements concluded by Colombian institutions (they are, rather, governed by domestic ("public") law with legal responsibility limited under that law to the concluding institution.
- Colombia suggested that if the relevant parties consent to limit responsibility under an inter-institutional agreement to the institutions concluding it, this should be reflected in the inter-institutional agreement itself. I have adjusted *Guideline 5.4.3* to reflect this idea as a best practice.
- Finally, at the request of a Committee member, I substituted the term "subsequent conduct" throughout the *Guidelines* with the more widely used term – "subsequent practice."

In addition, as this is my last opportunity to work on these *Guidelines*, I have also combed over them and made several adjustments to ensure consistency in style, footnoting, and formatting. Finally, the *Guidelines* have been re-titled to make clear that they are a product of the Inter-American Juridical Committee itself rather than the OAS as a whole.

10. At each stage, my reports have benefited from the insight and expertise of the other members of the IAJC; their questions, suggestions, and commentary have improved the existing *Guidelines* immeasurably.¹⁴ At the same time, the inputs of Member States have been critical to both the *Guidelines* and the accompanying *Commentary*. Of course, the most important of these inputs are the thirteen formal responses to the Committee's questionnaire as well as formal comments on the earlier draft of the *Guidelines*.

11. A number of important insights, however, were also derived from more informal comments and suggestions received from representatives of States (both in the region and outside of

¹³ See, e.g., Monica Hakimi, *Making Sense of Customary International Law*, 118 MICHIGAN L. REV. (forthcoming 2020).

¹⁴ For the records of these questions and comments, see, e.g., *Summarized Minute*, 91st Regular Session of the Inter-American Juridical Committee, 9 Aug. 2017; *Summarized Minute*, 92nd Regular Session of the Inter-American Juridical Committee, 27 Feb. 2018; *Summarized Minute*, 93rd Regular Session of the Inter-American Juridical Committee, 9, 15-16 Aug. 2018; *Summarized Minute*, 94th Regular Session of the Inter-American Juridical Committee, 20 Feb. 2019. *Summarized Minute* 6, 95th Regular Session of the Inter-American Juridical Committee, 7 Aug. 2019; *Summarized Minute* 3, 96th Regular Session of the Inter-American Juridical Committee, 4 March 2020.

it) and international organizations. In particular, I would note with appreciation the generous questions, suggestions, and commentaries that I received during the Committee's second meeting with Foreign Ministry Legal Advisers in August 2018.¹⁵ I have also been fortunate to present my work in various United Nations settings. Most notably, the *Guidelines* reflect additional input received from presentations made on this project: (i) to the UN General Assembly's 29th Informal Meeting of Legal Advisers held on 23 October 2018, and (ii) to an informal working group of treaty experts and practitioners hosted by the governments of Canada and Colombia in concert with UN General Assembly events marking the 50th Anniversary of the conclusion of the Vienna Convention on the Law of Treaties on 23-24 May 2019. In addition, I am particularly appreciative of the Government of Canada's willingness to share with me the results of their own survey of binding and non-binding agreements, which included the views of two OAS Member States (Canada and Mexico) as well as inputs from Finland, Germany, Israel, Japan, the Republic of Korea, and Spain.

12. Finally, I must thank the Committee's Secretariat—the OAS Department of International Law—for their constant support, advice and efforts to ensure this project moved forward and helped engage Member States and others in its work. Jean Michel Arrighi, OAS Secretary for Legal Affairs; Dante Negro, Director of the Department of International Law; and Luis Toro, head of the OAS Treaty Office, have each played critical roles at various points to support my efforts as Rapporteur to pursue this project and bring it to fruition with the completion of these *Guidelines*.

13. With the Committee's approval, I believe the time has come to conclude this agenda item and publicize its results. In particular, I believe it would be appropriate for the Committee to approve this report and to forward the *Guidelines* to the OAS General Assembly for their consideration, and possible endorsement. The Committee may wish to release a copy of this report so that it can benefit not only the OAS Member States but other States and international organizations. It has been a true privilege to work on this project over the last four years. I hope that the result is a final product that is not only of high quality but which also provides useful information and practical guidance to OAS Member States and other stakeholders in treaty law and practice.

* * *

ANNEX I

GUIDELINES OF THE INTER-AMERICAN JURIDICAL COMMITTEE FOR BINDING AND NON-BINDING AGREEMENTS

States and other international actors currently form and apply a diverse range of international agreements. At the broadest level, current practice divides between (i) agreements that are "binding" and thus governed by law, whether international law (treaties) or domestic law (contracts), and (ii) agreements that are not binding ("political commitments") and for which law provides no normative force. States also increasingly sanction agreement-making by their national ministries or sub-national territorial units (*e.g.*, provinces, regions).

The current range of binding and non-binding agreements offers great flexibility; agreements can be crafted to correspond to the context presented, including the authors' interests, legal authorities, and resources. At the same time, international law and practice suggests significant ambiguities (or outright differences) in how States authorize or understand their different international agreements.

This current state of affairs has generated substantial confusion among States' representatives and a potential for misunderstandings and disputes. Two States may conclude an agreement that one State regards as a non-binding political commitment and the other regards as a treaty (or a contract). The potential for confusion and disputes is compounded when State ministries or sub-national territorial units conclude agreements. Some States authorize these entities to conclude treaties (that is, binding agreements governed by international law) while others deny that they may do so (either because of a lack of authority or on the premise that international law does not afford these actors a treaty-making capacity).

¹⁵ See OAS Inter-American Juridical Committee, *Joint Meeting of the Inter-American Juridical Committee with Legal Advisers of OAS Member States, Summary Minutes*, 93rd Regular Session, Wednesday 15 August 2018.

The present *Guidelines* seek to alleviate current confusion and the potential for conflict among States and other stakeholders with respect to binding and non-binding agreements. They provide a set of working definitions, understandings, and best practices on who makes such agreements, how they may do so, and what, if any, legal effects may be generated. The aim is to assist States in understanding the contours and consequences of pursuing and concluding different types of international agreements. Increasing knowledge and awareness of best practices may allow States to avoid or mitigate the risks for confusion or conflict they currently face.

At the same time, these *Guidelines* in no way aspire to a legal status of their own. They are not intended to codify international law nor offer a path to its progressive development. Indeed, in several places they note areas where existing international law is unclear or disputed. The *Guidelines* leave such issues unresolved. Their aim is more modest—to provide a set of voluntary understandings and practices that Member States may employ among themselves (and perhaps globally) to improve understanding of how international agreements are formed, interpreted, and implemented, thereby reducing the risk of future disagreements or difficulties.

1. Definitions for Binding and Non-Binding Agreements

1.1 Agreement – Although its usage in a text is often indicative of a treaty, the concept may be defined more broadly to encompass mutual consent by participants to a commitment regarding future behavior.

1.2 Treaty – A binding international agreement concluded between States, State institutions, or other appropriate subjects that is recorded in writing and governed by international law, regardless of its designation, registration, or the domestic legal procedures States employ to consent to be bound by it.

1.3 Political Commitment – A non-legally binding agreement between States, State institutions, or other actors intended to establish commitments of an exclusively political or moral nature.

1.4 Contract – A voluntary arrangement between two or more parties that constitutes a binding agreement governed by national law or non-State law.

1.5 Inter-Institutional Agreement – An agreement concluded between State institutions, including national ministries or sub-national territorial units, of two or more States. Depending on its terms, the surrounding circumstances, and subsequent practice, an inter-institutional agreement may qualify as a treaty, a political commitment, or a contract.

2. The Capacity to Conclude International Agreements

2.1 The Treaty-Making Capacity of States: States have the capacity to conclude treaties and should do so in accordance with the treaty's terms and whatever domestic laws and procedures regulate their ability to consent to be bound.

2.2 The Treaty-Making Capacity of State Institutions: States may—but are not required to—authorize their institutions to make treaties on matters within their competence and with the consent of all treaty partners.

2.3 Confirming Treaty-Making Capacity: States or authorized State institutions contemplating a treaty with another State's institution should endeavor to confirm that the institution has sufficient competence over the treaty's subject-matter and authorization from the State of which it forms a part to enter into a treaty on such matters.

2.4 The Capacity to Make Political Commitments: States or State institutions should be able to make political commitments to the extent political circumstances allow.

2.5 Inter-State Contracting Capacity: A State should conclude contracts with other willing States in accordance with the contract's governing law.

2.6 Inter-Institutional Contracting Capacity: A State institution should conclude contracts with willing foreign State institutions in accordance with its own domestic law and, if different, the contract's governing law.

3. Methods for Identifying Binding and Non-Binding Agreements

3.1 Identifying Agreements: States and other agreement-makers should conclude their international agreements knowingly rather than inadvertently. As a threshold matter, this means States

must differentiate their agreements (whether binding or non-binding) from all other commitments and instruments. The following best practices may help States do so:

3.1.1 States should rely on the actual terms used and the surrounding circumstances to discern whether or not an agreement will arise (or has already come into existence).

3.1.2 When in doubt, a State should confer with any potential partner(s) to confirm whether a statement or instrument will—or will not—constitute an agreement (and, ideally, what type of agreement it will be).

3.1.3 A State should refrain from affiliating itself with a statement or instrument if its own views as to its status as an agreement diverge from those of any potential partner(s) until such time as they may reconcile their differences.

3.2 Identifying the Type of Agreement Concluded: The practice of States, international organizations, international courts and tribunals, and other subjects of international law currently suggests two different approaches to distinguishing binding from non-binding agreements.

- First, some actors employ an “intent test,” a subjective analysis looking to the authors’ manifest intentions to determine if an agreement is binding or not (and if it is binding, whether it is a treaty or a contract).
- Second, other actors employ an “objective test” where the agreement’s subject-matter, text, and context determine its binding or non-binding status independent of other evidence as to one or more of its authors’ intentions.

The two methods often lead to the same conclusion. Both tests look to (a) text, (b) surrounding circumstances, and (c) subsequent practice to identify different types of binding and non-binding agreements. Nonetheless, different results are possible particularly where the text objectively favors one conclusion (*e.g.*, a treaty) but external evidence suggests another (*e.g.*, contemporaneous statements by one or more participants that a treaty was not intended). The objective test would prioritize the text and language used in contrast to the intent test’s emphasis on what the parties’ intended. Such different outcomes may, in turn, lead to confusion or conflicts. Certain practices can mitigate such risks:

3.2.1 If a State has not already done so, it should decide whether it will employ the intent test or the objective test in identifying its binding and non-binding agreements.

3.2.2 A State should be open with other States and stakeholders as to the test it employs. It should, moreover, be consistent in applying it, not oscillating between the two tests as suits its preferred outcome in individual cases. Consistent application of a test will help settle other actors’ expectations and allow more predictable interactions among them.

3.2.3 A State should not, however, presume that all other States or actors (including international courts and tribunals) will use the same test as it does for identifying binding and non-binding agreements. A State should thus conclude—and apply—its international agreements in ways that mitigate or even eliminate problems that might lead these two tests to generate inconsistent conclusions. States can do this by aligning subjective and objective evidence to point towards the same outcome.

3.3 Specifying the Type of Agreement Concluded: To avoid inconsistent views on the binding status of an agreement or its governing law, participants should endeavor to specify expressly the type of agreement reached whether in the agreement text or in communications connected to its conclusion. In terms of text, States may use the sample provisions listed in Table 1 to specify an agreement’s status. Given the diversity of international agreements, however, States may also adapt other standard formulations as well.

Table 1: Specifying the Type of Agreement Concluded	
Type of Agreement	Sample Text
Treaty	<i>“This agreement shall establish relationships among the parties governed by international law and is intended to give rise to rights and obligations according to its terms.”</i>
Political Commitment	<i>“This [title] is not binding under international law and creates no legally binding rights or obligations for its Participants.”</i>
	<i>“This [title] is a political commitment whose provisions are not eligible for registration under Article 102 of the Charter of the United Nations.”</i>
Contract	<i>“This agreement shall be governed by the law of [list State] [and/or list non-State source of law].”</i>

3.4 Evidence Indicative of an Agreement’s Status as Binding or Non-Binding: Where agreement participants do not specify or otherwise agree on its status, States should use (or rely on) certain evidence to indicate the existence of a treaty or a non-binding political commitment, including:

- (a) the actual language employed;
- (b) the inclusion of certain final clauses;
- (c) the circumstances surrounding the agreement’s conclusion; and
- (d) the subsequent practice of agreement participants.

Table 2 lists the language and clauses States should most often associate with treaties as well as those they may most often associate with political commitments.

3.5 Evidence Indicative of a Contract: Where agreement participants do not specify or otherwise agree on its status, States should use (or rely on) a governing law clause to establish the existence of a contract. States should presume that a clearly binding text among States that is silent as to its status is a treaty rather than a contract.

3.6 Ambiguous or Inconsistent Evidence of an Agreement’s Status: Where evidence indicative of an agreement’s status is ambiguous or inconsistent, the agreement’s status should depend on a holistic analysis that seeks to reconcile both the objective evidence and the participants’ shared intentions. States should seek to share the results of their holistic analysis with agreement partners. In some cases, States may wish to consider more formal dispute resolution options to clarify or resolve the binding or non-binding status of their agreement(s).

Table 2: Identifying Binding and Non-Binding Agreements		
Agreement Features	Evidence Indicative of a Treaty	Evidence Indicative of a Political Commitment
Titles	Treaty Convention Agreement Covenant Protocol	Understanding Statement of Intent Arrangement Declaration
Authors	Parties	participants
Terms	articles obligations undertakings rights	commitments expectations principles paragraphs understandings
Language of Commitment (verbs)	shall agree must undertake Done at [place] this [date]	should seek promote intend expect carry out take understand accept
Language of Commitment (adjectives)	binding authentic authoritative	political voluntary effective equally valid
Clauses	Consent to be Bound Accession Entry into Force Depositary Amendment Termination Denunciation Compulsory Dispute Settlement	Coming into Effect Coming into Operation Differences Modifications

4. Procedures for Making Binding and Non-Binding Agreements

4.1 Different Domestic Procedures for Treaties: Every State should remain free to develop and maintain one or multiple domestic processes for authorizing the negotiation and conclusion of treaties by the State or its institutions. These procedures may be derived from the State's constitution, its laws, or its practice. Different States may employ different domestic procedures for the same treaty.

4.2 Developing Domestic Procedures for Political Commitments: States should develop and maintain procedures for authorizing the conclusion of political commitments by the State or its institutions. Although non-binding agreements, political commitments could benefit from a practice where States have procedures that confirm:

- (a) a commitment's non-binding status;

- (b) the appropriateness of using a non-binding form in lieu of a binding one, such as where time constraints or uncertainty counsel against locking the State into a legal agreement; and
- (c) notification to—and coordination with—relevant State institutions, including a State’s Foreign Ministry.

4.3 Developing Domestic Approval Procedures for Inter-State Contracts: For States that engage in inter-State contracting, they should develop and maintain procedures for approving the conclusion of any such contracts. As a best practice, States should include:

- (a) information on how the State will identify the governing law of the contract; and
- (b) mechanisms for confirming that governing law with the other contracting State(s) to avoid future conflicts.

4.4. Domestic Approval Procedures for Binding Inter-Institutional Agreements: States should have procedures by which they can assure appropriate authorization for any institutions (whether government ministries, sub-national units, or both) with the capacity to conclude a treaty governed by international law. States should also have procedures by which they can assure appropriate authorization for their institutions (whether government ministries, sub-national units, or both) to conclude a contract, whether under that State’s own domestic law, the domestic law of another State, or non-State law.

4.4.1 Such procedures should identify how a State differentiates for itself whether the institution is concluding a treaty or a contract; and]

4.4.2 Such procedures should include mechanisms for confirming in advance that the other foreign institution concurs as to the type and legally binding status of the inter-institutional agreement to be concluded.

4.5 Publicizing Institutional Capacities to Conclude Binding Agreements

4.5.1 A State should make public which, if any, of its institutions may be authorized to conclude treaties, including specifying whether it may do so on behalf of the State as a whole or in its own name.

4.5.2 A State should make public which, if any, of its institutions may be authorized to conclude contracts, including specifying whether it may do so on behalf of the State as a whole, or in its own name.

4.5.3 A State may make this information public generally, such as by posting its procedures on-line, or specifically, by communicating with other States or State institutions as to its institutions’ capacities and the relevant procedures under which they operate.

4.6 Publicizing Registries of Binding and Non-Binding Agreements

4.6.1 *National Registries of Binding Agreements.* States should create and maintain public registries for all binding agreements of the State and State institutions.

4.6.2 *National Registries of Political Commitments.* States should maintain a national registry of all, or at least the most significant, political commitments of the State and State institutions.

5. Legal Effects of Binding and Non-Binding Agreements

5.1 The Legal Effects of State Treaty-Making: States and their institutions should approach their treaty-making understanding that their consent to a treaty will generate at least three different sets of legal effects:

5.1.1 *Primary International Legal Effects* – Pursuant to the fundamental principle of *pacta sunt servanda* treaties impose an obligation to observe their terms in good faith.

5.1.2 *Secondary International Legal Effects* – the existence of a treaty triggers the application of several secondary international legal regimes, including the law of treaties, State responsibility, and any other specific regimes tied to the treaty’s subject-matter.

5.1.3 *Domestic Legal Effects* – A State’s domestic legal order may, but is not required to, accord domestic legal effects to the State’s treaties. States should be prepared to explain to other States and stakeholders what domestic legal effects follow its own treaty-making.

5.2 The Legal Effects of Contracts: States and their institutions should approach their agreement-making understanding that the legal effects of a contract will depend on the contract’s

governing law, including issues of performance, displacement of otherwise applicable domestic law, and enforcement.

5.3 The Effects of Political Commitments: States and their institutions should approach their agreement-making understanding that a political commitment will not produce any direct legal effects under international or domestic law; political commitments are not legally binding.

5.3.1 States and their institutions should honor their political commitments and apply them with the understanding that other States will expect performance of a State's political commitment whether due to their moral force or the political context in which they were made.

5.3.2 States and their institutions should be aware that, even if non-binding, a political commitment may still have legal relevance to a State. For example, political commitments may be:

- (a) incorporated into other international legal acts such as treaties or decisions of international organizations;
- (b) incorporated into domestic legal acts such as statutes or other regulations; or
- (c) the basis for interpretation or guidance of other legally binding agreements.

5.4 The Legal Effects of an Inter-Institutional Agreement: States should expect the legal effects of an inter-institutional agreement to track to whatever category of agreement—a treaty, a political commitment, or a contract—it belongs.

5.4.1 States may presume that inter-institutional treaties and contracts will trigger the responsibility of the State as a whole.

5.4.2 Nonetheless, States should be sensitive to the fact that in certain cases, a State or its institution may claim that legal responsibility for an inter-institutional agreement extends only to the State institution entering into the agreement.

5.4.3 Where States have differing views of the legal responsibility accompanying a binding inter-institutional agreement, they should align their views, whether by both agreeing to have the States bear responsibility under the inter-institutional agreement or agreeing to limit responsibility to the institutions concluding it and reflect this agreement in the text of the respective instrument.

5.4.4 States should exercise any available discretion to avoid giving legal effects to an inter-institutional agreement where one or more of the institutions involved did not have the requisite authority (or general capacity) to make such an agreement from the State of which it forms a part.

6. Training and Education Concerning Binding and Non-Binding Agreements

6.1 Training and Education Relating to Binding and Non-Binding Agreements by States: States should undertake efforts to train and educate relevant officials within a Foreign Ministry and other relevant ministries or agencies to ensure that they are capable of:

- (i) identifying and differentiating among the various types of binding and non-binding agreements;
- (ii) understanding who within the State has the capacity to negotiate and conclude which agreements;
- (iii) following any and all domestic procedures involved in such agreement making; and
- (iv) appreciating the legal and non-legal effects that can flow from different types of international agreements.

6.2 Training and Education Relating to Inter-Institutional Agreements: Where a State authorizes inter-institutional agreements, it should undertake efforts to train and educate relevant officials of a government agency or sub-national territorial unit to ensure that they are capable of:

- (i) identifying and differentiating among the various types of binding and non-binding agreements;
- (ii) understanding who within the State has the capacity to negotiate and conclude which agreements;
- (iii) following any and all domestic procedures involved in such agreement making; and
- (iv) appreciating the legal and non-legal effects that can flow from different types of international agreements.

**GUIDELINES OF THE INTER-AMERICAN JURIDICAL COMMITTEE FOR
BINDING AND NON-BINDING AGREEMENTS
(WITH COMMENTARY)**

States and other international actors currently form and apply a diverse range of international agreements. At the broadest level, current practice divides between (i) agreements that are “binding” and thus governed by law, whether international law (treaties) or domestic law (contracts), and (ii) agreements that are not binding (“political commitments”) and for which law provides no normative force. States also increasingly sanction agreement-making by their national ministries or sub-national territorial units (*e.g.*, provinces, regions).

The current range of binding and non-binding agreements offers great flexibility; agreements can be crafted to correspond to the context presented, including the authors’ interests, legal authorities, and resources. At the same time, international law and practice suggests significant ambiguities (or outright differences) in how States authorize or understand their different international agreements.

This current state of affairs has generated substantial confusion among States’ representatives and a potential for misunderstandings and disputes. Two States may conclude an agreement that one State regards as a non-binding political commitment and the other regards as a treaty (or a contract). The potential for confusion and disputes is compounded when State ministries or sub-national territorial units conclude agreements. Some States authorize these entities to conclude treaties (that is, binding agreements governed by international law) while others deny that they may do so (either because of a lack of authority or on the premise that international law does not afford these actors a treaty-making capacity).

The present *Guidelines* seek to alleviate current confusion and the potential for conflict among States and other stakeholders with respect to binding and non-binding agreements. They provide a set of working definitions, understandings, and best practices on who makes such agreements, how they may do so, and what, if any, legal effects may be generated. The aim is to assist States in understanding the contours and consequences of pursuing and concluding different types of international agreements. Increasing knowledge and awareness of best practices may allow States to avoid or mitigate the risks for confusion or conflict they currently face.

At the same time, these *Guidelines* in no way aspire to a legal status of their own. They are not intended to codify international law nor offer a path to its progressive development. Indeed, in several places they note areas where existing international law is unclear or disputed. The *Guidelines* leave such issues unresolved. Their aim is more modest—to provide a set of voluntary understandings and practices that Member States may employ among themselves (and perhaps globally) to improve understanding of how international agreements are formed, interpreted, and implemented, thereby reducing the risk of future disagreements or difficulties.

1. Definitions for Binding and Non-Binding Agreements

1.1 Agreement – *Although its usage in a text is often indicative of a treaty, the concept may be defined more broadly to encompass mutual consent by participants to a commitment regarding future behavior.*

Commentary: The concept of an agreement has not been well defined in international law. In preparing the draft that became the 1969 Vienna Convention on the Law of Treaties (VCLT), the International Law Commission (ILC) gave the idea little attention even as they used it regularly throughout their discussions.¹⁶ Nor did any of the OAS Member States responding to the Committee’s

¹⁶ Although they used the term “agreement” throughout their work, none of the four ILC Special Rapporteurs offered a specific definition for the term. See J.L. Brierly, *First Report on the Law of Treaties* [1950] YBILC, vol. II, 227 (¶¶19-20); Hersch Lauterpacht, *First Report on the Law of Treaties* [1953] YBILC, vol. II, 90, 93-94 (Art. 1); Gerald G. Fitzmaurice, *First Report on the Law of Treaties*

Questionnaire address it. Nonetheless, there are at least two core elements to any agreement: *mutuality* and *commitment*.

In terms of *mutuality*, the First ILC Rapporteur for the Law of Treaties, J.L. Brierly, noted that defining treaties as “agreements” excludes “unilateral declarations.”¹⁷ Agreements thus do not arise *sua sponte* from a single actor, but are the product of a mutual interchange or communication.¹⁸ Brierly also identified the “essence of a ‘treaty’” not in the instrument or document recording it, but in the “agreement or *consensus* brought into existence by the act of its formal conclusion.”¹⁹ By linking agreement to a “consensus,” the concept is thus tied to having a “meeting of the minds” or *consensus ad idem*.²⁰

Beyond *mutuality*, the *consensus ad idem* must also incorporate some commitment. *Commitment* refers to the idea that an agreement encompasses shared expectations of future behavior. It is not enough for an agreement’s participants to explain their respective positions or even list an “agreed view” – commitments elaborate how participants will change their behavior from the status quo or continue existing behavior.²¹ Of course, the precision of commitments can vary; some encompass clear rules that participants are able to fully implement *ex ante* while others are standards where compliance requires an *ex post* analysis in light of all the circumstances. Nor should the *mutuality* of commitments be confused with reciprocity. Agreements can be one-sided; they do not

[1956] YBILC, vol. II, 117; Humphrey Waldock, *First Report on the Law of Treaties* [1962] YBILC, vol. II, 31 (Art. 1(a)).

¹⁷ Brierly, *supra* note 1, at 227, ¶¶19-20. International law has come to treat certain unilateral declarations as a form of international legal commitment. In the *Nuclear Tests* case, the ICJ found that France was bound under international law by public statements of its President and Foreign and Defense Ministers to cease nuclear tests in the South Pacific, obviating the need for the Court to rule on the case at hand. *Nuclear Tests (Australia/New Zealand v. France)* [1974] I.C.J. Rep. 267–8, ¶¶43–50. Based on this ruling, in 2006, the ILC articulated a basic *Guiding Principle*—“Declarations publicly made and manifesting the will to be bound may have the effect of creating legal obligations.” ILC, *Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations, with commentaries thereto* (2006) 58th Session, U.N. Doc. A/61/10, Guiding Principle 1. Examples of unilateral declarations include Egypt’s 1957 Declaration on the Suez Canal, Jordan’s 1988 waiver of claims to the West Bank, U.S. representations before the WTO Dispute Settlement Body in the *1974 Trade Act* case, and (at least potentially) Cuba’s 2002 declarations about the supply of vaccines to Uruguay. VR Cedeño, ‘Eighth Report on Unilateral Acts of States’ (26 May 2005) U.N. Doc. A/CN.4/557; *United States—Sections 301–310 of the Trade Act of 1974* (Report of the Panel) (1999) WT/DS152/R [7.118]–[7.123].

Sources are divided, however, on whether unilateral declarations depend on the intent of the declaring State or a principle of estoppel in cases of good faith, *i.e.*, reasonable reliance by the statement’s intended audience. Compare *Case concerning the Frontier Dispute (Burkina Faso v. Republic of Mali)* (Judgment) [1986] I.C.J. Rep. 573–4, ¶39; *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)* (Judgment) (1 Oct 2018), General List 153, 47, ¶148 (existence of a binding unilateral declaration “all depends on the intention of the State in question”); with ILC, *Report of the Working Group on Unilateral Acts of States* (20 July 2006) U.N. Doc. A/CN.4/L.703, Introductory note, Preamble (noting intent and estoppel as two competing theories of the source of obligation for unilateral declarations).

¹⁸ Duncan B. Hollis and Joshua J. Newcomer, “Political” Commitments and the Constitution, 49 VIRG. J. INT’L L. 507, 522 (2009); JAN KLABBERS, THE CONCEPT OF TREATY IN INTERNATIONAL LAW 51-53 (1996).

¹⁹ [1950] YBILC, vol. II, 227, ¶¶19-20.

²⁰ See, *e.g.*, J.L. Weinstein, *Exchange of Notes*, 29 BRITISH YBK INT’L L. 205, 226 (1952) (“It is the consensus of the parties which is the essence of the agreement and not the instrument, no matter what form it takes”); MARK E. VILLIGER, COMMENTARY ON THE 1969 VIENNA CONVENTION ON THE LAW OF TREATIES 77 (2009) (same); Kelvin Widdows, *What is an Agreement in International Law?*, 50 BRITISH YBK INT’L L. 117, 119 (1979) (same).

²¹ See, *e.g.*, Hollis and Newcomer, *supra* note 3, at 522; KLABBERS, *supra* note 3, at 51-53; Kal Raustiala, *Form and Substance in International Agreements*, 99 AM. J. INT’L L. 581, 584–85 (2005).

require an exchange of commitments (or what the common law calls “consideration”); a single commitment by one participant to another participant (or participants) can suffice.²²

1.2 Treaty *A binding international agreement concluded between States, State institutions, or other appropriate subjects that is recorded in writing and governed by international law, regardless of its designation, registration, or the domestic legal procedures States employ to consent to be bound by it.*

Commentary: The *Guidelines*’ definition of a treaty derives from the one employed in VCLT Article 2(1)(a):

For the purposes of the present Convention: (a) “treaty” means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.²³

This definition is widely accepted. The International Court of Justice (ICJ) has suggested it reflects customary international law.²⁴ Most States endorse it.²⁵ And scholars regularly cite it when defining the treaty concept.²⁶

At the same time, the VCLT treaty definition is widely recognized as incomplete. It fails to include agreements by other subjects of international law. And yet, no one seriously disputes that agreements with or among international organizations qualify as treaties.²⁷ The VCLT definition also references issues that once were controversial (*i.e.*, that an exchange of notes may constitute a treaty) that are no longer open to serious question.²⁸ Treaties can exist in a single instrument or two or more related instruments.²⁹

The *Guidelines*’ treaty definition thus expands upon the VCLT definition to accommodate modern treaty law and practice. For the purposes of these *Guidelines*, a treaty has the following elements: (i) an international agreement; (ii) concluded; (iii) between States, State institutions, or other appropriate subjects; (iv) that is recorded in writing; (v) governed by international law; and

²² See Duncan B. Hollis, *Defining Treaties*, in DUNCAN B. HOLLIS (ED.), THE OXFORD GUIDE TO TREATIES 20 (2nd ed., 2020).

²³ Vienna Convention on the Law of Treaties (opened for signature 23 May 1969, entered into force 27 January 1980) 1155 U.N.T.S. 331, Art. 2(1)(a) (“VCLT”).

²⁴ See *Maritime Delimitation in the Indian Ocean (Somalia v. Kenya)* (Judgement) [2017] I.C.J. Rep. 3, 21, ¶42; *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria; Equatorial Guinea Intervening)* [2002] I.C.J. Rep. 249, ¶263. Other international tribunals take a similar position. See, *e.g.*, *Texaco v. Libyan Arab Republic*, 53 INT’L L. REP. 389, 474 (1977).

²⁵ Duncan B. Hollis, *Second Report on Binding and Non-Binding Agreements*, OEA/Ser. Q, CJI/doc.553/18 (6 February 2018) ¶8 (“Hollis, Second Report”) (9 of 10 OAS Member States responding accept VCLT definition in their own treaty law and practice, while the tenth State did not address the issue); Duncan B. Hollis, *A Comparative Approach to Treaty Law and Practice*, in NATIONAL TREATY LAW & PRACTICE 9 (Duncan B. Hollis et al., eds., 2005) (among 19 representative States, “virtually every state surveyed” accepts the VCLT treaty definition).

²⁶ See, *e.g.*, ANTHONY AUST, MODERN TREATY LAW & PRACTICE 14 (3rd ed., 2013); MALGOSIA FITZMAURICE AND OLUFEMI ELIAS, CONTEMPORARY ISSUES IN THE LAW OF TREATIES 6-25 (2005); KLABBERS, *supra* note 3, at 40.

²⁷ See Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (adopted 21 March 1986, not yet in force) 25 ILM 543 (1986) (“1986 VCLT”); A. MCNAIR, THE LAW OF TREATIES 755 (1961) (“Fifty years ago it might have been possible to say that only States could conclude treaties, but today any such statement would be out of date.”).

²⁸ The 1935 *Harvard Draft Convention on the Law of Treaties*, for example, originally excluded exchanges of notes from its treaty definition. 29 AM. J. INT’L L. (SUPP.) 653, 698 (1935). Today, however, treaties can be comprised by single or repeated exchanges of notes. See, *e.g.*, Philippe Gautier, *Article 2, Convention of 1969*, in THE VIENNA CONVENTION ON THE LAW OF TREATIES 35 (Oliver Corten and Pierre Klein, eds., 2011); VILLIGER, *supra* note 5, at 200.

²⁹ VCLT Art. 2(1)(a).

without regard to (vi) its designation; (vii) registration; or (viii) the domestic legal procedures States employ to consent to be bound by it.

- (i) *An international agreement...* A treaty constitutes a specific type of agreement: *all treaties are agreements, but not all agreements qualify as treaties*.³⁰ It is not clear, however, what other work the “international” qualifier does. It has not been employed to limit the subject-matter for treaty-making. Today, requiring an “international” agreement may best be read to reinforce the treaty’s scope, whether in terms of cabining who can conclude one (*i.e.*, those actors with international legal personality) or the international legal basis for the obligations that result.³¹
- (ii) *... concluded ...* When is an international agreement concluded? The term may be used loosely to refer to any point from the negotiations’ end to a “definitive engagement that the parties are bound by the instrument under international law.”³² Both the VCLT and State practice define conclusion as the point at which parties adopt the treaty text or when it is opened for signature.³³ For purposes of these *Guidelines*, it is important to emphasize that a treaty can be “concluded” even if it has not entered into force (or never will).³⁴ Conclusion and entry into force are not synonymous.³⁵ Thus, it is important to differentiate the legal effects that arise when a treaty merely exists from those effects imposed upon its entry into force (*i.e.*, *pacta sunt servanda* only applies to the latter subset of treaties).³⁶
- (iii) *... between States, State institutions and other appropriate subjects ...* The VCLT defines a treaty as an agreement between States. In practice, a State may conclude a treaty directly in its own name (an inter-State agreement) or via one of its institutions – whether the national government as a whole (a government-to-government agreement), a national ministry (an agency-to-agency agreement), or via a sub-national territorial unit (*e.g.*, a province-to-province agreement).³⁷ At the same time, the VCLT recognizes that “other subjects of international law” may also conclude treaties.³⁸ This category encompasses entities such as international organizations, which form the subject of the 1986 Vienna Convention.³⁹ In addition, other subjects of international law may have sufficient legal personality to conclude treaties on certain subjects (*i.e.*, insurgent groups can conclude treaties regarding the conduct of hostilities).⁴⁰ These *Guidelines* employ the label “appropriate subjects” to acknowledge that not all entities that aspire to be subjects of international law may qualify as such. Some States

³⁰ See VILLIGER, *supra* note 5, at 77. This point was repeated throughout the ILC’s preparatory work. See Brierly, *First Report*, *supra* note 1, at 227, ¶19; Humphrey Waldock, *Fourth Report on the Law of Treaties* [1965] YBILC, vol. II, 11, ¶1; [1965] YBILC, vol. I, 10, ¶10 (Briggs).

³¹ This follows from Waldock’s earlier understanding. Waldock, *First Report*, *supra* note 1, at 31 (Art. 1(a)); see also VILLIGER, *supra* note 5, at 78.

³² Waldock adopted the latter view. Waldock, *First Report*, *supra* note 1, at 30, ¶9. Brierly supported linking a treaty’s conclusion to the establishment of the agreed text in final form. J.L. Brierly, *Second Report on the Law of Treaties* [1951] YBILC, vol. II, 70-71; see also VILLIGER, *supra* note 5, at 78-9.

³³ The VCLT’s structure favors this view – VCLT Articles 7-10 discuss the “text of the treaty” when referring to full powers, adoption and authentication of a treaty text, but to the “treaty” in those articles (Arts. 11-18) elaborating various means of expressing consent to be bound. The 1986 VCLT adopts the same approach. See RICHARD GARDINER, *TREATY INTERPRETATION* 232-33 (2nd ed., 2015); AUST, *supra* note 11, at 86.

³⁴ Unperfected treaties—those that do not enter into force—are thus still considered treaties. See, *e.g.*, 1986 VCLT, *supra* note 12 (not yet in force).

³⁵ AUST, *supra* note 11, at 86; VILLIGER, *supra* note 5, at 79.

³⁶ See, *e.g.*, VCLT Art. 24(4) (noting various provisions of “a treaty” that “apply from the time of the adoption of its text” rather than on entry into force).

³⁷ See, *e.g.*, Hollis, *Second Report*, *supra* note 10, at 8, ¶24 (United States and Jamaica report support for agency-level agreements as treaties); *id* at ¶26 (Mexican law permits federal entities to conclude inter-institutional agreements governed by international law).

³⁸ See VCLT Art. 3 (VCLT’s treaty definition does not preclude the legal force of agreements concluded by States with other subjects of international law or among such subjects); Waldock, *First Report*, *supra* note 1, at 30.

³⁹ 1986 VCLT, *supra* note 12.

⁴⁰ See Tom Grant, *Who Can Make Treaties? Other Subjects of International Law*, in DUNCAN B. HOLLIS (ED.), *THE OXFORD GUIDE TO TREATIES* 150-51 (2nd ed., 2020).

claim that a State institution (*e.g.*, overseas territory, regional government) can be treated as an “other subject” of international law, that is, capable of concluding a treaty directly in their own name. That position is, however, disputed and these *Guidelines* do not purport to resolve that dispute.⁴¹ Thus, the treaty definition simply lists State institutions among the actors that conclude treaties without clarifying whether they can do so independently or only as agents of a State.

- (iv) ... *that is recorded in writing* ... The VCLT requires all treaties to be in writing – with permanent and readable evidence of the agreement. But it does not impose any particular requirements of form.⁴² International courts and tribunals have, for example, found agreements need not be signed to qualify as treaties.⁴³ Nor must they be published.⁴⁴ There are, moreover, many different ways to record a treaty, including the most obvious, traditional means – typewriting and printing. Modern communication methods, including e-mail, texts, social media accounts (*e.g.*, Twitter), may provide additional mechanisms for recording future treaties.⁴⁵

The VCLT excludes oral agreements from its ambit (primarily for practical reasons).⁴⁶ Today, many—but not all—States understand customary international law to allow for oral treaties.⁴⁷ U.S. domestic law, for example, provides that oral international agreements, once made, must be committed to writing.⁴⁸ By providing that a treaty be “*recorded in writing*,” these *Guidelines* avoid endorsing the oral treaty concept specifically. At the same time, however, the definition may include any oral treaties once they are subsequently recorded in written form.

- (v) ... *and governed by international law*,... This is the essential criterion of the treaty definition. Simply put, *if an international agreement is governed by international law, it is a treaty*. The challenge, however, lies in understanding what this phrase means. Using the “governed by international law” qualifier clearly distinguishes treaties from two other categories of international agreement: contracts (agreements governed by national or non-State law) and political commitments (agreements not governed by law at all).⁴⁹ But it is not clear precisely

⁴¹ Hollis, Second Report, *supra* note 10, at 8, ¶25 (Argentina denies government ministries can conclude treaties since they do not qualify as subjects of international law).

⁴² AUST, *supra* note 11, at 16.

⁴³ *Pulp Mills on the River Uruguay (Argentina v. Uruguay)* (Judgment, 20 April 2010) [2010] I.C.J. Rep. ¶¶132-50 (treating an unsigned joint press communique as an “agreement”); Gautier, *supra* note 13, at 38; AUST, *supra* note 11, at 20-21.

⁴⁴ FITZMAURICE AND ELIAS, *supra* note 11, at 23-24; KLABBERS, *supra* note 3, at 85-86.

⁴⁵ AUST, *supra* note 11, at 16 (supporting the idea that a treaty could be concluded via e-mail).

⁴⁶ See VCLT Art. 3. The ILC emphasized it focused exclusively on written agreements “in the interests of clarity and simplicity” and had “not intended to deny the legal force of oral agreements under international law or to imply that some of the principles contained in later parts of the Commission’s draft articles on the law of treaties may not have relevance in regard to oral agreements.” [1966] YBILC, vol. II, 189, ¶7.

⁴⁷ See, *e.g.*, Hollis, *A Comparative Approach*, *supra* note 10, at 12-13 (surveying treaty law and practice of Canada, Germany, Japan, Switzerland, and the United Kingdom); Directorate of International Legal Affairs, *Comments of the Republic of Colombia on-Binding Agreements: Sixth Report (CJI/Doc.600/20)* (May 2020) (“Colombia 2020 Comments”) (“Colombia... has the practice that treaties must be in writing in their entirety, whether in a single instrument, or in two or more related instruments ...”); see also Jan G. Brower, *The Netherlands*, in NATIONAL TREATY LAW & PRACTICE 486 (Duncan B. Hollis et al., eds., 2005) (Dutch Government has opposed practice of oral agreements since 1983); K. Thakore, *India*, in NATIONAL TREATY LAW & PRACTICE 352 (Duncan B. Hollis et al., eds., 2005) (oral agreements “are not resorted to in Indian practice”); Neville Botha, *South Africa*, in NATIONAL TREATY LAW & PRACTICE 583 (Duncan B. Hollis et al., eds., 2005) (neither South African law nor practice makes any provision for oral agreements and they lack official sanction).

⁴⁸ See 1 U.S.C. §112b.

⁴⁹ Both distinctions were raised at the ILC and in the Vienna Conference. On the distinction between treaties and contracts, see [1966] YBILC, vol. II, 189, ¶6; [1959] YBILC, vol. II, 95, ¶3; U.N. Conference on the Law of Treaties, *Official Records: Documents of the Conference*, U.N. Doc. A/CONF.39/11/Add.2, 9, ¶6 (“Vienna Conference, Official Records”). On the distinction between treaties and political commitments see [1959] YBILC, vol. II, 96-97, ¶8 (“instruments which, although

how it does so. For starters, the idea that treaties are governed by international law may be read as more of a consequence of treaty-making rather than a constitutive element of the concept.⁵⁰ And, as discussed further below, States and scholars have never fully resolved how to decide which agreements are governed by international law. Today, there are two different camps. The first favors subjective indicators to discern when an agreement is governed by international law based on the intention of the States (or other subjects) who make it. In other words, an agreement is a treaty where that reflects the shared intentions of its authors. In contrast, a second camp contemplates an agreement's objective markers (whether its subject-matter or the use of certain text) as more indicative of when it is governed by international law. As a practical matter, therefore, applying this treaty criterion evidences an "oscillation between subjective and objective approaches."⁵¹

- (vi) ... *regardless of its designation* ... International law has not imposed any requirements of form or formalities for concluding treaties.⁵² Thus, a treaty need not bear the title "treaty." In practice, treaties bear many different titles, including "act," "agreed minute," "charter," "convention," "covenant," "declaration," "memorandum," "note verbale," "protocol," "statute," and, of course, "treaty." International tribunals have classified instruments as treaties notwithstanding the agreement being housed in very different forms. In *Qatar v. Bahrain*, the International Court of Justice analyzed the 1990 "Agreed Minutes" of a meeting among Foreign Ministers as a treaty.⁵³ More recently, in the *Pulp Mills* case, the Court concluded that a press release constituted a binding agreement for the parties.⁵⁴

At most, an agreement's title may provide some indication of its status. It may, for example, indicate its authors' intentions. When two States use the title "treaty," it suggests that they anticipated making one. But, the fact that an agreement bears a particular title is not determinative of whether it is (or is not) a treaty. Thus, although some States like Canada prefer to use "Memorandum of Understanding" (MOU) as the title for their political commitments, the fact that an agreement bears that heading does not automatically make it non-binding. MOUs can still be treaties.⁵⁵

they might look like treaties, merely contained declarations of principle or statements of policy, or expressions of opinion, or *voeux*, would not be treaties"); Vienna Conference, Official Records, *supra*, at 111-112; U.N. Conference on the Law of Treaties, *Summary Records of First Session*, U.N. Doc. A/CONF.39/11, 23, ¶26 ("Vienna Conference, First Session") (Mexican delegate distinguishes treaties from "declarations of principle or political instruments"); *id* at 28, ¶65.

⁵⁰ That perspective was clearly at work in the ILC's origination of the phrase. See [1959] YBILC, vol. II, 95, ¶3. Thus, treaties have sometimes been defined in terms of the legal relationships they create, or as Colombia suggests, the "legally binding obligations" they generate for parties. Colombia 2020 Comments, *supra* note 47; Brierly *First Report*, *supra* note 1, at 223 (describing how agreements establish "a relationship under international law"). Although these are accurate characterizations of what treaties can do, these *Guidelines* do not incorporate them into the treaty definition on the theory that either element may be under-inclusive. Treaties, for example, can do more than generate obligations; they can also permit behavior without requiring it. Similarly, treaties may create new entities and empower them in lieu of obligating States parties.

⁵¹ Martti Koskenniemi, *Theory: implications for the practitioner*, in *THEORY AND INTERNATIONAL LAW: AN INTRODUCTION* 19-20 (Philip Allott et al., eds., 1991).

⁵² See, e.g., *An Arbitral Tribunal Constituted Under Annex VII to the 1982 United Nations Convention on the Law of the Sea (The Republic of Philippines v. The People's Republic of China)*, Award on Jurisdiction, PCA Case No. 2013-19 (Oct. 29, 2015) ¶214 ("*South China Sea Arbitration*") ("The form or designation of an instrument is ... not decisive of its status as an agreement."); *South West Africa (Ethiopia/Liberia v. South Africa)* (Preliminary Objections) [1962] I.C.J. Rep. 319, 331 ("terminology is not a determinant factor as to the character of an international agreement").

⁵³ *Maritime Delimitation and Territorial Questions (Qatar v. Bahrain)* (Jurisdiction and Admissibility) [1994] I.C.J. Rep. 112, ¶21-30.

⁵⁴ *Pulp Mills*, *supra* note 28, at 138.

⁵⁵ Global Affairs Canada, *Policy on Tabling of Treaties in Parliament*, at <https://treaty-accord.gc.ca/procedures.aspx?lang=eng>, Annex C ("Canada Treaty Policy") ("while Canadian recent practice dictates that Memorandum of Understanding or Arrangements are not legally binding, not all States view these instruments as such. Simply labeling a document as a "Memorandum of Understanding" or "Arrangement" is not enough to ensure that it will not be considered as an agreement

- (vii) ... *registration* ... UN Charter Article 102(1) requires that “[e]very treaty and every international agreement entered into by any Member of the United Nations after the present Charter comes into force shall as soon as possible be registered with the Secretariat and published by it.”⁵⁶ Does this mean all unregistered agreements are not treaties? The answer is clearly in the negative.⁵⁷ Neither the UN Charter nor the VCLT explicitly tie treaty registration to an agreement’s legal status. For its part, the United Nations is careful to regularly indicate that the Secretariat’s acceptance of an instrument for registration “does not confer on the instrument the status of a treaty or an international agreement if it does not already have that status.”⁵⁸ Similarly, a failure to register will generally not deny an agreement the status of a treaty. As the ICJ noted in *Qatar v. Bahrain*, “[n]on-registration or late registration ... does not have any consequence for the actual validity of the agreement, which remains no less binding upon the parties.”⁵⁹ In short, registration is not a required criterion for defining treaties.

Even if it is not determinative, the fact of registration may be indicative of a treaty’s existence. Like the title, registration indicates an intent (albeit of only the registering party) that the agreement will be a treaty. But since States do not regularly monitor treaty registrations, registration often says little, if anything, about the other State(s)’ intentions. Nonetheless, the ICJ recently signaled in *Somalia v. Kenya* that registration is among the factors it considers in identifying treaties, particularly where the other party did not subsequently object to registration.⁶⁰

governed by public international law”); Canada, Treaty Law Division, Global Affairs Canada, *Binding and Non-Binding Agreements: A Questionnaire for OAS Member States—Submission by Canada* (9 September 2019) (“Canada Response”); Treaty Law Division, Global Affairs Canada, *Working Group on Treaty Practice, Survey on Binding and Non-Binding International Instruments* (18 Sept. 2019) 5, 23 (“Working Group on Treaty Practice”) (Canada, Finland, Germany, Israel, Japan, Korea, Mexico, and Spain all indicate that the title of an agreement is not determinative of its binding or non-binding status, although Spain noted that it does not consider MOUs to be legally binding in accordance with Article 43 of its Treaty Law 25/2014); Chile, *Comments on the Sixth Report of the Inter-American Juridical Committee on Binding and Non-Binding Agreements*, DIGEJUR-JFL 27.05.20 (27 May 2020) (Chile Comments 2020) (based on terms used in an instrument and its content, a memorandum of understanding may qualify as a treaty); Colombia 2020 Comments, *supra* note 47 (“it is clear that the name does not determine the legal nature of the instrument. Thus, an agreement called a memorandum of understanding may in fact be a treaty, or one called a treaty may actually amount only to a political commitment, depending on the content of the instrument”).

Moreover, States may ascribe a different status to the same MOU as the United States and its treaty partners did with respect to certain defense-related MOUs. The United States considered them treaties, while its partners (Australia, Canada, and the United Kingdom) regarded them as non-binding, political commitments. See J. McNeill, *International Agreements: Recent US-UK Practice Concerning the Memorandum of Understanding*, 88 AM. J. INT’L L. 821 (1994).

⁵⁶ UN Charter, Art. 102(1); see also VCLT Art. 80(1) (“Treaties shall, after their entry into force, be transmitted to the Secretariat of the United Nations for registration or filing and recording, as the case may be, and publication”). In contrast, Article 18 of the League of Nations’ Covenant went further, indicating that “a treaty or international engagement” was not binding until registered.

⁵⁷ Accord AUST, *supra* note 11, at 302-03; FITZMAURICE AND ELIAS, *supra* note 11, at 23; KLABBERS, *supra* note 3, at 84; D.N. Hutchinson, *The Significance of the Registration or Non-Registration of an International Agreement in Determining Whether or Not it is a Treaty*, CURRENT LEGAL PROBLEMS 257, 265-276 (1993).

⁵⁸ U.N. Secretary-General, *Note by the Secretariat*, in 2856 TREATIES AND INTERNATIONAL AGREEMENTS REGISTERED OR FILED AND RECORDED WITH THE SECRETARIAT OF THE UNITED NATIONS VII (2012). In cases of doubt, the United Nations favors registration. But it has occasionally refused to register a text that it did not consider a treaty.

⁵⁹ *Qatar v. Bahrain*, *supra* note 38, at ¶29. The failure to register or publish a 1983 U.S.-U.K. MOU was, however, a factor in the Heathrow Arbitration’s decision to regard it as non-legally binding. *Award on the First Question, US/UK Arbitration concerning Heathrow Airport User Charges* (1992) ch. 5, 155, ¶6.5.

⁶⁰ See *Somalia v. Kenya*, *supra* note 9, at 21, ¶42 (citing Kenya’s registration and the lack of any Somali objection for five years as among the reasons the MOU qualified as a treaty).

- (viii) ... or the domestic legal procedures States employ to consent to be bound by it. The definition of a “treaty” may vary depending on the context in which is used. For purposes of these *Guidelines*, it is important to differentiate how Member States may define treaties for purposes of their domestic law and how international law and practice define the concept. As a matter of domestic law, some States limit the definition of a treaty to agreements authorized through specific domestic procedures, most often legislative approval.⁶¹ International agreements that do not require or receive legislative approval will not be defined as treaties for domestic law purposes, but rather comprise a discrete category. Many States refer to these as “executive agreements.”⁶² Other States, particularly those belonging to the Commonwealth, use the term “treaty” to refer to their international agreements even though they do not require any advance legislative authorization.⁶³ Thus, the fact that a State mandates a particular set of domestic procedures for an international agreement will not accurately predict its status as a binding agreement under international law. Hence, these *Guidelines* adhere to the broader formulation where a treaty encompasses *all* binding agreements governed by international law independent of how States decide to authorize their consent to it.

1.3 Political Commitment – *A non-legally binding agreement between States, State institutions, or other actors intended to establish commitments of an exclusively political or moral nature.*

Commentary: Unlike the treaty, international law lacks a widely accepted definition for political commitments. Nonetheless, States and scholars have recognized these non-binding agreements for more than a century, albeit under different headers: *e.g.*, gentleman’s agreements, informal agreements, *de facto* agreements, non-binding agreements, political texts, extra-legal agreements, non-legal agreements, international understandings, and political commitments.⁶⁴ The “political commitment” label captures all of these variations and corresponds to the category of non-binding international agreements generally.

⁶¹ Which agreements require legislative approval—if any—varies from State to State. *See, e.g.*, Hollis, *A Comparative Approach*, *supra* note 10 (surveying how nineteen States address a legislative role in treaty-making). Some States (*e.g.*, Dominican Republic) require legislative approval for all their international agreements. *See, e.g.*, Dominican Republic, Legal Department, Ministry of Foreign Affairs, *Replies to the Questionnaire on Binding and Non-Binding Agreements*, 29 Nov. 2017 (citing Art. 93 of the 2015 Constitution) (“Dominican Republic Response”). Other States, like Canada, do not require legislative approval to conclude any international agreement (legislation may, however, be required to implement certain agreements domestically). Canada Response, *supra* note 40, at 6. Other States adopt different domestic procedures for international agreements on different subjects or in light of other domestic authorities. *See, e.g.*, Government of Ecuador, Department of Foreign Affairs and Trade, *Questionnaire: Binding and Non-Binding Agreements* (“Ecuador Response”) (legislative approval required for certain international agreements on topics involving, for example, territorial or border delimitations, alliances, and trade agreements).

⁶² In the United States, for example, only agreements that receive “advice and consent” from a two thirds majority of the upper chamber of its legislature (the Senate) are called treaties; agreements approved by a simple majority of both chambers are called “congressional-executive agreements” while those done under the President’s own constitutional powers are titled “sole executive agreements.” In Chile, “executive agreements” are called “agreements in simplified form” and may be of two types: (a) agreements concluded by the president of the Republic to implement an international treaty in force and which do not deal with matters pertaining to law; or (b) agreements concluded by the president of the Republic in the exercise of his or her autonomous regulatory power, which, by definition, deals with matters outside the legal domain. In both types of agreement, no parliamentary debate is required for their approval. However, the legal nature of a treaty approved by the National Congress does not differ from those that do not require such approval; their legal value is the same. *See Chile Comments 2020, supra* note 40.

⁶³ *See* Canada Treaty Policy, *supra* note 40 (adopting a treaty definition that applies to “any type of instrument governed by public international law”).

⁶⁴ *See* KLABBERS, *supra* note 3, at 18; *see also* Hollis and Newcomer, *supra* note 3, at 516-24; Michael Bothe, *Legal and Non-Legal Norms—A Meaningful Distinction in International Relations*, 11 NETH. Y.B. INT’L L. 65, 95 (1980); Oscar Schachter, *The Twilight Existence of Nonbinding International Agreements*, 71 AM. J. INT’L L. 296 (1977).

Today, States clearly support the practice of concluding mutual commitments whose normative force lies outside of any sense of legal obligation.⁶⁵ The practice, moreover, appears to reflect increasing State usage of this vehicle for agreement.⁶⁶ Political commitments are, by definition, non-binding. These are commitments for which compliance derives not from law, but rather a sense of moral duty or the political relations from which the agreement originated. Political commitments stand in contrast to binding agreements governed by law whether international (for treaties) or national (for contracts). The difference is an important one, as the U.S. State Department described in referencing several political commitments concluded alongside the START Treaty:

An undertaking or commitment that is understood to be legally binding carries with it both the obligation of each Party to comply with the undertaking and the right of each Party to enforce the obligation under international law. A “political” undertaking is not governed by international law Until and unless a party extricates itself from its “political” undertaking, which it may do without legal penalty, it has given a promise to honor that commitment, and the other Party has every reason to be concerned about compliance with such undertakings. If a Party contravenes a political commitment, it will be subject to an appropriate political response.⁶⁷

Of course, political force may also attach to legal norms. A treaty breach can, for example, generate *both* legal and political consequences. Thus, what separates treaties from political commitments is the *additional* application of international law to treaties (*e.g.*, the law of State responsibility).

The concept of a political commitment should not, however, be confused with “soft law.” Although the term “soft law” has multiple meanings, it essentially views law not as a binary phenomenon—where something is/is not law—but as existing along a spectrum of different degrees of bindingness or enforceability ranging from soft to hard.⁶⁸ Soft law thus incorporates two different ideas: (a) norms that, while precise, are not intended to give rise to obligations under international law; and (b) legal norms incapable of enforcement because they are too vague or lack monitoring or enforcement mechanisms.⁶⁹ Political commitments involve normative agreements of the first, but not the second, type.

Moreover, as elaborated in Part 2 below, because political commitments do not depend on international or national law for their authority, they are not constrained by legal rules on capacity.

⁶⁵ See, *e.g.*, AUST, *supra* note 11, at 28-29, 35-39; MCNAIR, *supra* note 12, at 6; Bothe, *supra* note 49, at 66 (using empirical approach to reveal political commitment practice); PAUL REUTER, AN INTRODUCTION TO THE LAW OF TREATIES ¶74 (J. Mico and P. Haggemacher, trans., 1989). Debates continue from a jurisprudential view as to whether States can choose to form non-binding agreements. See KLABBERS, *supra* note 3, at 119 (“[I]f states wish to become bound, they have no choice but to become legally bound.”); Ian Sinclair, *Book Review—The Concept of Treaty in International Law*, 81 AM. J. INT’L L. 748 (1997) (disputing Klabbers’s views).

⁶⁶ Working Group on Treaty Practice, *supra* note 40, at 13, 31 (all 8 States surveyed – Canada, Finland, Germany, Israel, Japan, Korea, Mexico, and Spain – agree that the frequency and significance of political commitments is increasing).

⁶⁷ Transmittal of the Treaty with the U.S.S.R. on the Reduction and Limitation of Strategic Offensive Arms (START Treaty), Nov. 25, 1991, S. TREATY DOC. NO. 102-20, at 1086; CONG. RESEARCH SERV., COMM. ON FOREIGN RELATIONS, 106TH CONG., TREATIES AND OTHER INTERNATIONAL AGREEMENTS: THE ROLE OF THE UNITED STATES SENATE 58-59 (Comm. Print 2001); see also Canada Response, *supra* note 40, at 3.

⁶⁸ See, *e.g.*, Alan Boyle, *Some Reflections on the Relationship of Treaties and Soft Law*, 48 INT’L & COMP. L. Q. 901 (1999); Christine M. Chinkin, *The Challenges of Soft Law: Development and Change in International Law*, 38 INT’L & COMP. L. Q. 850, 865-66 (1989).

⁶⁹ See Prosper Weil, *Towards Relative Normativity in International Law*, 77 AM. J. INT’L L. 413, 414-415, n7 (1983). Others have offered a narrow definition limiting soft law to non-legally binding normative agreements. See, *e.g.*, Wolfgang H. Reinicke & Jan M. Witte, *Interdependence, Globalization and Sovereignty: The Role of Non-Binding International Legal Accords*, in COMMITMENT AND COMPLIANCE: THE ROLE OF NON-BINDING NORMS IN THE INTERNATIONAL LEGAL SYSTEM 76 n3 (Dinah Shelton, ed., 2000).

States can, of course, conclude political commitments. So too can sub-national territorial units.⁷⁰ But since political commitments do not derive from international law, there is no reason to limit political commitment-making to the entities that can conclude treaties.⁷¹

Thus, the *Guidelines*' definition of a political commitment includes all other actors who have the capacity to engage in a political or moral undertaking. This would presumably include business firms and/or individuals. Political commitments can be concluded, moreover, among a group of participants with a shared identity (*i.e.*, only States, or only firms). Or, they can be concluded by a range of different actors in a multi-stakeholder framework. For a recent example, see the thousand-plus signatories of the *Paris Call for Trust and Security in Cyberspace*, including States, firms, academic institutions, and various representatives of civil society.⁷²

1.4 Contract – *A voluntary arrangement between two or more parties that constitutes a binding agreement governed by national law or non-State law.*

Commentary: Like treaties (and unlike political commitments), contracts generate legally binding obligations. Instead of international law, however, a national legal system usually governs the formation, interpretation, and operation of a contract.⁷³ Alternatively, in a number of commercial contexts, parties (or an adjudicator) may select non-State law (*e.g.*, customs, usages and practices, principles, and *lex mercatoria*) to govern contracts in lieu of—or in addition to—a national legal system. The OAS Inter-American Juridical Committee recently prepared a *Guide on the Law Applicable to International Commercial Contracts in the Americas* that elaborates on the concept of a “contract.”⁷⁴ The definition used here is meant to parallel the definition in that *Guide*.⁷⁵

Contracts are usually defined as agreements by private actors (firms or individuals) that are governed by the relevant national legal system or private international law.⁷⁶ But as the ILC acknowledged, States may choose to use laws other than international law to govern their agreements.⁷⁷ Thus, public actors, whether States as a whole or their various institutions, may choose to conclude their agreements as contracts.

The existence of an inter-State (or inter-institutional) contract will often be a function of intent – did the parties intend their agreement to be governed by national or non-State law (and, if so, which one)? At the same time, however, the relevant national legal system will have its own rules on which

⁷⁰ See Duncan B. Hollis, *Unpacking the Compact Clause*, 88 TEXAS L. REV. 741 (2010) (surveying U.S. state agreements with foreign counterparts and noting that they have “heartily endorsed the political commitment form”).

⁷¹ See Hollis & Newcomer, *supra* note 3, at 521.

⁷² See *Paris Call for Trust and Security in Cyberspace* (12 November 2018) <https://www.diplomatie.gouv.fr/en/french-foreign-policy/digital-diplomacy/france-and-cyber-security/article/cybersecurity-paris-call-of-12-november-2018-for-trust-and-security-in>.

⁷³ Widdows, *supra* note 5, at 144-49. To say a contract is governed by domestic law does not mean it can never have international legal effect. Depending on the circumstances, international legal responsibility may follow a State's breach of contract. But, as the ILC noted, “this did not entail the consequence that the undertaking itself, or rather the instrument embodying it, was ... a treaty or international agreement. While the obligation to carry out the undertaking might be an international law obligation, the incidents of its execution would not be governed by international law.” [1959] YBILC, vol. II, 95, ¶3.

⁷⁴ See GUIDE ON THE LAW APPLICABLE TO INTERNATIONAL COMMERCIAL CONTRACTS IN THE AMERICAS, OAS/Ser. Q, CJI/RES. 249 (XCIV-O/19) (21 February 2019).

⁷⁵ *Id.* The one difference is that in the international commercial context, the definition emphasized the need for contracts to be “enforceable.” *Id.* at ¶108. Where, however, States conclude contracts *inter-se* (or even contracts among State agencies or sub-national institutions) enforceability may not be guaranteed; issues of sovereign immunity, for example may preclude a court from taking jurisdiction over a dispute under such contracts. As such, the current definition does not require enforceability for a contract to exist.

⁷⁶ Each nation's legal system dictates which contracts fall within its jurisdiction, whether because the parties choose that legal system or because of that system's contacts with the parties. Where contracts involve actors from different States, multiple States may assume jurisdiction over that agreement. In such cases, conflict of law rules dictate which legal system takes priority in cases of conflict.

⁷⁷ [1966] YBILC, vol. II, 189, ¶6.

agreements qualify as contracts and how to choose which law governs them.⁷⁸ Thus, there is a possibility that States could desire to create a contract that is invalid under the selected (or otherwise applicable) governing law. In such cases, there is an open question whether international law would step in to govern the agreement.⁷⁹

1.5 Inter-Institutional Agreement – *An agreement concluded between State institutions, including national ministries or sub-national territorial units, of two or more States. Depending on its terms, the surrounding circumstances, and subsequent practice, an inter-institutional agreement may qualify as a treaty, a political commitment, or a contract.*

Commentary: States currently use the term inter-institutional agreement to reference international agreements concluded among State institutions, whether (i) national ministries or agencies or (ii) sub-national territorial units like regions or provinces. Mexico, for example, defines the scope of its inter-institutional agreements as those “concluded in written form between any area or decentralized entity of the federal, state, or municipal public administration and one or more foreign government entities or international entities ...”⁸⁰ Peru indicates “‘interinstitutional agreements’ ... may be concluded, within their purview, by Peruvian governmental entities, including municipalities and regional governments, with their foreign counterparts or even with international organizations.”⁸¹

The concept of inter-institutional agreements has received relatively little attention from international law. Practice, moreover, appears quite diverse in terms of whether these agreements are viewed as binding or non-binding. Some States, like Mexico, classify inter-institutional agreements as “governed by public international law,” making them binding treaties as that term is defined in these *Guidelines*.⁸² Ecuador, in contrast, indicates that its “lower-level state institutions usually sign with their counterparts or with international organizations *non-binding* understandings known as inter-institutional instruments.”⁸³ Other States take a hybrid approach. Uruguay provides that inter-institutional agreements may be *either* binding or non-binding.⁸⁴ Peru suggests that inter-institutional

⁷⁸ In Paraguay, for example, Law No. 5393/201 governs the law applicable to international contracts. See *Note from the Permanent Mission of Paraguay to the Department of Law of the Secretariat for Legal Affairs, OAS General Secretariat*, No. 635-18/MPP/OEA (12 June 2018) (“Paraguay Response”). The Inter-American Juridical Committee has recently concluded a *Guide on the Law Applicable to International Commercial Contracts* that extensively addresses international contracting. Although it focuses on commercial contracts (rather than those involving States and State institutions with which these *Guidelines* deal), it contains extensive guidance of general utility for all international contracts. See INTERNATIONAL COMMERCIAL CONTRACTS GUIDE, *supra* note 59.

⁷⁹ Lauterpacht was of this view, as was the ILC, at least initially. Lauterpacht, *First Report*, *supra* note 1, 100; [1959] YBILC, vol. II, 95.

⁸⁰ See *Law Regarding the Making of Treaties*, reprinted in 31 I.L.M. 390 (1992), CDLX *Diario Oficial de la Federación* 2 (2 Jan. 1992) (1992 Mexican Law Regarding the Making of Treaties).

⁸¹ Peru, General Directorate of Treaties of the Ministry of Foreign Affairs, *Report of the Inter-American Juridical Committee, Binding and Non-Binding Agreements: Questionnaire for the Member States* (“Peru Response”); see also Hollis, Second Report, *supra* note 10, at ¶14.

⁸² 1992 Mexican Law Regarding the Making of Treaties, *supra* note 65. Labeling inter-institutional agreements as treaties may not accord with the label they have within a domestic legal order. In both Mexico and the United States, for example, only instruments that receive parliamentary approval are called treaties even as both States conclude other “international agreements” that would qualify as treaties as a matter of international law. Thus, these *Guidelines* refer to certain inter-institutional agreements as treaties in the international law sense of that term, notwithstanding that as a matter of constitutional law they would not bear such a label.

⁸³ Ecuador Response, *supra* note 46 (emphasis added); Hollis, Second Report, *supra* note 10, at ¶13; see also Canada Response, *supra* note 40, at 6 (non-binding MOUs “and similar arrangements can be between Canada and another sovereign State, but more commonly are between a Canadian government department, agency, province, other subnational government, or para-statal organization, and a similar body in another country.”).

⁸⁴ See Uruguay, *Reply to questionnaire on “binding and non-binding agreements”* (“Uruguay Response”) (listing “Inter-Institutional Agreements” as non-binding agreements, but later noting inter-institutional agreements may “bind not the State but themselves.”). Panama advises that representatives of its territorial units may enter into treaties if they receive full powers from the Foreign Ministry. *Note from the Republic of Panama, Ministry of Foreign Affairs – International Legal Affairs and Treaties*

agreements may be “governed by international law” if “they develop international commitments established under treaties in force”; otherwise inter-institutional agreements may be political commitments or contracts.⁸⁵ Jamaica, in contrast, does not view its institution’s agreements as treaties, but notes that “[s]ub-national territorial units and agencies may conclude non-binding agreements or contracts . . .”⁸⁶ The United States, meanwhile, indicates that its national ministries may conclude inter-institutional agreements that can be either treaties, “non-binding” political commitments, or contracts.⁸⁷

The diversity of State practice suggests that the category of inter-institutional agreements cannot be exclusively associated with any single category of binding (or non-binding) agreements. Simply put, an inter-institutional agreement may be a binding treaty or a binding contract, or it may be a non-binding political commitment. Its legal (or non-legal) status should, therefore, be determined by reference to the institution’s capacity to conclude international agreements and the same methods of identification employed to differentiate among inter-State agreements (*i.e.*, the text, the surrounding circumstances, and subsequent practice).

2. The Capacity to Conclude International Agreements

2.1 The Treaty-Making Capacity of States: *States have the capacity to conclude treaties and should do so in accordance with the treaty’s terms and whatever domestic laws and procedures regulate their ability to consent to be bound.*

Commentary: By virtue of their sovereignty, all States have the capacity to enter into treaties.⁸⁸ Through both the VCLT and custom, international law has devised a robust set of default rules on the treaty-making capacities of States. VCLT Article 7, for example, indicates who can consent to a treaty on a State’s behalf – its head of government, head of state, foreign minister, and anyone else granted “full powers” to do so. As VCLT Article 7(1)(b) notes, moreover, full powers may be dispensed with where “[i]t appears from the practice of States concerned or from other

Directorate to the Department of International Law of the Secretariat for Legal Affairs of the Organization of the American States, N.V.-A.J. MIRE-201813176 (“Panama Response”).

⁸⁵ Peru Response, *supra* note 66 (citing Article 6 of Supreme Decree No. 031-2007-RE). Peru notes “‘nonbinding’ agreements ... coming into increasing use ... at the interinstitutional level (between Peruvian governmental entities—including municipalities and regional governments—and their foreign counterparts)” at the same time these entities “are authorized to conclude contracts for the procurement of goods and services.” *Id.*

⁸⁶ Jamaica, *Note from the Mission of Jamaica to the O.A.S. to the Department of International Law, O.A.S. Secretariat for International Affairs*, Ref. 06/10/12, 14 Dec. 2017 (“Jamaica Response”) (emphasis added); *see also* Colombia 2020 Comments, *supra* note 47 (Under Colombian law, State entities may enter into *inter-institutional agreements* on their own, which are governed by their assigned domestic law and not by international law); *See* Chile Comments 2020, *supra* note 40 (inter-institutional agreements are authorized by Article 35 of Law No. 21.080; they must not encompass “matters of law” or “concern issues that are not compatible with Chile’s foreign policy,” with any “rights and obligations deriving from these agreements assumed by the body that signs them, in accordance with the general rules and within its budgetary possibilities” rather than international law).

⁸⁷ *See* United States, *Inter-American Juridical Report: Questionnaire for the Member States* (“U.S. Response”) (“Departments and agencies of the United States may enter into agreements with agencies of other states that fall within the definition of a treaty contained in Article 2 of the Vienna Convention on the Law of Treaties. Departments and agencies of the United States also enter into non-legally binding instruments and contracts governed by domestic law with agencies of other states.”). U.S. practice with respect to its sub-national territorial units (that is, U.S. states) is more complex. U.S. states are denied a treaty-making capacity under the U.S. Constitution but can conclude agreements or compacts with foreign counterparts where authorized by its Congress. *Id.* In contrast, Argentina allows its sub-national territorial units to conclude some “partial” treaties but denies that capacity to its national ministries or agencies because it does not regard them as subjects of international law. Argentina, *OAS Questionnaire Answer: Binding and Non-Binding Agreements* (“Argentina Response”); *Diplomatic Note from the Permanent Mission of the Argentine Republic to the Organization of American States*, OEA 074 (3 June 2020) (denying agencies’ treaty-making capacity).

⁸⁸ *See, e.g., Case of the SS Wimbledon (Great Britain v. Germany)* [1923] P.C.I.J. Rep. Ser. A No. 1 25, ¶35 (“the right of entering into international engagements is an attribute of State sovereignty”).

circumstances that their intention was to consider that person as representing the State for such purposes...”

A treaty’s terms may, however, limit which States are capable of joining. Multilateral treaties, for example, may be open to all States, only to States from a specific region,⁸⁹ or only to States engaged in a specific activity.⁹⁰ States only have the capacity to join treaties where the treaty’s terms allow them to do so.⁹¹

International law also recognizes that every State has domestic laws and procedures governing its treaty-making. In theory, these rules may only rarely (if ever, in practice) override a State’s consent to be bound to a particular treaty. To date, VCLT Article 46 has not provided legal grounds for a State to walk back its consent to be bound to a treaty (even in the face of allegations of significant breaches of domestic law or procedures).⁹² That said, a State should—as a best practice—only exercise its capacity to join treaties that have been approved through its domestic laws and procedures. In other words, if a State’s constitution requires a particular treaty to receive prior legislative approval, the State should not exercise its capacity to consent to be bound to that treaty until after the legislature has given that approval.

States should be sensitive, moreover, to the fact that other States’ domestic laws and procedures may either facilitate or restrict their capacity to conclude treaties. States should not assume equivalence between their own domestic rules and those of prospective treaty partners. One State may only have the capacity to conclude a particular treaty with prior legislative approval, while another State’s domestic law or practice may authorize the conclusion of the same treaty without any legislative involvement. States should thus exercise their treaty-making capacity in ways that ensure each of the participating States is given an opportunity to complete the necessary domestic approvals before it gives its consent to be bound by a treaty.

2.2 The Treaty-Making Capacity of State Institutions: *States may—but are not required to—authorize their institutions to make treaties on matters within their competence and with the consent of all treaty partners.*

Commentary: Unlike questions surrounding the treaty-making capacity of international organizations, international law has devoted little attention to treaty-making by a State’s institutions.⁹³ Nonetheless, State institutions – whether national ministries or sub-national territorial units – clearly do conclude instruments that at least some States (including those States of which these institutions form a part) regard as treaties (*i.e.*, agreements governed by international law).⁹⁴ When should these

⁸⁹ See, e.g., Inter-American Convention to Prevent and Punish Torture (1985) OAS Treaty Series No. 67, Arts. 18, 20 (participation limited to American States).

⁹⁰ See Constitution of the Association of Natural Rubber Producing Countries (1968) 1045 U.N.T.S. 173, ¶21 (treaty open to “countries producing natural rubber”). In addition, some treaties are open to additional States only by invitation. See International Sugar Agreement (1992) 1703 U.N.T.S. 203, Art. 37 (Agreement open to governments “invited to the United Nations Sugar Conference, 1992”).

⁹¹ A treaty’s terms may, of course, empower existing States parties to decide whether or not to admit a new State as a party; this is often the case with respect to the constituent treaties of international organizations.

⁹² See VCLT Art. 46(1) (“A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.”). Efforts to invoke Article 46 in practice have not proved terribly successful. See *Somalia v. Kenya*, *supra* note 9, at 21 ¶¶48-50. (rejecting Somalia’s arguments that the MOU’s failure to receive approvals required under its domestic law allowed it to invoke VCLT Article 46 or otherwise deny its consent to be bound); accord *Cameroon v. Nigeria*, *supra* note 9, at ¶¶265-67; Jan Klabbers, *The Validity and Invalidity of Treaties*, in DUNCAN B. HOLLIS, *THE OXFORD GUIDE TO TREATIES* 557 (2nd ed., 2020) (“Whether Article 46 qualifies as customary international law would seem debatable. There is little practice, after all, and while the rule is sometimes invoked, it is rarely honoured.”)

⁹³ Compare 1986 VCLT, *supra* note 12.

⁹⁴ See, e.g., Grant, *supra* note 25, at 151-56; Duncan B. Hollis, *Why State Consent Still Matters—Non-State Actors, Treaties, and the Changing Sources of International Law*, 23 BERKELEY J INTL L 137, 146-47 (2005). At the same time, it is not always clear what capacity these institutions have to represent the

institutions have the capacity to do so? For starters, the subject-matter of the agreement should be one over which the institution has competence. For example, a State's Finance Ministry may have the competence to engage in tax information sharing with its counterparts but would not have the competence to share defense related data. In federal States, moreover, some matters fall within the exclusive competence of a sub-national territorial unit (e.g., a province or region), which may create incentives for that territorial unit to conclude a treaty directly rather than having the State consent to doing so on the unit's behalf.

It would be a mistake, however, to conflate competence over a treaty's subject-matter with the capacity to make treaties on that matter. For institutions to enter into treaties, States appear to endorse two additional conditions: (1) the State responsible for the institution should consent to it making a treaty on matters within the institution's competence; and (2) the potential treaty partners should be willing to enter into that treaty with the institution.⁹⁵

As a first order consideration, it is up to each State to decide whether to authorize any of its institutions to engage in treaty-making. Some States like Canada, Chile, Colombia, and Paraguay may opt not to do so at all.⁹⁶ In such cases, the institution should presumptively lack any treaty-making capacity.

When States do authorize treaty-making by their institutions, they can do so for all their institutions or only some of them. Mexico, for example, has authorized treaty-making by all types of State institutions.⁹⁷ Other States have focused on authorizing (or denying authority) to make treaties to specific categories of institutions. For example, several States in the region (e.g., Jamaica, Panama, the United States) report authorizing their national ministries to conclude treaties, while other States (e.g., Colombia, the Dominican Republic, Peru) report a lack of any domestic authority for those ministries to do so.⁹⁸ Meanwhile, States like Argentina authorize their sub-national territorial units to conclude certain types of "partial" treaties, but deny their ministries can do so on the theory that they are not subjects of international law.⁹⁹ Other Member States, in contrast, have not authorized sub-national territorial units to engage in any treaty-making.¹⁰⁰

State itself under the law of treaties; they are not, for example, listed among the actors VCLT Art. 7 recognizes as being able to consent on the State's behalf. It might be that there is sufficient practice under 7(1)(b) to allow these institutions to bind their State via agreement. Yet, it is also possible to reason that they do not have such authority, thereby suggesting any treaties they conclude only bind the concluding institutions. That later position, however, runs counter to the dominant view that inter-institutional agreements trigger the responsibility of the State as a whole. *See supra* note 249 and accompanying text (Guideline 5.4 and accompanying commentary). As such, States and other stakeholders may wish to give this issue of representation further attention in concert with the current *Guidelines'* focus on questions of capacity.

⁹⁵ Oliver J. Lissitzyn, *Territorial Entities in the Law of Treaties*, III RECUEIL DES COURS 66-71, 84 (1968); see also [1962] YBILC, vol. I, 59, ¶20 (Briggs) (laying out a similar two part test); Grant, *supra* note 25, at 155.

⁹⁶ See Canada Response, *supra* note 40, at 7-8 (indicating that "only the Canadian federal government can bind Canada" to treaties rather than government ministries or provinces; "provinces and territories can only conclude non-binding instruments"); Chile Comments 2020, *supra* note 40 (noting the Ministry of Foreign Affairs is empowered to represent Chile in concluding treaties and that while Chilean legislation contemplates inter-institutional agreements, their nature is "not that of an international treaty"); Colombia Comments 2020, *supra* note 47 (Under Colombian law, the power to represent the State in matters concerning treaties resides exclusively in the President of the Republic and is not shared nor derived from other government ministries of lower rank or subnational territorial units); Paraguay Response, *supra* note 63 ("Under domestic law, the Ministry of Foreign Affairs is the only agency with the capacity to conclude treaties governed by international law").

⁹⁷ See *supra* note 65, and accompanying text.

⁹⁸ Hollis, Second Report, *supra* note 10, at ¶¶24-25; See also Panama Response, *supra* note 69. Similar State practice exists outside the region; South Korea, for example, reports limiting its agency-to-agency agreements to those that do not create "binding rights or obligations for nations under international law." Working Group on Treaty Practice, *supra* note 40, at 21.

⁹⁹ See Argentina Response, *supra* note 72 (suggesting that since Argentina's ministries are not subjects of international law, they cannot conclude treaties while noting that under Article 12[5] of Argentina's

States may, moreover, authorize their institutions to negotiate and conclude treaties in various ways. Some – particularly European States – have constitutional provisions delineating the authority of certain State institutions to make treaties with respect to matters falling within their exclusive competence.¹⁰¹ Others, like Mexico, have used a statute to lay out procedures for authorizing certain treaty-making by federal agencies and sub-national territorial units. Several States offer their consent on a more *ad hoc* basis. Under a 1981 Social Security treaty with the United States, for example, Canada authorized its province, Quebec, to conclude a separate subsidiary agreement with the United States in light of Quebec’s distinct pension system.¹⁰² And in 1986 the United States authorized Puerto Rico to join the Caribbean Development Bank.¹⁰³

Second, in addition to having the “internal” consent from the State of which it forms a part, an institution’s capacity to make treaties should also turn on the “external” consent of the other State(s) or institution(s) with which it seeks to form a treaty. Just because one State has authorized a national ministry (or a province) to conclude treaties on certain matters should not mean potential treaty-partners must accept that authority. States can—and do—regularly decline to conclude such treaties or insist that the other State conclude the treaty on the institution’s behalf (*i.e.*, in the form of a State-to-State treaty or a government-to-government one). To avoid unaligned expectations, a State authorizing its own institution to conclude treaties should ensure that it or its institution obtains the consent of other treaty parties that the State’s institution will join such treaties (rather than the State itself doing so).

Constitution, its provinces and the Autonomous City of Buenos Aires can enter into “international agreements provided that they are not incompatible with the foreign policy of the Nation and do not affect the powers delegated to the Federal Government or the public credit of the Nation”); see also Argentina Constitution of 1853, Reinstated in 1983, with Amendments through 1994, Arts. 125-26 (Eng. Trans. from www.constituteproject.org).

¹⁰⁰ See, e.g., Brazil, *Binding and Non-Binding Agreements: Questionnaire for the Member States* (“Brazil Response”) (“Subnational entities (states, municipalities, and the Federal District) do not have the power, under the Brazilian Constitution, to conclude international legal acts that bind the Brazilian state”); Colombia, *Responses to the Questionnaire for the Member States of the Organization of American States (OAS) Binding and Non-Binding Agreements: Practice of the Colombian State* (“Colombia Response”) (domestic Colombian legislation does not authorize “sub-national territorial units” (e.g., Colombian departments, districts, municipalities and indigenous territories) to conclude treaties governed by international law.”).

¹⁰¹ See, e.g., Austria Constitution 1920 (reinst. 1945, rev. 2013) B-VG Art. 16 (Eng. trans. from www.constituteproject.org) (“In matters within their own sphere of competence, the Länder can conclude treaties with states, or their constituent states, bordering on Austria”); Belgian Constitution 1883 (rev. 2014) Art. 167(3) (Eng. trans. from www.constituteproject.org) (“The Community and Regional Governments described in Article 121 conclude, each one in so far as it is concerned, treaties regarding matters that fall within the competence of their Parliament. These treaties take effect only after they have received the approval of the Parliament.”); Germany, Basic Law of 1949 (rev. 2014) Art. 32(3) (Eng. trans. from www.constituteproject.org) (“Insofar as the Länder have power to legislate, they may conclude treaties with foreign states with the consent of the Federal Government.”); Swiss Constitution (1999) Art. 56(1) (Eng. trans. from www.constituteproject.org) (“A Canton may conclude treaties with foreign states on matters that lie within the scope of its powers.”). Such authorization is not an entirely European phenomena; States like Russia also authorize treaty-making by certain sub-State units (e.g., Yaroslav, Tatarstan). See W.E. Butler, *Russia*, in NATIONAL TREATY LAW AND PRACTICE 151, 152-53 (D. Hollis et al., eds., 2005); Babak Nikravesh, *Quebec and Tatarstan in International Law*, 23 FLETCHER F. WORLD AFF. 227, 239 (1999).

¹⁰² See Agreement With Respect to Social Security, 11 Mar. 1981, U.S.-Can., Art. XX, 35 U.S.T. 3403, 3417. Quebec and the United States concluded that agreement in 1983, which the United States includes in its official treaty series. See Understanding and Administrative Arrangement with the Government of Quebec, 30 Mar. 1983, U.S.-Quebec, T.I.A.S. No. 10,863.

¹⁰³ *Self-Governing and Non-Self-Governing Territories, 1981-1988 CUMULATIVE DIGEST OF U.S. PRACTICE ON INTERNATIONAL LAW*, vol. 1, § 5, at 436, 438-40 (July 17, 1986 testimony of Michael G. Kozak, then-Principal Deputy Legal Adviser to the U.S. Department of State, before the House Committee on Interior and Insular Affairs). Subsequently, Puerto Rico withdrew from the Bank.

In addition to inter-institutional agreements, States may conclude bilateral treaties with a foreign State institution. Hong Kong, for example, has a number of treaties with OAS Member States.¹⁰⁴ In the multilateral treaty context, such authorizations are infrequent, but there are several cases where States have agreed to accept a treaty relationship with sub-State actors. For example, Article 305 of the 1982 United Nations Convention on the Law of the Sea (UNCLOS) allows three categories of associated States and territories to sign and ratify the Convention with all the attendant rights and obligations the Convention provides.¹⁰⁵ And the Agreement Establishing the World Trade Organization is open to any “customs territory possessing full autonomy in the conduct of its external commercial relations and of the other matters provided for in this Agreement and the Multilateral Trade Agreements.”¹⁰⁶

2.3 Confirming Treaty-Making Capacity: *States or authorized State institutions contemplating a treaty with another State’s institution should endeavor to confirm that the institution has sufficient competence over the treaty’s subject-matter and authorization from the State of which it forms a part to enter into a treaty on such matters.*

Commentary: States currently have very different views on whether State institutions have the capacity to conclude inter-institutional agreements as treaties.¹⁰⁷ Some States clearly contemplate their national ministries and/or their sub-national territorial units having such a capacity. Other States just as firmly deny any authority to one or both types of their own institutions. As such, there is a risk of unaligned expectations in inter-institutional agreements, where one side assumes both institutions have a treaty-making capacity and the other assumes that one or both institutions do not. Such an event can not only cause confusion but can also lead to diplomatic tensions and disputes if the two institutions conclude an agreement.

One way to avoid such problems is to increase transparency and an understanding of the respective capacities of an agreement’s participants. As *Guideline 2.2* suggests, some of this transparency may flow from actions of the authorizing State or its institution. A State contemplating authorizing its institution to conclude a treaty should inquire (or have its institution inquire) whether the potential agreement partner shares the view that the agreement will constitute a treaty. But treaty partners need not just be passive recipients awaiting requests from foreign States or their institutions. The current guideline proposes a separate best practice where treaty partners (be they States or State institutions) should engage in their own due diligence; *i.e.*, States faced with the prospect of an inter-institutional agreement should affirmatively verify what capacities are accorded to the foreign institution(s) involved.

Such verifications could be formal or informal. In 2001, for example, the United States asked the United Kingdom to confirm that the Governments of Guernsey, the Isle of Man, and Jersey had the authority to conclude bilateral tax information exchange agreements with the United States. The United Kingdom provided an instrument of “entrustment” verifying the sub-national territorial units of the United Kingdom had the requisite competence and authority to conclude such treaties.¹⁰⁸

¹⁰⁴ See Agreement between the Government of Canada and the Government of Hong Kong for the surrender of fugitive offenders, 7 September 1993, U.K.-Hong Kong, 2313 U.N.T.S. 415.

¹⁰⁵ United Nations Convention on the Law of the Sea, 10 Dec.1982, 1833 U.N.T.S. 396, Arts. 305(1)(c)-(e), (“UNCLOS”) (authorizing ratification or acceptance of the Convention by (1) “self-governing associated States which have chosen that status in an act of self-determination supervised and approved by the United Nations” ... and (3) “territories that enjoy full internal self-government, recognized as such by the United Nations, but [which] have not attained full independence”). The same approach was followed in the U.N. Fish Stocks Agreement. See Agreement for the Implementation of the Provisions of the United Nations Convention of the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, 4 Aug. 1995, 2167 U.N.T.S. 88, Arts. 1(2)(b), 37-40.

¹⁰⁶ Marrakesh Agreement Establishing the World Trade Organization, 15 Apr. 1994, 1867 U.N.T.S. 3, Art. XII.

¹⁰⁷ See *supra* notes 67-72, and accompanying text. This confusion likely extends beyond wholly inter-institutional agreements to those between a State and a foreign State’s institution. See *supra* notes 89-91 and accompanying text.

¹⁰⁸ See, e.g., Press Release, U.S. Treasury Department, *Treasury Secretary O’Neill Signing Ceremony Statement: United States and Jersey Sign Agreement to Exchange Tax Information* (4 Nov. 2002).

What happens if the potential partner cannot confirm the foreign institution's treaty-making capacity? A State (or its institution) has several options. It could opt not to conclude the treaty at all. Or, it could revise the treaty to make it with the foreign State responsible for the institution in question. For example, when the United States determined that the Cayman Islands lacked the necessary entrustment to sign a tax information exchange agreement in its own name, the United States concluded the agreement with the United Kingdom, which acted on behalf of the Cayman Islands.¹⁰⁹ And when the United States and Canada discovered that the city of Seattle and the Province of British Columbia had concluded a significant agreement concerning the Skagit River, they stepped in to "consent" to and indemnify that agreement via a treaty of their own.¹¹⁰

Can a State institution authorized to conclude a treaty with a foreign institution enter into that treaty if it cannot confirm the foreign institution's capacity to do so? Unfortunately, there is substantial evidence of inter-institutional agreements arising without clear authorization from one or more responsible State(s).¹¹¹ Many of these agreements may be best regarded as political commitments or contracts. At least some of them, however, bear the markers of a treaty. For example, in 2000, the U.S. state of Missouri concluded a Memorandum of Agreement with the Canadian province of Manitoba where they agreed to jointly cooperate in opposing certain inter-basin water transfer projects contemplated by U.S. federal law.¹¹² Other States have experienced similar problems. By the end of the twentieth century, for example, the Canadian province of Quebec had reportedly concluded some 230 unauthorized "ententes" with foreign governments, nearly 60% of which were with foreign States.¹¹³ At present, it does not seem a good practice to regard such agreements as treaties, especially if it later becomes clear one or more of the institutions involved had no capacity to conclude treaties in its own name. Nonetheless, it is an area worthy of further State attention and discussion.

2.4 The Capacity to Make Political Commitments: *States or State institutions should be able to make political commitments to the extent political circumstances allow.*

Commentary: Political commitments are, by definition, free of any legal force under international or domestic law. As such, international law imposes no capacity conditions for which actors can conclude them. Similarly, domestic legal systems usually do not regulate which actors may conclude such commitments.¹¹⁴ Unlike treaties, therefore, there are no concrete distinctions between the capacity of States and State institutions to conclude these non-binding agreements.

Politics, rather than law, serves as the guiding criterion for who within a State may enter into political commitments and on which subjects. Most States have little experience with regulating the capacity to make non-binding commitments on behalf of the State or State institutions. On some occasions, however, States have adopted policies organizing the capacity of the State or State institution(s) to enter into political commitments. In Colombia, for example, only those with the legal capacity to represent a State institution can sign memoranda of understanding or letters of intent, even where these instruments are regarded as non-binding (and even then, only after the instrument has

¹⁰⁹ See, e.g., Agreement Between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland, Including the Government of the Cayman Islands, For the Exchange of Information Relating to Taxes, 21 Nov. 2001, U.S.-U.K., T.I.A.S., CTIA No. 15989.000.

¹¹⁰ See Treaty Between the United States of America and Canada Relating to the Skagit River and Ross Lake, and the Seven Mile Reservoir on the Pend D'Oreille River, 2 Apr. 1984, U.S.-Can., T.I.A.S. No. 11,088.

¹¹¹ See Hollis, *Unpacking the Compact Clause*, *supra* note 55 (identifying 340 binding and non-binding agreements concluded by U.S. states with foreign powers).

¹¹² See *Role of Individual States of the United States: Analysis of Memorandum of Understanding Between Missouri and Manitoba*, 2001 CUMULATIVE DIGEST OF U.S. PRACTICE ON INTERNATIONAL LAW, § A, at 179-98.

¹¹³ Nikraves, *supra* note 86, at 239. France, moreover, reportedly regards its ententes with Quebec as instruments governed by international law. See *id.* at 242.

¹¹⁴ This is the case so long as the commitment does not infringe on the constitution or domestic law. Of course, should an agreement do so, its status as a political commitment would likely be called into question since the category, by definition, only covers agreements lacking legal force.

undergone a legal review).¹¹⁵ And, of course, international politics can have a significant influence on which States or State institutions can conclude political commitments and on what subjects.

In a few high-profile cases, a State may impose domestic legal constraints that limit the capacity to enter into a non-binding political commitment. As part of the controversy over the Joint Comprehensive Plan of Action (JCPOA), for example, the U.S. Congress passed a statute, the Iran Nuclear Review Act, requiring the U.S. President to submit “any agreement with Iran” (*i.e.*, not just a legally binding one) to Congress for review and an opportunity for disapproval.¹¹⁶ President Obama submitted the JCPOA as required under the Act, although Congress eventually declined to approve or disapprove of that instrument.¹¹⁷ Canada, Ecuador, and Peru have reported similar practices of coordinating and reviewing their political commitments, with Peru reporting different policies for the review of inter-State and inter-institutional political commitments.¹¹⁸

2.5 Inter-State Contracting Capacity: *A State should conclude contracts with other willing States in accordance with the contract’s governing law.*

Commentary: Consistent with the earlier views of the ILC, some States in the region assert a capacity to enter into contracts with other States.¹¹⁹ At the same time, other States indicate that they do not engage in inter-State contracting.¹²⁰ Thus, it appears that nothing in international law precludes a State from having a practice of concluding contracts with a foreign State likewise willing to conclude such contracts. A State’s own legal system could, in theory, limit its capacity to conclude inter-State contracts, but there are no examples of such limitations to date.

Any capacity constraints to inter-State contracting are more likely to come from either the choice or content of the contract’s governing law. The choice of a single governing domestic law may, as a practical matter, limit the frequency of such contracts since it requires at least one (if not both) contracting States to agree to a governing domestic law other than their own.¹²¹ Contracting capacity is, moreover, a function of the law of the contract. Domestic legal systems (and certain non-State laws like *lex mercatoria*) each have their own rules for who can form a contract and on which subjects. As such, whether a foreign State can conclude a contract governed by a State’s domestic law depends on a legal analysis of the applicable law (whether the one selected by the parties, or, in appropriate circumstances, the governing law determined according to the application of conflict of law rules).

¹¹⁵ Colombia Response, *supra* note 85. Thus, among Colombia’s government ministries, only the Ministry of Foreign Affairs is authorized to sign political commitments on behalf of the State as a whole. *Id.*

¹¹⁶ See Pub. L. No. 114-17, 129 Stat. 201 (2015). The JCPOA was a political commitment relating to Iran’s nuclear program between Iran, the 5 Permanent Members of the U.N. Security Council, Germany and the European Union. U.S. President Trump gave notice of U.S. withdrawal from the JCPOA on May 8, 2018.

¹¹⁷ Kristina Daugirdas & Julian Davis Mortensen, *Contemporary Practice of the United States relating to International Law*, 109 AM. J. INT’L L. 873, 874-78 (2015) (due to a minority filibuster, Congress failed to take any action on the JCPOA to approve or disapprove it).

¹¹⁸ Peru Response, *supra* note 66 (assessment of political commitments “made by the Ministry of Foreign Affairs focuses on verifying their consistency with foreign policy, as well as their wording . . .”); see also Canada Response, *supra* note 40, at 4; Ecuador Response, *supra* note 46.

¹¹⁹ See [1966] YBILC, vol. II, 189, ¶6. In responding to the OAS Questionnaire, Canada, Ecuador, Jamaica, Mexico, and the United States all acknowledged the possibility of inter-State contracting. See Hollis, Second Report, *supra* note 10, ¶15; Canada Response, *supra* note 40, at 4.

¹²⁰ Hollis, Second Report, *supra* note 10, ¶15 (Argentina, Colombia, the Dominican Republic, Peru and Uruguay report no practice of concluding contracts governed by domestic law for binding agreements among States.).

¹²¹ Selecting non-State law to govern such contracts, however, could (at least in theory) sidestep such difficulties. See note 59 and accompanying text. Canada recounts a practice where inter-State contracts include a waiver of privileges and immunities; indeed, where there is “no such waiver, and no subordination to a chosen law and chosen forum, the instrument may be seen as something other than an enforceable contract.” Canada Response, *supra* note 40, at 4.

2.6 Inter-Institutional Contracting Capacity: *A State institution should conclude contracts with willing foreign State institutions in accordance with its own domestic law and, if different, the contract's governing law.*

Commentary: The capacity of State institutions to conclude contracts with foreign State institutions appears less controversial than inter-State contracting. Many of the States that disclaim any role in inter-State contracting admit the capacity of their institutions to do so.¹²² Unlike inter-State contracting, however, the capacity of State institutions to conclude inter-institutional contractual agreements is not solely a function of the choice and contents of the contract's governing law. As creatures of a State's legal system, the contracting capacity of a State institution will be governed by that State's domestic law, whether or not it is the same as the contract's governing law. Colombia, for example, authorizes its "public legal entities or public bodies with the capacity to enter into contracts" but does so "subject to the authorities those entities are accorded under the Constitution and by law."¹²³ In Chile State administration bodies (within the scope of their competence) may sign inter-institutional agreements of an international nature with foreign or international entities, but subject to several substantive limitations.¹²⁴

Indeed, in some cases, States from the region appear to have constitutional or legislative mandates requiring the use of their own law as the governing law for certain public contracts, which would appear to include inter-institutional ones. Mexico's Constitution, for example, requires public tenders for certain types of behavior (*e.g.*, procurement, leasing of assets, and public services) via "contracts that must follow the procedures and observe the formalities established in the applicable national legal framework (federal, state, and municipal)."¹²⁵ States like Peru and Ecuador have procurement laws that provide similar authorizations and conditions for contracts by State institutions.¹²⁶

Thus, the domestic law of the State institution may direct its capacity to conclude contracts with foreign State institutions directly through authorizations or indirectly through governing law mandates. That said, an inter-institutional agreement may be concluded that selects one State's governing law over the others. Article 9 of the 1998 Agreement between the National Aeronautics and Space Administration (NASA) and the Brazilian Space Agency (AEB) on Training of NA AEB Mission Specialist, provides, for example, that "[t]he Parties hereby designate the United States Federal Law to govern this Agreement for all purposes, including but not limited to determining the validity of this Agreement ..."¹²⁷ It is possible, moreover, that two State institutions could select a third State's domestic law to govern their contract (subject to the caveat that the third State's law permits such a selection). Similarly, inter-institutional agreements might select non-State law to govern the contract in addition to—or in lieu of—a national legal system.

3. Methods for Identifying Binding and Non-Binding Agreements

3.1 Identifying Agreements: *States and other agreement-makers should conclude their international agreements knowingly rather than inadvertently. As a threshold matter, this means States must differentiate their agreements (whether binding or non-binding) from all other commitments and instruments. The following best practices may help States do so:*

3.1.1. *States should rely on the actual terms used and the surrounding circumstances to discern whether or not an agreement will arise (or has already come into existence).*

¹²² See Hollis, Second Report, *supra* note 10, ¶30 (Argentina, Colombia, and Peru, each of which declined any practice of inter-State contracting, reported significant experience with inter-institutional contracting).

¹²³ *Id.* at ¶30.

¹²⁴ Chile Comments 2020, *supra* note 40.

¹²⁵ See Reply of Mexico, *Report of the Inter-American Juridical Committee, Binding and Non-Binding Agreements: Questionnaire for the Member States* ("Mexico Response") (discussing Mexico Constitution 1917 (rev. 2015) Art. 134).

¹²⁶ Hollis, Second Report, *supra* note 10, ¶¶15, 30.

¹²⁷ An excerpt of the contract, including Article 9, is reprinted in BARRY CARTER ET AL., *INTERNATIONAL LAW* 86-87 (7th ed., 2018).

3.1.2. *When in doubt, a State should confer with any potential partner(s) to confirm whether a statement or instrument will—or will not—constitute an agreement (and, ideally, what type of agreement it will be).*

3.1.3 *A State should refrain from affiliating itself with a statement or instrument if its own views as to its status as an agreement diverge from those of any potential partner(s) until such time as they may reconcile their differences.*

Commentary: How can States and others determine whether any particular text will (or already) constitute a treaty, a political commitment, or a contract? There are two steps involved. First, there must be a discernable agreement. Second, there needs to be some method(s) for differentiating within the category of agreements: which ones are treaties? which ones are political commitments? and which ones are contracts?

Guideline 3.1 offers best practices for the first step – identifying agreements generally. In some cases, the participants make it easy and jointly concede an agreement’s existence. In the *Pulp Mills* case, for example, neither Argentina nor Uruguay disputed that their Presidents had reached an agreement expressed via a 31 May 2005 press release; their dispute revolved around whether the agreement was binding (*i.e.*, governed by international law) or not.¹²⁸ Similarly, in the *Iron Rhine (“Ijzeren Rijn”) Railway* arbitration, both Belgium and the Netherlands acknowledged that they had reached an agreement in a Memorandum of Understanding (MOU) *and* that the MOU was not a “binding instrument.”¹²⁹

In many cases, however, there will not be any “agreement to agree.” In these circumstances States should follow the ICJ’s lead from the *Aegean Sea* case and examine any proposed or existing statement with “regard above all to *its actual terms and to the particular circumstances* in which it was drawn up.”¹³⁰ That test provides a useful framework for identifying the conditions of any agreement – *i.e.*, mutuality and commitment. In the *Aegean Sea* case, for example, Greece and Turkey disputed both the existence of an agreement and its particular type. To resolve the issue, the Court reviewed both prior communications and the language used in a Joint Communiqué between Greece and Turkey’s Prime Ministers, concluding that the Communiqué did not constitute a “commitment” to submit the States’ dispute to the Court.¹³¹ The ICJ affirmed this approach in *Qatar v. Bahrain*, examining a set of “Agreed Minutes” signed by Qatar’s and Bahrain’s Foreign Ministers and finding that they did constitute an agreement; they were “not a simple record of a meeting ... they do not merely give an account of discussions and summarize points of agreement and disagreement. They enumerate the commitments to which the Parties have consented.”¹³² The ICJ continued this approach in the *Case Concerning Kasikili/Sedudu Island*, reading the varying views contained in exchanges of notes and letters between South Africa and Bechuanaland with regard to a boundary location and finding that they “demonstrate the absence of agreement.”¹³³

For its part, the International Tribunal for the Law of the Sea (ITLOS) has suggested that otherwise “conditional” language in a shared text can preclude assigning it the status of an agreement.¹³⁴ International tribunals have also declined to identify an agreement where one side is non-responsive to an offer made by the other side. Thus, ITLOS refused to find that Japan had, by its

¹²⁸ See *Pulp Mills*, *supra* note 28, at ¶¶132-33.

¹²⁹ *Award in the Arbitration regarding the Iron Rhine (“Ijzeren Rijn”) Railway between the Kingdom of Belgium and the Kingdom of the Netherlands* (2005) 27 RIAA 35, ¶156.

¹³⁰ *Aegean Sea Continental Shelf (Greece v. Turkey)* (Judgment) [1978] I.C.J. Rep. 3, ¶95 (emphasis added).

¹³¹ *Id.* at ¶107.

¹³² *Qatar v. Bahrain*, *supra* note 38, at ¶24.

¹³³ *Case Concerning Kasikili/Sedudu Island (Botswana v. Namibia)* (Judgment) [1999] I.C.J. Rep. 1045, ¶63.

¹³⁴ *Delimitation of the Maritime Boundary in the Bay of Bengal (Bangladesh/Myanmar)* (Judgment of Mar. 14, 2012) 2012 ITLOS Rep. 4, ¶92 (“The Tribunal considers that the terms of the 1974 Agreed Minutes confirm that these Minutes are a record of a conditional understanding reached during the course of negotiations, and not an agreement within the meaning of article 15 of the Convention. This is supported by the language of these Minutes, in particular, in light of the condition expressly contained therein that the delimitation of the territorial sea boundary was to be part of a comprehensive maritime boundary treaty.”).

silence, agreed to a methodology for setting bonds that Russia presented in certain joint meetings and recorded subsequently in written protocols between the two States.¹³⁵ Similarly, a Permanent Court of Arbitration (PCA) Tribunal declined to find that Jordan had reached an agreement to arbitrate when it failed to respond to two letters from an Italian Ambassador asserting that the two States had concluded an oral agreement to that effect.¹³⁶

Of course, there may be cases where the text and surrounding circumstances are ambiguous as to whether a particular proposed statement or instrument will comprise an agreement. In such cases, this guideline advocates a direct approach – encouraging States to confer and convey to each other their respective understandings as to whether or not an agreement exists (or will result). Such discussions may confirm that there is an agreement or that none will (or does) exist. In some cases, however, these discussions may reveal a divergence of views with one side viewing a statement or instrument as constituting an agreement while the other denies it has such status. In such cases, it is best for all involved to take a step back and refrain from relevant activity until further discussions can seek some reconciliation of views. Doing so will reduce the risk of unaligned expectations or disputes among those involved (or others) that risk escalation, implicate third party dispute resolution mechanisms, or otherwise complicate international relations.

3.2 Identifying the Type of Agreement Concluded: *The practice of States, international organizations, international courts and tribunals, and other subjects of international law currently suggests two different approaches to distinguishing binding from non-binding agreements.*

- *First, some actors employ an “intent test,” a subjective analysis looking to the authors’ manifest intentions to determine if an agreement is binding or not (and if it is binding, whether it is a treaty or a contract).*
- *Second, other actors employ an “objective test” where the agreement’s subject-matter, text, and context determine its binding or non-binding status independent of other evidence as to one or more of its authors’ intentions.*

The two methods often lead to the same conclusion. Both tests look to (a) text, (b) surrounding circumstances, and (c) subsequent practice to identify different types of binding and non-binding agreements. Nonetheless, different results are possible particularly where the text objectively favors one conclusion (e.g., a treaty) but external evidence suggests another (e.g., contemporaneous statements by one or more participants that a treaty was not intended). The objective test would prioritize the text and language used in contrast to the intent test’s emphasis on what the parties’ intended. Such different outcomes may, in turn, lead to confusion or conflicts. Certain practices can mitigate such risks:

3.2.1 *If a State has not already done so, it should decide whether it will employ the intent test or the objective test in identifying its binding and non-binding agreements.*

3.2.2 *A State should be open with other States and stakeholders as to the test it employs. It should, moreover, be consistent in applying it, not oscillating between the two tests as suits its preferred outcome in individual cases. Consistent application of a test will help settle other actors’ expectations and allow more predictable interactions among them.*

3.2.3 *A State should not, however, presume that all other States or actors (including international courts and tribunals) will use the same test as it does for identifying binding and non-binding agreements. A State should thus conclude—and apply—its international agreements in ways that mitigate or even eliminate problems that might lead these two tests to generate inconsistent conclusions. States can do this by aligning subjective and objective evidence to point towards the same outcome.*

Commentary: Where there is an existing agreement, one way to determine if it is binding (or not) involves asking what its authors intended. The ILC ended up endorsing this methodology to determine which agreements would meet the treaty requirement of being “governed by international

¹³⁵ See “*Hoshinmaru*” (*Japan v. Russian Federation*) (Prompt Release, Judgment) 2007 ITLOS Rep. 18 (Aug. 6), ¶¶85-87.

¹³⁶ *Salini Costruttori S.p.A. and Italstrade S.p.A. v. The Hashemite Kingdom of Jordan*, ICSID Case No. ARB/02/13, Award (31 Jan. 2006), ¶98.

law.”¹³⁷ The Vienna Conference delegates agreed.¹³⁸ Today, a large number of States, scholars, and international tribunals regard intent as *the* essential criterion for identifying which agreements are treaties.¹³⁹ In the *South China Seas* arbitration, for example, the Tribunal emphasized that “[t]o constitute a binding agreement, an instrument must evince a clear intention to establish rights and obligations between the parties.”¹⁴⁰ Several OAS Member States have affiliated themselves with this approach as well.¹⁴¹ Under this view, if the parties intend an agreement to be a treaty, it is a treaty. Similarly, if they do not intend their agreement to be binding, it will be a non-binding political commitment.

The ICJ has, however, signaled a more objective approach to identifying when an agreement is a treaty (*i.e.*, governed by international law). In *Qatar v. Bahrain*, the ICJ found that the parties *had* concluded a legally binding agreement accepting ICJ jurisdiction in the form of Agreed Minutes,

¹³⁷ [1966] YBILC, vol. II, 189, ¶6 (“The Commission concluded that, in so far as it may be relevant, the element of intention is embraced in the phrase ‘governed by international law’, and it decided not to make any mention of the element of intention in the definition”). Before reaching this conclusion, the ILC oscillated between subjective and objective approaches. Brierly proposed an objective look for agreements establishing “a relationship under international law” while his successor, Hersch Lauterpacht defined treaties as agreements “intended to create legal rights and obligations.” Compare Brierly, *First Report*, *supra* note 1, at 223 with Lauterpacht, *First Report*, *supra* note 1, at 93. The ILC’s Third Rapporteur, Gerald Fitzmaurice tried to combine the two approaches, defining a treaty as an agreement “intended to create legal rights and obligations, to establish relationships, governed by international law.” [1959] YBILC, vol. II, 96. He later fell back on just using the governed by international law formula as a stand in for a subjective test. See Fitzmaurice, *First Report*, *supra* note 1, at 117.

¹³⁸ U.N. Conference on the Law of Treaties, Summary Records of Second Session, U.N. Doc. A/CONF.39/11, Add.1, 225, ¶13 (“Vienna Conference, Second Session”) (Drafting Committee “considered the expression ‘agreement ... governed by international law’ ... covered the element of intention to create obligations and rights in international law”).

¹³⁹ *South China Sea Arbitration*, *supra* note 37, at ¶213; *France v. Commission*, C-233/02 (E.C.J., 23 Mar. 2004) (“the intention of the parties must in principle be the decisive criterion for the purpose of determining whether or not the Guidelines are binding”); Switzerland, Federal Department of Foreign Affairs, *Practical Guide to International Treaties* 4 (2015) at https://www.eda.admin.ch/dam/eda/en/documents/publications/Voelkerrecht/Praxisleitfaden-Voelkerrechtliche-Vertraege_en.pdf (“Switzerland Guide to Treaties”) (“establishing whether the parties wish to make their agreement legally binding is essential. If this is not the intention, it is not a treaty”); see also AUST, *supra* note 11, at 20-21 (“It is the negotiating states which decide whether they will conclude a treaty, or something else”); KLABBERS, *supra* note 3, at 68 (“Notwithstanding its awkwardness, there is virtual unanimity among international lawyers that, at the very least, intent is one of the main determinants of international legal rights and obligations”); Widdows, *supra* note 5, at 120-39.

¹⁴⁰ *South China Seas Arbitration*, *supra* note 37, at ¶213.

¹⁴¹ See, e.g., Hollis, Second Report, *supra* note 10, ¶16 (Five Member States – Brazil, Colombia, Mexico, Peru, and the United States – specifically invoked “intent” as the deciding criterion for identifying a treaty); Brazil Response, *supra* note 85 (relies “on the intention of the parties”); Colombia Response, *supra* note 85 (looks for “an expression of or an agreement/arrangement on the intent of the States to enter into legally binding obligations”); Mexico Response, *supra* note 109 (“‘Non-binding’ instruments, use words emphasizing the intent of the participants involved”); Peru Response, *supra* note 66 (describing efforts to ensure the agreement records “the common intent of the parties”); U.S. Response, *supra* note 72 (United States works to “ensure that the text of written instruments it concludes with other states accurately reflects the intentions of the states involved with respect to the legal character of the instrument and the law, if any, that governs it”); see also Chile Comments 2020, *supra* note 40 (“What is decisive is whether the relevant States intended the instrument to be an agreement governed by international law”). Canada’s response was more equivocal although it did indicate that “[a]n exchange of notes that is *intended* by the parties to be binding can also constitute a treaty” while political commitments involve “instruments that the participants *intend* to be non-legally binding.” Canada Response, *supra* note 40, at 4 (emphasis added).

notwithstanding protestations by Bahrain’s Foreign Minister that he had not intended to do so.¹⁴² The Court viewed the Agreed Minutes as a treaty based on the “terms of the instrument itself and the circumstances of its conclusion, not from what the parties say afterwards was their intention.”¹⁴³ Some suggest the Court might simply have been emphasizing the intention expressed in the Agreed Minutes over later, self-serving claims of intention issued in anticipation of litigation.¹⁴⁴ For others, however, the Court’s approach suggests that objective criteria – *e.g.*, the language and types of clauses included in the instrument, and perhaps even its very subject-matter – may dictate whether it is a treaty or not.¹⁴⁵ The Court’s more recent cases – *e.g.*, *Pulp Mills* and *Maritime Delimitation in the Indian Ocean* – have reinforced this objective approach.¹⁴⁶ The Court’s opinion in *Maritime Delimitation in the Indian Ocean*, for example, reasoned that the “inclusion of a provision addressing the entry into force of the MOU is indicative of the instrument’s binding character” without any mention of the parties’ intentions.¹⁴⁷

The objective test is not, however, merely an ICJ formulation. The *Chagos Arbitration* Tribunal emphasizes the need for an “objective determination” in sorting binding and non-binding agreements.¹⁴⁸ Meanwhile, a number of OAS Member States have likewise emphasized the structure and language used in a text as determinative of its legal (or non-legal) status.¹⁴⁹

The purpose of these *Guidelines* is not to pronounce one of these methods superior to the other, let alone resolve which one more accurately reflects international law. Rather, these *Guidelines* aim to advise States and others on how to create and differentiate among binding and non-binding international agreements in a world where different methods may be employed to do so. To that end, these *Guidelines* highlights how, in many respects, the intent and objective tests overlap in the evidence they use:

- (a) the text;
- (b) the surrounding circumstances; and
- (c) subsequent practice.

For example, those adhering to the intent test regularly regard the structure and language of the agreed text as the best manifestation of the authors’ intentions.¹⁵⁰ That same structure and language forms the crux of the objective test.

¹⁴² *Qatar v. Bahrain*, *supra* note 38, at ¶27.

¹⁴³ *Id.* (“The two Ministers signed a text recording commitments accepted by their Governments, some of which were to be given immediate application. Having signed such a text, the Foreign Minister is not in a position to say that he intended to subscribe only to a ‘statement recording a political understanding’, and not to an international agreement”); see also *Maritime Delimitation and Territorial Questions (Qatar v. Bahrain)* (Judgment, 15 Feb. 1995) [1995] I.C.J. Rep. 6.

¹⁴⁴ AUST, *supra* note 11, at 51-52; *Accord Widdows*, *supra* note 5, at 94 (in determining an agreement’s status, “the views of one party at the time of conclusion of the instrument will be of some assistance, subject to all other considerations being equal, but one party’s statements made at a later stage should be disregarded ... as self-serving”).

¹⁴⁵ See Chinkin, *supra* note 53, at 236-37; KLABBERS, *supra* note 3, at 212-216.

¹⁴⁶ See, *e.g.*, *Pulp Mills*, *supra* note 28, at ¶128, *Somalia v. Kenya*, *supra* note 9, at ¶42.

¹⁴⁷ *Somalia v. Kenya*, *supra* note 9, at ¶42.

¹⁴⁸ *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, PCA Case 2011-03 (18 March 2015) at 168, ¶426 (“Tribunal readily accepts that States are free in their international relations to enter into even very detailed agreements that are intended to have only political effect, the intention for an agreement to be either binding or non-binding as a matter of law *must be clearly expressed or is otherwise a matter for objective determination*” (emphasis added)).

¹⁴⁹ See, *e.g.*, Jamaica Response, *supra* note 71 (“The language used in an agreement characterizes the type of agreement”). The Dominican Republic endorsed the existence of an entry into force clause as determining a treaty’s status as such. Dominican Republic Response, *supra* note 46.

¹⁵⁰ See, *e.g.*, Brazil Response, *supra* note 85 (“language used in an instrument is key”); Colombia Response, *supra* note 85 (“treaties, as binding legal instruments, usually employ specific language creating obligations binding on the parties”); Mexico Response, *supra* note 109 (noting verbs and words used to differentiate treaties from non-binding agreements); Peru Response, *supra* note 66 (recommending aspirational language for non-binding agreements and differentiating the structure and forms used to signal a treaty versus a political commitment); U.S. Response, *supra* note 72.

Nonetheless, there are cases where the two approaches may produce divergent results; *i.e.*, where external manifestations of consent differ from those manifested in the language of the document. In the *South China Sea Arbitration*, for example, the agreement contained language – such as “undertake” and “agree” – that in other contexts is taken as objective evidence of a treaty.¹⁵¹ Nonetheless, the Tribunal discounted such language given the context in which it was used and the parties’ characterization of the instrument as a “political document.”¹⁵² That Tribunal was, however, clearly engaged in a search for the parties’ intentions. Tracking the objective approach of *Qatar v. Bahrain* or *Pulp Mills* might have produced a different result; *i.e.*, holding the language used in the agreement itself is sufficiently determinative to forgo any need to consult the *travaux préparatoires* or other statements by States of their intentions.¹⁵³

Thus, for some Member States, structure and terminology are determinative of treaty status, whereas for others, the presence of specific verbs, words, or clauses should not supersede the search for party intentions. This creates a risk that different participants will categorize their agreement differently (or that third parties such as international courts or tribunals might do so). Such disagreements can have important international and domestic law consequences. Whether an agreement is binding under international law or not, for example, determines whether counter-measures are an available option in cases of breach.¹⁵⁴ Domestic laws can also require certain agreements to take a treaty form, creating difficulties when other participants do not regard them as such.¹⁵⁵ Conversely, some States need an agreement to be non-binding because they do not (or cannot) get the requisite domestic approvals that would be required if the agreement were a treaty.

States may take several steps to alleviate such difficulties. For starters, this guideline proposes that Member States consciously adopt one test or the other and be transparent and consistent in doing so. Consistent application of a test will help settle other actors’ expectations and allow more predictable interactions among them. Where a State knows that another State uses the same test for identifying binding and non-binding agreements, it will have greater certainty that its expectations as to the agreement’s status as a treaty (or a political commitment, or a contract) will hold.¹⁵⁶ And where a State knows in advance that another State identifies its binding and non-binding agreements using a different test, a State will know that it may need to take specific steps or use particular text to ensure it can produce the type of agreement it desires.

Whatever their view on the appropriate method for identifying international agreements, States should thus be sensitive to the possibility that others (including international courts and tribunals) may not share their view. Whenever possible, States (and their institutions) should take measures to reduce the risk of inconsistent views on the type of agreement reached. This may best be done expressly whether in the agreement text or communications related to its conclusion.

3.3 Specifying the Type of Agreement Concluded: *To avoid inconsistent views on the binding status of an agreement or its governing law, participants should endeavor to specify expressly the type of agreement reached whether in the agreement text or in communications connected to its conclusion. In terms of text, States may use the sample provisions listed in Table 1 to specify an agreement’s status. Given the diversity of international agreements, however, States may also adapt other standard formulations as well.*

¹⁵¹ *South China Sea Arbitration*, *supra* note 37, at ¶216.

¹⁵² *Id.* at ¶¶217-218. The Tribunal undertook a similar analysis of several bilateral joint statements, finding that they were non-binding despite containing language like “agree.” *Id.* at ¶¶231, 242.

¹⁵³ See *Qatar v. Bahrain*, *supra* note 38, at ¶27 (“The Court does not consider it necessary to consider what might have been the intentions of the Foreign Minister of Bahrain or, for that matter, those of the Foreign Minister of Qatar.”).

¹⁵⁴ See ILC, “Draft Articles on the Responsibility of States for Internationally Wrongful Acts” in *Report on the Work of its Fifty-first Session* (3 May-23 July, 1999), U.N. Doc A/56/10 55 [3], Art. 22 [‘ASR’].

¹⁵⁵ See *supra* note 40 (discussing disagreement between the United States and its allies on the binding status of certain MOUs).

¹⁵⁶ That certainty may not be complete if third party dispute settlement is possible; a tribunal could, in theory, override both States’ approach to identification in favor of its own.

Table 1: Specifying the Type of Agreement Concluded	
Type of Agreement	Sample Text
Treaty	<i>“This agreement shall establish relationships among the parties governed by international law and is intended to give rise to rights and obligations according to its terms.”</i>
Political Commitment	<i>“This [title] is not binding under international law and creates no legally binding rights or obligations for its Participants.”</i>
	<i>“This [title] is a political commitment whose provisions are not eligible for registration under Article 102 of the Charter of the United Nations.”</i>
Contract	<i>“This agreement shall be governed by the law of [list State] [and/or list non-State source of law].”</i>

Commentary: One way to mitigate the risk of disputes over the type of agreement reached lies in the participants’ control – they can specify a shared understanding of its status. States can—and probably should—in the course of negotiations confirm if there is any doubt among the participants on the type of agreement envisioned. A record that the parties understood themselves to be forming a treaty, for example, can reduce the risk that its status as such will come into later dispute.

States and State institutions can, moreover, employ text in the agreement itself to specify its status. Treaty texts have rarely done so to date, but *Guideline 3.2* offers a sample formulation that might be used in future cases. It is a variation on Gerald Fitzmaurice’s earlier treaty definition, which attempted to fuse intentional and objective approaches.¹⁵⁷ Thus, it could be employed by adherents of both the intent and objective tests. I included a “shall” to provide further objective evidence of the agreement’s binding status as well as a qualifier “according to its terms” to have the text be the reference point for interpreting what rights and obligations the treaty conveys.

States and State institutions more regularly use language to specify their shared view that an agreement is non-binding. In some cases, the title alone may be sufficient specification as in the appropriately titled, *Non-Legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of all Types of Forests*.¹⁵⁸ Or, the specification may come via a clause that rejects the treaty label. In 2010, for example, the Republic of Moldova and the U.S. state of North Carolina concluded a “Memorandum of Principles and Procedures” on their mutual relations, which clarified in paragraph A that “[t]his Memorandum does not create any obligations that constitute a legally binding agreement under international law.”¹⁵⁹ In other cases, participants specify the political character of their commitments, affirmatively describing it as “politically binding” or a “political commitment.”¹⁶⁰ Most famously, the Helsinki Accords specified the agreement as a political commitment by describing it as not “eligible for registration” under Article 102 of the UN Charter.¹⁶¹ States in the region may wish to adopt such practices to make clear when they understand their agreements to be non-binding. Thus, this guideline provides two sample clauses for signaling a non-binding agreement, the first negatively and the second affirmatively. Neither sample

¹⁵⁷ See *supra* note 121.

¹⁵⁸ 31 ILM 882 (1992) (emphasis added).

¹⁵⁹ Memorandum of Principles and Procedures between the Republic of Moldova and the State of North Carolina (USA) concerning their Desire to Strengthen their Good Relations (2010), excerpted in DUNCAN B. HOLLIS (ED.), *THE OXFORD GUIDE TO TREATIES* 656 (2012).

¹⁶⁰ See, e.g., Founding Act on Mutual Relations, Cooperation and Security (NATO-Russia) 36 ILM 1006, ¶1 (1996) (describing the declaration as an “enduring political commitment undertaken at the highest political level”); CSCE Document of the Stockholm Conference on Confidence- and Security-Building Measures and Disarmament in Europe, 26 ILM 190, ¶101 (1986) (“The measures adopted in this document are politically binding ...”).

¹⁶¹ Final Act of the Conference on Security & Co-operation in Europe, 14 ILM 1293 (1975).

clause specifies the title of the instrument, recognizing that these clauses could be employed for documents titled anything from “Memorandum of Understanding” to “Memorandum of Intent” or from “Declaration” to “Code of Conduct.”

Finally, this guideline offers a choice of law clause to specify when a binding agreement constitutes a contract. It includes a possibility of referencing either a specific State’s national laws or some non-State law sources, such as UNIDROIT principles or *lex mercatoria* (however defined).

Explicit, shared, and transparent indications of the participants’ understanding of the type of agreement being concluded may go far to alleviating the confusion and conflicts that have occupied State practice recently. Nonetheless, it is important to recognize that an agreement’s authors may not always have complete control over what type of agreement they conclude. If the participants lack a treaty-making capacity, for example, they cannot create a treaty even if they use the sample clause included here or otherwise claim their agreement qualifies as such. And whatever specifications are employed, international law may disavow the treaty status of an agreement that results from coercion or violates *jus cogens*.¹⁶² Similarly, even if States or State institutions adopt the contract label for their agreement, the governing law of that contract will have the last say on whether they may do so. Finally, although never litigated, there remain open questions about whether certain subjects require the treaty form, the parties’ views notwithstanding.¹⁶³

3.4 Evidence Indicative of an Agreement’s Status as Binding or Non-Binding: *Where agreement participants do not specify or otherwise agree on its status, States should use (or rely on) certain evidence to indicate the existence of a treaty or a non-binding political commitment, including:*

- (a) *the actual language employed;*
- (b) *the inclusion of certain final clauses;*
- (c) *the circumstances surrounding the agreement’s conclusion; and*
- (d) *the subsequent practice of agreement participants.*

Table 2 lists the language and clauses States should most often associate with treaties as well as those they may most often associate with political commitments.

Commentary: Differentiating among treaties, political commitments, and contracts involves a holistic examination of the language used, the presence or absence of specific clauses, the circumstances surrounding the agreement’s conclusion, and the subsequent practice of participants. Regardless of the method used, all such evidence is relevant to the identification of treaties.

Language. In practice, States and scholars have identified certain formulas to identify an agreement as a treaty. In the English language, for example, the use of the verb “shall” strongly suggests the commitment is a binding one. Several Member States have confirmed such usage along with verbs like “must” and “agree” and terms like “party” to describe agreement participants.¹⁶⁴

At the same time, State practice has developed a set of linguistic markers that are associated with non-binding agreements. In contrast to language of commitment like “shall,” political commitments often contain the more precatory “should.”¹⁶⁵ Other words and clauses are often employed to signal non-binding intent. For example, instead of treaty “parties,” political commitments often refer to “participants”; instead of “articles,” a political commitment is more likely to reference paragraphs; instead of describing “obligations” that are “binding,” political commitments may reference “principles”

¹⁶² See, e.g., VCLT, Art. 52 (coercion) and Art. 53 (*jus cogens*).

¹⁶³ Roberto Ago, for example, famously suggested that commitments on certain subjects (e.g., territorial boundaries) must be treaties whatever the parties’ intentions. [1962] YBILC, vol. I, 52, ¶19.

¹⁶⁴ Hollis, Second Report, *supra* note 10, at ¶18. Outside the region, several States have tables that lay out a glossary of language typical for treaties versus political commitments. See, e.g., Switzerland, Guide to Treaties, *supra* note 123, at Annex B; Germany, Richtlinien für die Behandlung völkerrechtlicher Verträge (RvV) (1 July 2019) (in German, but Annex H includes examples in English of clauses and language differentiating treaties from political commitments), at http://www.verwaltungsvorschriften-im-internet.de/bsvwbund_05032014_50150555.htm.

¹⁶⁵ It is possible for a treaty to contain a clause with precatory language; doing so limits the legal rights or obligations that a particular clause imposes on parties. But, assuming the agreement otherwise was intended to constitute a treaty (or has sufficient markers to so qualify) it will remain a treaty.

that are “voluntary.” *Guideline 3.4* thus offer a non-exhaustive list of the sort of language often used in treaties and political commitments in Table 2.

Table 2: Identifying Binding and Non-Binding Agreements		
Agreement Features	Evidence Indicative of a Treaty	Evidence Indicative of a Political Commitment
Titles	Treaty Convention Agreement Covenant Protocol	Understanding Statement of Intent Arrangement Declaration
Authors	Parties	participants
Terms	articles obligations undertakings rights	commitments expectations principles paragraphs understandings
Language of Commitment (verbs)	shall agree must undertake Done at [place] this [date]	should seek promote intend expect carry out take understand accept
Language of Commitment (adjectives)	binding authentic authoritative	political voluntary effective equally valid
Clauses	Consent to be Bound Accession Entry into Force Depositary Amendment Termination Denunciation Compulsory Dispute Settlement	Coming into Effect Coming into Operation Differences Modifications

It is important to emphasize, however, that there are no “magic words” that guarantee an agreement the status of either a treaty or a political commitment. For starters, there is the divide between the intentional and objective methods discussed in *Guideline 3.3* above. Those who favor the intentional test emphasize a holistic approach, where all manifestations of party intention must be considered rather than allowing one word or phrase alone to dictate the result. But even those who ascribe to an objective analysis should be reluctant to treat any single verb or noun as outcome-determinative. Clever drafters can turn otherwise imperative language into precatory form. It matters for example, whether a verb like “agree” stands alone or is prefaced by language such as “intend to agree” or “hope to agree.” Similarly, although the use of the verb “shall” would usually evidence a treaty, that may not always follow depending on the context in which the verb is used (e.g., “States shall work towards”). As such, the

language used is an important indicator of the agreement's status, but decision-makers should be careful not to rely on any one single piece of evidence to reach their conclusion.

Clauses. Certain clauses are often standard in treaty texts and thus their presence may be indicative that an agreement qualifies as a treaty. Treaties often contain elaborate provisions on consenting to be bound via options such as definitive signature, simple signature followed by ratification, accession, acceptance, or approval. When treaties are concluded as an exchange of notes, State practice has devised a common formula both sides use to signal their consent to be legally bound. A paradigmatic example is found in an Exchange of Notes between the United Kingdom and Uruguay. The United Kingdom concluded its proposal by saying:

If the Government of Uruguay accepts this proposal, I have the honour to propose that this Note and your reply in the affirmative shall constitute an Agreement between our two governments.

And Uruguay's reply note indicated:

With regard to the above, I wish to inform Your Excellency of the consent of the government of the Oriental Republic of Uruguay to the arrangements as set out, and therefore this Note and Your Excellency's Note shall constitute an Agreement between our two Governments which will come into force today.¹⁶⁶

Other "final" clauses are regularly used in treaties and this guideline offers an illustrative list of those whose existence may be indicative of a treaty. Treaties often precede the parties' signatures with standard phrasing (*i.e.*, "Done at [place], this [date]..."). The use of a clause on "entry into force" is another well-recognized marker of a treaty. In the *Somalia v. Kenya* case, the ICJ found that "the inclusion of a provision addressing the entry into force of the MOU is indicative of the instrument's binding character."¹⁶⁷ Treaties also regularly include references to the authenticity of the languages in which the agreement is written, clauses on the possibility of accession, and/or notice requirements for termination, denunciation, or withdrawal (for example, requiring six or twelve months advance written notice).

In contrast, political commitments may not be signed (the text may simply be released to the press or otherwise published), and when they are, they usually forgo the more formal signature language employed in the treaty context. Instead of clauses on amendments or termination, a political commitment will (if it addresses the issue at all) sometimes use the term "modifications."

Not all States employ the same linguistic markers, titles, or clauses to differentiate a treaty from a political commitment. As such, no single clause should guarantee an agreement treaty status (or the status of a political commitment). The VCLT, for example, acknowledges that treaties can lack a withdrawal or termination clause, providing default rules in such cases.¹⁶⁸ As such, all of these clauses are better viewed as indicative, rather than determinative. Countervailing evidence, whether in the agreement or outside of it, may point to the existence of a political commitment rather than to a treaty (or vice versa). For example, the Conference on Security and Cooperation in Europe (now the OSCE) produced a "Document on Confidence and Security Building Measures in Europe" in 1986 that provided that it would "come into force on 1 January 1987" – the sort of entry into force clause usually associated with a treaty. Yet, the same sentence also clarified that the "measures adopted in this document are politically binding."¹⁶⁹

Surrounding Circumstances. The effort to identify and differentiate binding and non-binding agreements is not limited to their text. Both the intentional and objective tests view similar external evidence – namely the surrounding circumstances and the participants' subsequent practice – in identifying agreements as treaties and political commitments. As noted, under the intentional test, the search for intention is a holistic one and thus includes the *travaux préparatoires* that precedes the agreement as well as any of the participants' subsequent practice relevant to identifying the nature of the agreement. In the *Bay of Bengal* case, for example, the ITLOS Tribunal emphasized that "the

¹⁶⁶ AUST, *supra* note 11, at 425, 427; *see also* HOLLIS, THE OXFORD GUIDE TO TREATIES, *supra* note 7, at 670-71; HANS BLIX AND JIRINIA H. EMERSON, THE TREATY-MAKER'S HANDBOOK 80 (1973).

¹⁶⁷ *Somalia v. Kenya*, *supra* note 9, at ¶42.

¹⁶⁸ *See* VCLT, Art. 56.

¹⁶⁹ CSCE Document of the Stockholm Conference on Confidence- and Security-Building Measures, *supra* note 160, at ¶101.

circumstances” in which the Agreed Minutes were adopted “do not suggest that they were intended to create legal obligations” where one of the participants, Myanmar, had made clear early on of its intention to only agree to a comprehensive agreement rather than a separate agreement like that alleged to be found in the Agreed Minutes.¹⁷⁰

At the same time, even as the objective test prioritizes text, it does not exclude analysis of external evidence, especially where the actual text is ambiguous or contradictory. Thus, the ICJ’s more objective analysis in *Qatar vs. Bahrain* was expressly contingent on considering the circumstances surrounding an agreement’s conclusion.¹⁷¹

Subsequent Practice. In addition to the surrounding circumstances, both intentional and objective methods may also invoke the parties’ subsequent practice. For example, in searching for the parties’ intentions, the *South China Seas* Tribunal concluded that an agreement was not intended to be a treaty given China’s repeated use of the term “political document” to describe it after its conclusion.¹⁷² The failure to submit an agreement to the domestic procedures required for treaties may also signal the parties’ intentions to conclude a political commitment.¹⁷³ That kind of behavior may, however, also be cast in a more objective light. Thus, the ICJ has found the parties’ subsequent behavior – e.g., making technical corrections to an agreement – indicative of a binding commitment.¹⁷⁴

What about the fact that a participant registered an agreement with the United Nations pursuant to Article 102 of the UN Charter? As noted above, registration is not a requirement for treaties. In *Qatar v. Bahrain*, the ICJ emphasized that the failure to register the Agreed Minutes could not deprive what it otherwise viewed as a legally binding agreement of that status.¹⁷⁵ On the other hand, in the *Maritime Delimitation in the Indian Ocean* case, the ICJ emphasized that Kenya had intended the MOU in question to be a treaty, having requested its registration at the United Nations, and that Somalia did not object to that request for almost five years.¹⁷⁶ In other words, even if not determinative, registration (or non-registration) may still be somewhat indicative of an agreement’s binding or non-binding character.

3.5 Evidence Indicative of a Contract: *Where agreement participants do not specify or otherwise agree on its status, States should use (or rely on) a governing law clause to establish the existence of a contract. States should presume that a clearly binding text among States that is silent as to its status is a treaty rather than a contract.*

Commentary: In differentiating among agreements, the possibility of a contract only emerges after two previous questions are answered affirmatively. First, is there an agreement? Second, is the agreement binding? Where there is a binding agreement, the question then arises whether it constitutes a treaty or a contract? The capacity of the participants may assist in this inquiry as certain participants may not be authorized to make treaties. See *Guideline 2.1-2.2* and the accompanying *Commentary* for how to identify which entities may have a treaty-making capacity.

¹⁷⁰ *Delimitation of the Maritime Boundary in the Bay of Bengal*, *supra* note 118, at ¶93; *Accord Aegean Sea* case, *supra* note 114, at ¶107. Similarly, in the *South China Seas Arbitration*, the Tribunal emphasized how China had repeatedly labeled the agreement at issue as a “political document” in the run-up to its conclusion. *South China Sea Arbitration*, *supra* note 37, at ¶216.

¹⁷¹ *Qatar v. Bahrain*, *supra* note 38, at ¶23 (In order to ascertain whether an agreement of that kind has been concluded, “the Court must have regard above all to its actual terms and to the particular circumstances in which it was drawn up”).

¹⁷² *South China Sea Arbitration*, *supra* note 37, at ¶218.

¹⁷³ *Delimitation of the Maritime Boundary in the Bay of Bengal*, *supra* note 118, at ¶97 (“[t]he fact that the Parties did not submit the 1974 Agreed Minutes to the procedure required by their respective constitutions for binding international agreements is an additional indication that the Agreed Minutes were not intended to be legally binding.”). On the other hand, the ICJ has suggested that a failure to follow domestic treaty-making procedures will not deny an agreement that otherwise looks like a treaty that status. *Somalia v. Kenya*, *supra* note 9, at 23-24, ¶¶48-50.

¹⁷⁴ *Land and Maritime Boundary (Cameroon v. Nigeria)*, *supra* note 9, at ¶253 (concluding that the Maroua Declaration was legally binding where it was published (without any condition suggesting a need for further ratification); subsequent letters were exchanged making technical corrections to its contents; and the boundary line it contained was notified to the relevant U.N. Secretariat).

¹⁷⁵ *Qatar v. Bahrain*, *supra* note 38, at ¶¶28-29.

¹⁷⁶ *Somalia v Kenya*, *supra* note 9, at ¶19.

As with the identification of treaties and political commitments, moreover, the language used in the agreement may be indicative of its contractual status. Contracts, for example, may be titled as such. Or, as indicated above, they may specify a governing law other than international law (thereby excluding the treaty option).¹⁷⁷ Care should be taken, however, not to conclude that any agreement that references a State's laws or legal system is a contract. States may condition their treaty obligations, for example, to only extend so far as domestic law allows (or to disavow as obligatory behavior that would violate such law). In such cases, the domestic law reference serves to limit the scope of the obligation governed by international law rather than to redefine what law governs the agreement.

What happens when a text is clearly binding but silent as to its status as a treaty or a contract? Where the participants are subjects of international law, binding agreements are most often presumed to constitute treaties.¹⁷⁸ Thus, States should assume binding inter-State agreements will qualify as treaties absent evidence indicative of a contract (e.g., a governing law clause). Where the participant is a State institution, however, this presumption may not hold, requiring careful analysis of not just the agreed text, but also the surrounding context and the parties' subsequent practice. There are, moreover, some academic suggestions that the two categories of binding agreement need not be mutually exclusive, *i.e.*, that some agreements could take a "hybrid" form where certain terms are governed by international law, while others are governed by national law.¹⁷⁹ As yet, however, there is insufficient State practice to support this as a new agreement form.

3.6 Ambiguous or Inconsistent Evidence of an Agreement's Status: *Where evidence indicative of an agreement's status is ambiguous or inconsistent, the agreement's status should depend on a holistic analysis that seeks to reconcile both the objective evidence and the participants' shared intentions. States should seek to share the results of their holistic analysis with agreement partners. In some cases, States may wish to consider more formal dispute resolution options to clarify or resolve the binding or non-binding status of their agreement(s).*

Commentary: In some cases, the evidence relating to the type of agreement concluded can be ambiguous. Consider, for example, the title "Memorandum of Understanding." For certain States, this title is indicative of a political commitment, rather than a treaty. But other States have not found this title preclusive of treaty status. Similar ambiguity surrounds the verb "will" in English. Among some States, particularly those associated with the British Commonwealth, the verb "will" is regarded as aspirational rather than mandatory. Hence, those States regularly use "will" in—and associate it with—non-binding agreement texts. For other States, however, "will" is synonymous with "shall" and can be read as conveying a binding commitment. Thus, States and State institutions should exercise caution in their assumptions that such language will be indicative of an agreement's status.

Some agreements contain a mix of clearly binding and clearly non-binding provisions. In such cases, the agreement should be treated as binding because a political commitment cannot, by definition, be binding in any part.¹⁸⁰ State practice appears to bear this out. Consider for example, the Paris Agreement on Climate Change—a treaty—that (famously) uses the verb "should" to define the parties' central obligation on emission reduction targets, while using the verb "shall" in other provisions on

¹⁷⁷ See, e.g., *supra* note 111 (governing law clause of 1998 NASA-AEB Agreement designated "United States Federal Law to govern this Agreement for all purposes, including but not limited to determining the validity of this Agreement ...").

¹⁷⁸ Professor Jan Klabbers devoted an entire book to establishing this presumption. See KLABBERS, *supra* note 3. For others favoring it, see Anthony Aust, *The Theory & Practice of Informal International Instruments*, 35 INT'L & COMP. L. Q 787, 798 (1986); Widdows, *supra* note 5, at 142; Hersch Lauterpacht, *Second Report on the Law of Treaties*, [1954] YBILC, vol. II, 125. These views have come to supplant earlier suggestions that the presumption should run the other way (against treaty-making absent a clearly manifested intent to do so). See Schachter, *supra* note 49, at 297; JES Fawcett, *The Legal Character of International Agreements*, 30 BRIT. YBK INT'L L. 381, 400 (1953).

¹⁷⁹ See Paul Reuter, *Third report on the question of treaties concluded between States and international organizations or between two or more international organizations*, [1974] YBILC, vol. II(1), 139.

¹⁸⁰ See, e.g., Switzerland Guide to Treaties, *supra* note 123, at 6 (a non-binding "text in its entirety has to be drafted using terms which do not express legal commitment").

future meetings and reporting.¹⁸¹ In other words, treaties can contain provisions that the parties do not intend to be binding alongside those they do. Of course, this possibility complicates any application of the intent test, since it requires evaluating the parties' intentions on a provision-by-provision basis.

In other cases, evidence may not be ambiguous but contradictory. States should, where possible, avoid such conflicting constructs. Where such cases nonetheless arise, the participants (or a third party) will need to carefully weigh all the evidence, whether in the text, the surrounding circumstances, or subsequent practice. If possible, in such cases, it would be good to determine whether the results of an intentional and objective approach reach the same conclusion. Where they do not, the participants may wish to pursue dispute settlement mechanisms, including possibilities of (a) clarifying or otherwise reaching an understanding on the agreement's status, (b) terminating the agreement, or (c) replacing it with a more clearly delineated agreement.

4 Procedures for Making Binding and Non-Binding Agreements

4.1 Different Domestic Procedures for Treaties: *Every State should remain free to develop and maintain one or multiple domestic processes for authorizing the negotiation and conclusion of treaties by the State or its institutions. These procedures may be derived from the State's constitution, its laws, or its practice. Different States may employ different domestic procedures for the same treaty.*

Commentary: States have extensive—and often different—domestic procedures for authorizing treaty-making derived from each State's legal, historical, political, and cultural traditions. Despite their differences, these procedures serve similar functions. First, and foremost, they can confirm that the proposed agreement will constitute a treaty for the State (in the international law sense of that term employed in the *Guideline 1.2* definition above). Second, they confirm that the treaty is consistent with the State's domestic legal order, ensuring, for example, that the treaty's terms do not run afoul of any constitutional or statutory regulations or that the institution in question has the requisite competence and authority to engage in treaty-making. Third, they ensure appropriate coordination regarding the treaty's contents and/or its performance both within a State's executive branch and across the other branches of government.¹⁸²

The domestic procedures States use to authorize treaty-making emerge from various sources. Some are mandated by a State's constitution.¹⁸³ Others may be a product of national law.¹⁸⁴ In some cases, the procedures have no formal legal basis, but depend on a national practice or policy. In Canada, for example, although the Prime Minister has unilateral authority to make a treaty on any subject, there is a practice of refraining from consenting to treaties that require implementing legislation until that legislation is enacted (whether at federal or provincial levels).¹⁸⁵ As a result, States may have different levels of legal commitment to their treaty-making procedures; some States' procedure will be non-

¹⁸¹ Compare U.N. Framework Convention on Climate Change, Adoption of Paris Agreement, FCCC/CP/2015/L.9, Dec. 12, 2015, art. 4.4 with arts. 4.9 & 4.12. The Paris Agreement's intended treaty status is also evident in the presence of clauses on consent, entry into force, and withdrawal/termination.

¹⁸² See, e.g., Colombia Response, *supra* note 85 (“depending on the subject matter of the legal instrument to be negotiated ... the ministries or entities of that branch with technical knowledge of the matters to be agreed upon in the text of the instrument itself” are involved in authorizing it).

¹⁸³ See, e.g., Argentina Response, *supra* note 72 (citing Article 99(11) of the Constitution for the President's authority to conclude treaties and Article 75(22) for the legislature's authority “[t]o approve or reject treaties concluded with other nations and with international organizations ...”); Colombia Response, *supra* note 85 (“treaties require adoption by the Congress of the Republic and a declaration of enforceability by the Constitutional Court, in fulfillment of the provisions of Articles 156 and 241 of the 1991 Political Constitution, respectively.”); Dominican Republic Response, *supra* note 46 (citing Art. 184 of the Constitution requiring the Constitutional Court to review all treaties and Art. 93 for providing for National Congress approval of all treaties); Ecuador Response, *supra* note 46 (citing Articles 416 to 422 and 438 of the Constitution regulating treaty-making); Mexico Response, *supra* note 109 (citing Art. 133 of the Mexican Constitution for treaties concluded by the President with Senate approval); U.S. Response, *supra* note 72 (citing Art. II, Sec. 2, cl. 2 of the U.S. Constitution); Chile Comments 2020, *supra* note 40 (citing Articles 54.1, 93.1, and 93.3 of the Constitution of Chile).

¹⁸⁴ Brazil Response, *supra* note 85 (treaty making authority delegated to the Ministry of Foreign Affairs via Article 62.III of Federal Law No. 13.502/2017).

¹⁸⁵ See Canada Response, *supra* note 40, at 6: Maurice Copithorne, *National Treaty Law & Practice: Canada*, in DUNCAN B. HOLLIS ET AL (EDS.), NATIONAL TREATY LAW & PRACTICE 95-96 (2005).

derogable; others may have more flexibility, capable of accommodating variations if the circumstances warrant.

In terms of the contents of these domestic treaty-making procedures, there is some uniformity in where the power to negotiate a treaty lies. Most treaty-making procedures assign the power to negotiate and conclude treaties to a State's executive, whether the Head of State (*e.g.*, the Monarch), the Head of Government (*e.g.*, the Prime Minister), or both (*e.g.*, the President). Often, the power is further delegated from the Head of State to the Head of Government and from the Head of Government to the Foreign Minister. There is also uniformity in States' commitment to having the legislature authorize the State's consent to at least some treaties.

But there is extensive variation in both the breadth and depth of the required legislative role.¹⁸⁶ For some States, like the Dominican Republic, all treaties require legislative approval.¹⁸⁷ Other States, like Ecuador, require legislative approval only for treaties that address certain subjects or perform certain functions.¹⁸⁸ Several States have different sets of domestic procedures for different categories of treaties. Thus, although many of Colombia's treaties must receive legislative approval, Colombian law and practice also recognizes "executive agreements" and "simplified procedure agreements." The former fall within the exclusive authorities of the Colombian President as director of international affairs under Article 189.2 of the Colombian Constitution while the latter are concluded pursuant to a prior treaty (which did receive the assent of the national legislature and review by the Constitutional Court).¹⁸⁹ Executive or simplified procedure agreements that exceed these parameters would be unconstitutional.

For States like the United States, law and practice have mixed to create no less than four different procedures for establishing when the Executive may consent to a treaty: (1) following the advice and consent of two-thirds of the U.S. Senate; (2) in accordance with a federal statute (enacted by a simple majority of both houses of Congress); (3) pursuant to those "sole" powers possessed exclusively by the Executive; and (4) where it is authorized by an earlier treaty that received Senate advice and consent.¹⁹⁰ In addition to legislative involvement, several Member States have a judicial review requirement, where the Constitutional Court reviews the constitutionality of a proposed treaty. Thus, in Colombia, the

¹⁸⁶ The level of legislative approval may vary. Some States require the entire legislature to approve a treaty. Others have both chambers of a legislature participate in the approval process, but one does so with greater rights than the other. A third approach involves having only one of two legislative chambers give its approval. Finally, some States affiliated with the Commonwealth do not grant their legislatures any role in approving a treaty, but they also disavow any domestic implementation without legislative authorization, which occurs via normal parliamentary procedures. *See Hollis, A Comparative Approach, supra* note 10, at 32-35 (surveying the treaty law and practice of nineteen representative States).

¹⁸⁷ Dominican Republic Response, *supra* note 46 (per Art. 93 of the 2015 Constitution, the National Congress is empowered to "approve or reject international treaties and agreements signed by the Executive").

¹⁸⁸ Ecuador Response, *supra* note 46 (National Assembly required to give prior approval to ratification of treaties involving territorial or border delimitation matters, political or military alliances, commitments to enact, amend or repeal a law, rights and guarantees provided for in the Constitution, the State's economic policies, integration and trade agreements, delegation of powers to an international or supranational organization, a compromise of the country's natural heritage and especially its water, biodiversity, and genetic assets).

¹⁸⁹ Colombia Response, *supra* note 85 (noting that for agreements developing a prior agreement, that prior agreement must be consistent with all constitutional requirements and that the implementing agreement itself must be consistent with—and cannot exceed—those in the framework treaty that serves as its basis); *see also* Colombia 2020 Comments, *supra* note 71.

¹⁹⁰ As a result, the United States domestically uses different terminology to refer to treaties (in the international law sense of that term) that proceed along these different paths. In U.S. law, the term "treaties" only refers to those agreements receiving Senate advice and consent; "congressional-executive agreements" are agreements approved by a federal statute; and "sole executive agreements" are agreements done under the President's executive authorities. Other States employ their own domestic lexicons to differentiate their treaties according to the different domestic procedures employed. *See* note 47 and accompanying text.

Dominican Republic, and Ecuador, the Constitutional Court must review all treaties before they can proceed through other domestic procedures.¹⁹¹

States may also impose notification requirements for treaties that the Executive can conclude without legislative (or judicial) involvement. This way the legislature is apprised of what treaties the State is concluding independent of its own approval processes. Some States like the United States have even devised procedures to coordinate treaty-making *within* the executive branch, including by government agencies. The “Circular 175” (C-175) process implements a provision of U.S. law restricting U.S. government agencies from signing or otherwise concluding treaties (in the international law sense of that term employed in these *Guidelines*) unless they have first consulted with the U.S. Secretary of State.¹⁹² In 2013, Peru’s Ministry of Foreign Affairs issued two Directives that “establish guidelines for the administration of treaties, including their negotiation, signature, adoption (domestic adoption and/or ratification), and procedures for the formulation of possible declarations, reservations, and objections to reservations, and registration....”¹⁹³

The breadth and diversity of States’ domestic treaty-making procedures counsels against any efforts at harmonization. On the contrary, *Guideline 4.1* adopts a best practice of “freedom” – accepting and supporting the autonomy of each State to decide for itself how to authorize treaty-making. States may vest their treaty-making procedures in constitutional or other legal terms. Or, they may develop them through more informal, practical processes. A State may, moreover, adopt a single process for all its treaties under international law, or it may opt to develop several different approval procedures for different treaty types.

States should, moreover, be aware that the choice(s) they make to have a particular treaty proceed through one process, such as legislative approval, may not be followed by their treaty partners. In other words, States should not assume that simply because their own national procedures require a particular treaty receive legislative approval (or, conversely, that no such approval is required), its potential treaty partners will adopt a similar approach.

4.2 Developing Domestic Procedures for Political Commitments: *States should develop and maintain procedures for authorizing the conclusion of political commitments by the State or its institutions. Although non-binding agreements, political commitments could benefit from a practice where States have procedures that confirm:*

- (b) a commitment’s non-binding status;*
- (b) the appropriateness of using a non-binding form in lieu of a binding one, such as when time constraints or uncertainty counsel against locking a State into a legal agreement; and*
- (c) notification to—and coordination with—relevant State institutions, including a State’s Foreign Ministry.*

Commentary: Political commitments, including many titled as MOUs, have become an increasing vehicle for inter-State and inter-institutional agreements. At least part of their appeal derives

¹⁹¹ See, e.g., Dominican Republic Response, *supra* note 46 (pursuant to Article 55 of Organic Law No. 137-11, the President must submit signed international treaties to the Constitutional Court for it to rule on their constitutionality); Ecuador Response, *supra* note 46 (citing Art. 110.1 of Ecuador’s Organic Law on Judicial Guarantees and Constitutional Oversight – “International treaties requiring legislative approval will be automatically put to constitutional review before ratification, prior to the start of any legislative approval process.”).

¹⁹² The Case-Zablocki Act, 1 U.S.C. §112b(c) (“Notwithstanding any other provision of law, an international agreement may not be signed or otherwise concluded on behalf of the United States without prior consultation with the Secretary of State.”). The C-175 process itself involves the Secretary of State authorizing the negotiation and/or conclusion of one or more international agreements by the State Department or another U.S. government agency. A copy of the C-175 procedures can be found at <https://fam.state.gov/FAM/11FAM/11FAM0720.html>.

¹⁹³ Peru, Ministry of Foreign Affairs, *General Internal Guidelines on the Signature, Domestic Adoption, and Registration of Treaties*, Directive No. 001-DGT/RE-2013 (covering the Ministry of Foreign Affairs itself); Peru, Ministry of Foreign Affairs, *General Guidelines on the Signature, Domestic Adoption, and Registration of Treaties*, Directive No. 002-DGT/RE-2013 (covering all Peruvian governmental entities).

from the general absence of domestic procedures for their conclusion.¹⁹⁴ That has allowed these instruments to develop a reputation for greater *speed* (in terms of the timing of their formation), *flexibility* (in terms of adjustments or modifications), and *exit* (in terms of bringing the commitment to an end) than treaties.¹⁹⁵ Such benefits suggest that it would be a mistake to extend the same approval procedures for treaties to political commitments.

But it does not follow that States should have *no* procedures for authorizing these agreements simply because they are ill-suited for treaty-making procedures. Without some prior review or authorization, it is difficult to know if a purported political commitment is actually non-binding. Similarly, without some review or approval processes, political commitments might be concluded that do not comport with the State's laws or policies. In the inter-institutional context, it is even possible that one institution within a State might conclude a political commitment that runs counter to—or conflicts outright—with institutional interests or agreements elsewhere in the same State.

Such concerns help explain why some States have devised review mechanisms for their political commitments. Canada's published treaty policy, for example, includes a section mandating policy approvals of "non-legally binding instruments" by the national government or its institutions.¹⁹⁶ Colombia limits the capacity to sign non-binding agreements to those with legal capacity to represent the entity and subject to verification by the relevant legal office that the commitments assumed would not exceed the functions and authorities granted to that entity by the Constitution or laws.¹⁹⁷ In Peru, non-binding political commitments by the State are coordinated with all the governmental entities within whose purview its contents fall. The legal office of the Ministry of Foreign Affairs is charged with deciding whether to issue approval for their signature. But where the nonbinding agreement is at the inter-institutional level, the negotiations are conducted by the institution concerned, and "[a]lthough under Peruvian legislation, there is no mandate to submit the draft instrument to the Ministry of Foreign Affairs for its consideration, many governmental entities do so."¹⁹⁸

Mexico and the United States recount similar efforts to review proposed non-binding agreements to confirm that they have such a status and otherwise comport with their own treaty practice. What is less clear, however, is how regularly this review occurs. Mexico's response indicates that it occurs "at the request of the signing Mexican entity" (although the relevant Mexican authority sends copies of the instrument once it "has been formalized"). In the United States, although it reports no "formal procedures governing the conclusion of non-legally binding instruments, ... such instruments are reviewed both [with] respect to their content and drafting, including to ensure that they appropriately

¹⁹⁴ See Charles Lipson, *Why are Some International Agreements Informal?*, 45 INT'L ORG. 495, 508 (1991); Raustiala, *supra* note 6, at 592. Brazil, for example, has no formal approval procedures for political commitments.

¹⁹⁵ Duncan B. Hollis, *Preliminary Report on Binding and Non-Binding Agreements*, OEA/Ser.Q, CJI/doc.542/17, ¶15 (24 July 2017) ("Preliminary Report").

¹⁹⁶ Canada Treaty Policy, *supra* note 40, Pt. 8 and Annex C ("each Department is responsible for ensuring that the proper distinction is made between treaties and non-binding instruments, in consultation with the Treaty Section" and requiring policy approval, including from Cabinet for a "non-legally binding instrument that would result in a major shift in Canadian policy" and archiving of all non-legally binding instruments with the Canadian Treaty Section); *see also* Canada Response, *supra* note 40 ("Although considered non-binding by Canada, such instruments do have a distinct form and must respect Canadian policies and practices, including the foreign policy of the Canadian government, Canadian and international law").

¹⁹⁷ Colombia Response, *supra* note 85; Colombia Comments 2020, *supra* note 71. Thus, among Colombia's government ministries, only the Ministry of Foreign Affairs is authorized to sign political commitments on behalf of the State as a whole, subject to review by the Department of International Legal Affairs of the Ministry of Foreign Affairs. Inter-institutional political commitments are reviewed by the legal office of the institution concerned. *Id.*

¹⁹⁸ Peru Response, *supra* note 66 (assessment of political commitments "made by the Ministry of Foreign Affairs focuses on verifying their consistency with foreign policy, as well as their wording ..."). Outside the region, States like Germany and Switzerland have also instituted formal procedures for approving the conclusion of political commitments, while States like Israel and Spain report more informal mechanisms for review. *See, e.g.,* Switzerland Guide to Treaties, *supra* note 123, at 25, 50 (noting different approvals required for different types of non-binding instruments); Working Group on Treaty Practice, *supra* note 40, at 10, 28.

reflect the intention that the instrument not be governed by, or give rise to rights or obligations under, domestic or international law.”¹⁹⁹

Guideline 4.2 encourages States as a best practice to formalize and regularize their review of political commitments. Doing so would remove the *ad hoc* quality of existing review mechanisms, many of which are informal. At present, it is often unclear exactly how often and in what circumstances a State’s internal procedures generate a review of a political commitment before its conclusion. As the *Guideline* suggests, these procedures could be designed to confirm the non-binding nature of the agreements under review and their consistency with the State’s laws and foreign policies. These procedures would also alleviate concerns that a particular institution within a State (whether a government ministry or a sub-national territorial unit) could conclude a political commitment where the State’s government or other institutions are unaware of its existence, let alone its contents.

The *Guidelines* do not, however, attempt to elaborate any best practice with respect to the contents of the approval procedures themselves. States will most likely want to avoid imposing overly restrictive or onerous processes as that would deprive the political commitment of the speed and flexibility benefits on which their current popularity rests.

At the same time, however, by formalizing at least some procedural review of a State’s political commitments, the government can ensure that the executive branch is not concluding treaties under the guise of their being political commitments or otherwise attempting to circumvent domestic procedures required for treaty-making. States should all have an interest in making sure that political commitments are used only in appropriate circumstances and not as a way to bypass the legislative or judicial role required for the State’s conclusion of binding agreements. Having at least *some* procedures for approving inter-State and inter-institutional political commitments would help mitigate that risk.

4.3 Developing Domestic Approval Procedures for Inter-State Contracts: *For States that engage in inter-State contracting, they should develop and maintain procedures for approving the conclusion of any such contracts. As a best practice, States should include:*

- (a) *information on how the State will identify the governing law of the contract; and*
- (b) *mechanisms for confirming that governing law with the other contracting State(s) to avoid future conflicts.*

Commentary: Some—but not all—States have a practice of entering into contracts with other States. *See Guideline 2.5* and accompanying *Commentary*. Of these, several States have developed procedures for reviewing or approving the conclusion of such contracts. Ecuador has a government procurement law that, while prioritizing the terms of any inter-State contract, regulates such agreements where they involve “international public enterprises” including other States’ public enterprises.²⁰⁰ The United States has a foreign military sales program that includes a program with instructions on the requirements and steps to be followed.²⁰¹ Mexico’s Constitution (Art. 134) requires certain public tenders for certain types of behavior (*e.g.*, procurement, leasing of assets, and public services) which, in turn, require “contracts that must follow the procedures and observe the formalities established in the applicable national legal framework (federal, state, and municipal).”²⁰²

Guideline 4.3 proposes as a best practice that *all* States with a practice of inter-State contracting should have procedures for authorizing the conclusion of such binding agreements. Having procedures for inter-State contracting would allow States to confirm the contractual status of the agreements proposed, and thus avoid inadvertent characterization of a treaty or political commitment as a contract.

¹⁹⁹ Mexico Response, *supra* note 109; U.S. Response, *supra* note 72.

²⁰⁰ *See, e.g.*, Ecuador Response, *supra* note 46 (citing Article 100 of the General Regulations of the Organic Law on the National Government Procurement System which authorizes contracts with “international public enterprises” and provides for the application of domestic articles “in the event no specific contracting regime is provided for” in the terms and conditions of any relevant agreements); *id* (citing Organic Law on the National Government Procurement System, Art. 3, which requires compliance with the terms of the agreements and “[a]nything not provided for in those agreements shall be governed by the provisions of this Law”).

²⁰¹ *See* U.S. Foreign Military Sales program, *available at* <http://www.dsca.mil/programs/foreign-military-sales-fms>.

²⁰² Mexico Response, *supra* note 109.

Moreover, these procedures could help alleviate questions that may arise with respect to the contract's governing law. States should have procedures indicating whether and when they would (i) insist on their own national law as the governing law, (ii) permit the other contracting State's law to do so, or (iii) authorize the employment of a third State's contract law or non-State law instead. Furthermore, States could have procedures that require communication on these governing law questions with the other contracting party. Doing so would help avoid problems where the contracting parties disagree on what domestic or non-State law governs the contract concluded.

4.4 Domestic Approval Procedures for Binding Inter-Institutional Agreements: *States should have procedures by which they can assure appropriate authorization for any institutions (whether government ministries, sub-national units, or both) with the capacity to conclude a treaty governed by international law. States should also have procedures by which they can assure appropriate authorization for their institutions (whether government ministries, sub-national units, or both) to conclude a contract, whether under that State's own domestic law, the domestic law of another State, or non-State law.*

4.4.1 *Such procedures should identify how a State differentiates for itself whether the institution is concluding a treaty or a contract; and*

4.4.2 *Such procedures should include mechanisms for confirming in advance that the other foreign institution concurs as to the type and legally binding status of the inter-institutional agreement to be concluded.*

Commentary: Consistent with *Guideline 4.1*, States should decide for themselves whether and which sorts of binding agreements to authorize their institutions to conclude.²⁰³ States may, moreover, authorize certain institutions to conclude treaties or contracts, but not others. A State, for example, may allow a government agency to conclude a treaty in its own name but not a sub-national entity, or vice versa. Article 125 of the Argentina Constitution, for example, authorizes subnational units to conclude “partial treaties”—which the government calls “international agreements”—with the “knowledge of Congress” and “provided that they are not incompatible with the foreign policy of the Nation and do not affect the powers delegated to the Federal Government or the public credit of the Nation.” At the same time, Argentina denies its national ministries a capacity to make treaties in their own name.²⁰⁴

Several States already have regulations or approval procedures in place for their institutions' agreements. Some States simply extend their existing procedures for the State's agreements to their institutions. The United States, for example, requires the same consultation and approval by the U.S. Department of State for inter-agency agreements as it does for treaties concluded in the U.S. name.²⁰⁵ Other States have devised procedures focused on one type of institution. Jamaica reports a practice of the relevant Ministry, Department, or Agency seeking Cabinet approval to negotiate a binding agreement and subsequently seeking further approval to sign it. Copies of signed inter-institutional agreements are then kept on file by the Foreign Ministry Legal Office. Mexico's 1992 Law on the Conclusion of Treaties regulates both the subject-matter and functional limits on inter-institutional agreements involving Mexican federal government ministries or its state or regional governments.²⁰⁶ Mexican institutions can (i) only conclude binding agreements on subjects within the exclusive purview of the area or entity making the agreement; (ii) the agreement can only affect the concluding entity; (iii) the entity's regular budget must be sufficient to cover the agreement's financial obligations; (iv) the legal rights of individuals cannot be affected; and (v) existing legislation cannot be modified. In addition, Article 7 of the Law on the Conclusion of Treaties requires Mexican institutions to inform the Secretariat of Foreign Affairs of any binding inter-institutional agreement they are seeking to conclude,

²⁰³ Thus, States like Brazil, the Dominican Republic, and Peru do not authorize *any* binding agreements by their government agencies, ministries, or institutions. *See, e.g.*, Peru Response, *supra* note 66 (“Peruvian governmental entities, including municipalities and regional governments, are not authorized to enter into binding agreements under international law (treaties)”). Colombia allows government entities to enter into binding agreements with their counterparts domestically or internationally, but such agreements are governed by domestic law, not by international law, and are not considered treaties. Colombia Comments 2020, *supra* note 71.

²⁰⁴ *See supra* note 84.

²⁰⁵ U.S. Response, *supra* note 72.

²⁰⁶ 1992 Mexican Law Regarding the Making of Treaties, *supra* note 65.

with a requirement that the Legal Department of the Secretariat of Foreign Affairs report on the lawfulness of signing such an agreement.²⁰⁷

States have sought further guidance regarding their inter-institutional agreements for three reasons.

- First, it is not always clear whether an institution can enter into *any* agreements.
- Second, even if the institution may have some agreement-making capacity, it does not follow that it can make all three types of agreements considered here (treaties, political commitments, and contracts).
- Third, in individual cases, it is often unclear what legal status an existing inter-institutional agreement currently has.

Guideline 4.4 endorses a best practice that addresses all three issues by calling on States that permit inter-institutional agreements to have procedures that ensure appropriate review or approval of such agreements. The *Guidelines* leave it to States whether such procedures should have a legal basis or exist as a matter of policy. Similarly, States should be free to decide whether to have procedures that authorize certain inter-institutional agreements generally or to devise a case-by-case system of notice or approval.

Moreover, *Guideline 4.4* suggests that States may include in their procedures one or more mechanisms for differentiating among the institutions' binding agreements. Some possible mechanisms to mitigate existing confusion and the risk of future misunderstandings or disagreements would include:

- a) a requirement that all contracts contain an explicit governing law clause to avoid any suggestion that they qualify for treaty status;
- b) a default presumption when two or more State institutions conclude a binding agreement, *i.e.*, establishing a presumption that the agreement qualifies as a treaty or, conversely, a presumption that binding inter-institutional agreements are contracts, not treaties; and/or
- c) procedures requiring the institution involved to confirm with their agreement partners a shared understanding that (i) the agreement is binding (or not); and (ii) what type of binding agreement will be concluded, be it a treaty or a contract.

4.5 Publicizing Institutional Capacities to Conclude Binding Agreements

4.5.1 *A State should make public which, if any, of its institutions may be authorized to conclude treaties, including specifying whether it may do so on behalf of the State as a whole or in its own name.*

4.5.2 *A State should make public which, if any, of its institutions may be authorized to conclude contracts, including specifying whether it may do so on behalf of the State as a whole, or in its own name.*

4.5.3 *A State may make this information public generally, such as by posting its procedures online, or specifically, by communicating with other States or State institutions as to its institutions' capacities and the relevant procedures under which they operate.*

Commentary: *Guideline 4.4* focuses on encouraging States to devise procedures to ensure that the State has sufficient self-awareness of whether and what types of binding agreements its institutions may conclude. *Guideline 4.5* promotes inter-State communication of the conclusions reached (including denying agreement-making competencies to its institutions) and procedures used by a State to approve or monitor any authorized inter-institutional agreement-making. Other States may benefit from learning:

- (i) which State institutions may conclude binding (or non-binding) agreements with foreign institutions;
- (ii) what types of binding and non-binding agreements may be authorized; and
- (iii) what the processes are for doing so.

This information may assist another State or its institutions in deciding whether to conclude an agreement with a State's institutions and what form that agreement should take.

Sharing information among States concerning their inter-institutional agreement authorities and practices should also pay off in existing cases to reduce confusion (or even conflicting views) as to what

²⁰⁷ Mexico Response, *supra* note 109.

type of inter-institutional agreement has been concluded. Finally, publicizing procedures may offer useful models or examples of processes on which States with less experience with inter-institutional agreements may rely.

There are various ways States may publicize this information whether through diplomatic channels or other means of direct communication among States. They may also opt to post relevant authorities and procedures online, whether on their Foreign Ministry website or some other visible web site. If the OAS could locate sufficient resources and personnel, it might even be worth having it establish a web site to which all Member States could contribute summaries or copies of relevant procedures and practices.

4.6 Publicizing Registries of Binding and Non-Binding Agreements

4.6.1 *National Registries of Binding Agreements: States should create and maintain public registries for all binding agreements of the State and State institutions.*

4.6.2 *National Registries of Political Commitments: States should maintain a national registry of all, or at least the most significant, political commitments of the State and State institutions.*

Commentary: All States are required to register their treaties with the United Nations under Article 102 of the UN Charter. Most States already have (and maintain) lists and archives with respect to their treaties and government contracts. In many cases, States make their treaty lists—or the agreements themselves—public, whether through publication in an Official Gazette, Bulletin, or a treaty-specific series. States may, however, limit which treaties they choose to publish, leaving out treaties dealing with matters deemed of less significance, or conversely, those containing commitments implicating classified information or programs. There is, moreover, much less publicity surrounding inter-State or inter-institutional contracts.

Guideline 4.6.1 suggests that States should have *public* registries of agreements binding the State and its institutions. Ideally, these registries could include, not just the fact of an agreement’s existence, but its contents as well. Doing so would have several benefits:

- (i) Publicizing binding agreements by the State or its institutions comports with the rule of law and democratic values, affording the public a window into a key area of State behavior.
- (ii) Public registries might be beneficial to a State internally. Government-wide knowledge of a States’ binding agreements can help ensure interested government agencies are aware of all binding agreements. That information should ensure more regular tracking of what binding agreements exist and better intra-governmental coordination in their formation.
- (iii) Public registries of treaties and contracts would also have external benefits. These registries would provide a regular information channel for other States, conveying the publicizing States’ views on the existence and legal status of its binding agreements. This could lead to quicker (and hopefully easier) recognition of potential differences on the existence of an agreement and its status as a treaty or a contract.
- (iv) Such public registries may even create space for differences of opinion to be resolved in advance rather than in response to a concrete problem or crisis.

When it comes to non-binding agreements, States currently suffer from an information deficit. Both the number and contents of a State’s political commitments, whether labeled as MOUs or otherwise, are often unclear. And there is even greater ambiguity surrounding inter-institutional political commitments. Whatever informal procedures might exist to review or even approve political commitments, most States do not count or collect them.²⁰⁸ Thus, there is a real dearth of information available on the number and types of non-binding agreements reached by States and their institutions.

²⁰⁸ Canada and Ecuador are notable exceptions. See Canada Treaty Policy, *supra* note 40; Ecuador Response, *supra* note 46 (noting practice of recording “non-binding political agreements (joint declarations and communiqués)” with the Directorate for Legal Advice on Public International Law, some of which are accompanied by a “legal opinion from the Foreign Ministry’s General Legal Coordination Office.”). Outside the region, several States report having a database or archive for political commitments. Working Group on Treaty Practice, *supra* note 40, at 9, 27 (Canada, Germany (since 2014), Israel, Korea, Mexico, and Spain report archives or mandatory reporting of political commitments to their Foreign Ministries; Finland and Japan do not); *but see id.* at 14, 32 (the 8 States

Guideline 4.6.2 aims to rectify this information gap by calling on States to accept a best practice by which they establish a centralized point of contact within the government where political commitments may be collected and retained. National registries of political commitments should be publicly accessible, and, as such, the publicity of such registers should conform to the domestic regulations of each State for public access to information. As with existing treaty registries, a political commitment registry would have valuable internal and external benefits.

- a) It would alert other actors within a State, such as the legislature or non-participating institutions, as to the existence of a political commitment. It might thus check incentives to use political commitments merely as a means to avoid the domestic approval procedures assigned to binding agreements.
- b) Externally, it would inform other States about the content and assumed non-binding legal status of the commitments listed, creating space for further inquiries or communications about such political commitments as these other States deem appropriate.
- c) It would, moreover, alert a State's public of *all* agreements a State has concluded, not just those that may generate legal effects. The public has a clear interest in learning more about agreements that may generate significant consequences for their State, even if those consequences will take a political (rather than legal) form.

5 Legal Effects of Binding and Non-Binding Agreements

5.1 The Legal Effects of State Treaty-Making: *States and their institutions should approach their treaty-making understanding that their consent to a treaty will generate at least three different sets of legal effects:*

5.1.1 Primary International Legal Effects – Pursuant to the fundamental principle of *pacta sunt servanda* treaties impose an obligation to observe their terms in good faith.

5.1.2 Secondary International Legal Effects – The existence of a treaty triggers the application of several secondary international legal regimes, including the law of treaties, State responsibility, and any other specific regimes tied to the treaty's subject-matter.

5.1.3 Domestic Legal Effects – A State's domestic legal order may, but is not required to, accord domestic legal effects to the State's treaties. States should be prepared to explain to other States and stakeholders what domestic legal effects follow its own treaty-making.

Commentary: One of a treaty's defining features is that it is *binding* under international law. Treaties trigger the foundational international legal principle of *pacta sunt servanda*: "Every treaty in force is binding upon the parties to it and must be performed by them in good faith."²⁰⁹ Thus, a treaty's primary legal effects lie in its own terms. States must conform their behavior to whatever the treaty requires, prohibits, or permits. And if the treaty provides vehicles for its own enforcement—*e.g.*, the American Convention on Human Rights—States are obligated to accept these as well.²¹⁰ Thus, Canada, Jamaica, and Peru acknowledge that each State must comply with obligations assumed in their binding agreements, while Colombia sources its compliance obligation to VCLT Article 26 and *pacta sunt servanda*.²¹¹

Beyond a treaty's primary international legal effects, the existence of a treaty may also trigger a series of secondary international legal rules and regimes.²¹² Chief among these is the law of treaties

surveyed – Canada, Finland, Germany, Israel, Japan, Korea, Mexico, and Spain – all cite a need for further internal coordination on the quality and effectiveness of political commitments).

²⁰⁹ VCLT, Art. 26. Some of a treaty's clauses—those on consent, provisional application, and entry into force—actually have legal effects before the treaty is in force.

²¹⁰ American Convention on Human Rights, 22 November 1969, 1144 U.N.T.S. 123, Chs. VI-IX (constituting the Inter-American Commission and Court of Human Rights).

²¹¹ *See, e.g.*, Canada Response, *supra* note 40 ("The parties to treaties have a legal obligation to fulfill their duties"); Dominican Republic Response, *supra* note 46; Jamaica Response, *supra* note 71; Colombia Response, *supra* note 85 ("Article 26 of the 1969 Vienna Convention, imposes an obligation on the parties to comply with the treaties they ratify, and to do so in good faith.").

²¹² Thus, treaties may be distinguished from customary international law, where there is now an ongoing debate about whether any secondary rules exist. *See, e.g.*, Monica Hakimi, *Making Sense of Customary International Law*, 118 MICHIGAN L. REV. (forthcoming 2020).

itself. The VCLT (or customary international law more generally) will regulate the validity, interpretation, application, breach, and termination of all a State's treaties. For example, VCLT Article 29 provides that "unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory." This provision creates room, *if* all the parties agree, for treaties to contain "federal" or "territorial" clauses that allow a State to designate to which sub-national territorial unit(s) a treaty does (or does not) apply.²¹³ On the other hand, it is also possible for States to refuse any territorial clauses, as they have in many human rights treaties, insisting that States parties must apply the treaty across the entire territory.²¹⁴ The VCLT also authorizes termination or suspension of a treaty by an affected party in response to another party's "material breach."²¹⁵

The secondary legal effects of a treaty are not, however, limited to the law of treaties. State responsibility, for example, may also attach to "internationally wrongful acts," which include treaty violations. As detailed in the 2001 Articles on State Responsibility ("ASR"), the law of State responsibility affords States the right to engage in "countermeasures"—unlawful acts that are justified (*i.e.*, lawful) because that State was negatively impacted by a prior internationally wrongful act.²¹⁶ By authorizing otherwise unlawful behavior in response to a treaty breach, countermeasures provide treaty-makers with a significant remedy that is unavailable for other forms of binding agreement (*e.g.*, contracts) let alone non-binding ones (*e.g.*, political commitments).

The existence of treaties on specific topics (*e.g.*, human rights, the environment) may also trigger a range of specialized rules and principles that have emerged to regulate that particular sub-field of international law.²¹⁷ Finally, the availability of certain dispute resolution procedures may depend on the existence of a treaty (either to establish the court's or tribunal's jurisdiction or to give the court material on which to resolve disputes). For example, under the heading of "international conventions," treaties are specifically listed among the sources of law on which the ICJ can reach an opinion.²¹⁸

States should, moreover, recognize that the legal effects of a treaty may not be limited to the international sphere. A State's domestic legal order can (but is not required to) accord domestic legal effects to the State's treaties. Thus, some States' domestic laws may supplement *pacta sunt servanda* by imposing their own obligation of treaty compliance. Under the Dominican Republic's Constitution, for example, there is "an obligation, once the constitutional ratification procedure is concluded, to comply with a valid treaty or agreement."²¹⁹ In Peru, this obligation is specifically imposed on those governmental departments under whose purview the treaty falls.²²⁰

Some States (*e.g.*, Canada) do not accord their treaties any domestic legal status, and thus, the treaty's existence will have little direct domestic impact.²²¹ Other States' domestic legal orders may accord treaty texts the same legal effects as a statute, or even in some cases, a constitutional provision

²¹³ See, *e.g.*, UN Convention on Contracts for the International Sale of Goods (CISG), 11 April 1980, 1489 U.N.T.S. 3, Art. 93(1); European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), Art. 56(1); Constitution of the International Labour Organization, 9 October 1946, 15 U.N.T.S. 35, Art. 19(7).

²¹⁴ See, *e.g.*, International Covenant on Civil and Political Rights ('ICCPR'), 16 December 1966, 999 U.N.T.S. 171, Art. 50; American Convention on Human Rights, *supra* note 194, Art. 28(2).

²¹⁵ VCLT Art. 60. In addition, States always remain free to engage in acts of *retorsion* – unfriendly, but intrinsically lawful behavior that a State might perform to incentivize a breaching State back into treaty compliance (say, for example, by halting the provision of financial assistance that a State otherwise has no obligation to provide). Since acts of retorsion may occur without any prior treaty breach, however, they do not technically fall under the banner of a treaty's legal effects. See ASR, *supra* note 138, at 128, ¶5.

²¹⁶ ASR, *supra* note 138, Ch. II. The ASR requires all countermeasures to be temporary, reversible, and proportionate (in the sense of being commensurate with the injury suffered). Moreover, countermeasures cannot violate *jus cogens*, nor can they unsettle prior dispute settlement resolution agreements.

²¹⁷ Human rights treaties, for example, are subject to specialized interpretative rules. See, *e.g.*, Başak Çalı, *Specialized Rules of Treaty Interpretation: Human Rights* in DUNCAN B. HOLLIS (ED.), THE OXFORD GUIDE TO TREATIES 504 (2nd ed., 2020).

²¹⁸ ICJ Statute, Article 38(1)(a).

²¹⁹ Dominican Republic Response, *supra* note 46.

²²⁰ Peru Response, *supra* note 66.

²²¹ See *supra* note 46.

(assuming the treaty otherwise comports with any domestic conditions regarding its formation or validity).²²² In some States, different treaty categories generate different domestic legal effects, whether based on the treaty's subject matter or the procedures used to authorize it. In Ecuador, for example, human rights treaties that provide "rights that are more favorable than those enshrined in the Constitution" prevail over "any other legal regulatory system or act of public authorities."²²³ Other treaties have significant weight within Ecuador's domestic legal order, with the Constitution listing treaties in the "order of precedence for the application of the regulations" above other organic laws and other forms of domestic regulation.²²⁴

In addition, just as a treaty may trigger the law of treaties internationally, a treaty's existence in domestic law may trigger various other domestic legal doctrines or regimes. Looking at Ecuador again, its Constitution assigns various domestic legal doctrines (*e.g.*, direct applicability) to "treaties and other instruments for human rights."²²⁵ States can also use their domestic legal system to afford treaties judicial enforcement.²²⁶

The *Guidelines* take existing legal effects as it finds them; there are, for example, no proposals of best practices on what domestic legal effects States should accord some—or all—treaties. There is too much diversity in existing practice, and the reasons States have chosen their own path are often so unique as to counsel against harmonization.

Nonetheless, there is value in having States pay closer attention to the legal effects that follow from treaty-making under both international and domestic law. For example, a State contemplating a new treaty relationship may have different positions on the treaty's contents depending on what—if any—domestic legal effects follow the treaty's conclusion not just in its own legal system, but that of its potential treaty partner(s) as well. A State might be content with a straightforward treaty provision where it and its potential partner give treaties direct domestic legal effect—*e.g.*, "the Parties shall not allow X to occur." That same State might, however, prefer a different formulation with States that do not give treaties direct effect—*e.g.*, "the Parties agree to legislate to not allow X to occur."

5.2 The Legal Effects of Contracts: *States and their institutions should approach their agreement-making understanding that the legal effects of a contract will depend on the contract's governing law, including issues of performance, displacement of otherwise applicable domestic law, and enforcement.*

Commentary: As with questions of validity and capacity, the primary effects of a contract will depend on the relevant governing law, which may be a State's national law or, if the parties select it,

²²² *See, e.g.*, Argentina Constitution, *supra* note 84, Art. 31 ("[T]reaties with foreign powers, are the supreme law of the Nation, and the authorities of every Province are bound to conform to it, notwithstanding any provision to the contrary which the Provincial laws or constitutions may contain ..."); *id.*, Art. 75(22) (giving treaties on human rights "standing on the same level as the Constitution"); Constitution of Peru, Art. 55, (Eng. trans. from www.constituteproject.org) ("Treaties formalized by the State and in force are part of national law.").

²²³ Ecuador Response, *supra* note 46 (citing the Ecuador Constitution, Art. 424).

²²⁴ Ecuador Response, *supra* note 46 (citing the Ecuador Constitution, Art. 425: "The order of precedence for the application of the regulations shall be as follows: The Constitution; international treaties and conventions; organic laws; regular laws; regional rules and district ordinances; decrees and regulations; ordinances; agreements and resolutions; and the other actions and decisions taken by public authorities."); *see also* Colombia 2020 Comments, *supra* note 47 ("in the Colombian case, treaties on human rights and international humanitarian law form part of the constitutional bloc, that is, their content has the same legal status as constitutional norms"); Chile Comments 2020, *supra* note 40.

²²⁵ *Id.* (Article 417 of the Constitution: "The international treaties ratified by Ecuador shall be subject to the provisions set forth in the Constitution. In the case of treaties and other international instruments for human rights, principles for the benefit of the human being, the non-restriction of rights, direct applicability, and the open clause as set forth in the Constitution shall be applied.").

²²⁶ *See* David Sloss, *Domestic Application of Treaties*, in DUNCAN B. HOLLIS (ED.), *THE OXFORD GUIDE TO TREATIES* 355 (2nd ed., 2020); Joost Pauwelyn, *Is it International Law or Not and Does it Even Matter?* in J. PAUWELYN, J. WESSEL AND J. WOUTERS (EDS.), *INFORMAL INTERNATIONAL LAWMAKING* 145-46 (2012).

non-State law.²²⁷ The governing law will establish whether and how contracts will operate as well as the available remedies for breach, including judicial means. In the case of non-State law, enforcement may occur through some international forum (e.g., UNIDROIT, ICSID).

Among their legal effects, contracts may also have the legal effect of displacing other, default rules of domestic law that exist in the absence of agreement. Ultimately, therefore, the nature and extent of a contract's legal effects depend on the governing law, including any relevant conflicts of law rules.

Although a contract's legal effects will flow from the governing law, contracts could generate legal effects in the international arena. One contracting State could undertake behavior in reliance on the other contracting State continuing to perform its obligations. Given the binding nature of contracts, that reliance might be sufficiently reasonable to estop the other State from ceasing performance.²²⁸

Alternatively, it might be possible for a contract governed by, say, national law to become elevated into a binding agreement governed by international law. In the *Chagos Arbitration*, for example, the Tribunal reasoned that a 1965 Agreement between the British Government and Mauritius (a non-self-governing territory) was at "most ... a contract binding upon the Parties under domestic law."²²⁹ It found, however, that Mauritius' independence, had "the effect of elevating the package deal reached with the Mauritian Ministers to the international plane and of transforming the commitments made in 1965 into an international agreement" governed by international law.²³⁰ Although the Tribunal did not say so explicitly, one way to explain this result would be on the idea that Mauritius' independence implicitly shifted the governing law of the "contract" from U.K. law to international law, which by definition, converted the agreement into a treaty.

5.3 The Effects of Political Commitments: *States and their institutions should approach their agreement-making understanding that a political commitment will not produce any direct legal effects under international or domestic law; political commitments are not legally binding.*

5.3.1 *States and their institutions should honor their political commitments and apply them with the understanding that other States will expect performance of a State's political commitment whether due to their moral force or the political context in which they were made.*

5.3.2 *States and their institutions should be aware that, even if non-binding, a political commitment may still have legal relevance to a State. For example, political commitments may be:*

- (i) incorporated into other international legal acts such as treaties or decisions of international organizations;*
- (ii) incorporated into domestic legal acts such as statutes or other regulations; or*
- (iii) the basis for interpretation or guidance of other legally binding agreements.*

Commentary: By definition, political commitments are not binding; they are incapable of producing any legal effects on their own. States and their institutions should adjust their expectations accordingly. As a matter of international law, political commitments will not trigger *pacta sunt servanda* nor any of the secondary international legal effects that follow treaty-making (e.g., the law of treaties, State responsibility, specialized regimes).²³¹

²²⁷ U.S. Response, *supra* note 72 ("The legal effects associated with contracts governed by domestic law are governed by the terms of the contract and the domestic law applicable to it.").

²²⁸ On estoppel in international law, see Thomas Cottier and Jörg Paul Müller, *Estoppel* in R. WOLFRUM (ED.), MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (April 2007); *Chagos Arbitration*, *supra* note 132, at 174, ¶438 ("estoppel may be invoked where (a) a State has made clear and consistent representations, by word, conduct, or silence; (b) such representations were made through an agent authorized to speak for the State with respect to the matter in question; (c) the State invoking estoppel was induced by such representations to act to its detriment, to suffer a prejudice, or to convey a benefit upon the representing State; and (d) such reliance was legitimate, as the representation was one on which that State was entitled to rely.").

²²⁹ *Chagos Arbitration*, *supra* note 132, at 167, ¶424 (quoting Hendry and Dickson).

²³⁰ *Id.* at 167-68, ¶¶425, 428.

²³¹ See, e.g., Canada Response, *supra* note 40, at 8 ("Non-binding instruments concluded at the agency or sub-national level are regarded to hold only political or moral commitments."); Peru Response, *supra* note 66 ("Since 'nonbinding' agreements concluded by Peruvian governmental entities with foreign

But it would be a mistake for States to assume this means that political commitments have no effects. Even if they are not themselves binding, political commitments still contain commitments and those commitments are often made in a State's name (or those of its institutions). Other States can—and often will—expect continued performance of their terms (even as they are aware that they will be incapable of invoking international legal tools in cases of non-performance).²³² Political commitments thus trigger the honor and reputation of the States and the State institutions that make them. State practice shows, moreover, that political commitments can have significant effects on State behavior, as for example, in implementing the commitments of the Financial Action Task Force to combat terrorist financing.²³³

As a best practice, therefore, these *Guidelines* recommend that States should honor their political commitments. They are, of course, not legally bound to do so. Still, by performing its political commitments, a State fulfils the behavioral expectations of other political commitment participants. Where a State encounters difficulties in performance, dialogue and communication with other participants are likely to be more productive than ignoring agreed terms. And just because a State that ceases to perform its political commitments will not be subject to international legal remedies (e.g., treaty termination or counter-measures) does not mean that non-performance will be costless. Other States may respond with unfriendly—albeit still lawful—acts, including those that are labeled as retorsion by international law.²³⁴ Indeed, other than countermeasures, the possible consequences from a political commitment violation may not differ too much from treaties. For example, when North Korea reneged on its political commitment to suspend uranium enrichment, the United States suspended aid it had promised to provide under the commitment and encouraged international sanctions.²³⁵

Several Member States appear to view political commitments as incapable of generating *any* legal effects.²³⁶ That view may, however, depend on how one defines “legal effects.” Practice suggests that political commitments may have legal *relevance* and, in certain cases, may even generate *indirect* legal effects in certain discrete ways:

- In terms of indirect international legal effects, States may eventually convert a political commitment into a treaty by the additional, discretionary exercise of political will. The prior informed consent procedure at the heart of the Rotterdam Convention existed prior to that treaty's conclusion via political commitments done under UNEP and FAO auspices.²³⁷ Alternatively, an international organization may incorporate a political commitment into an internationally legally binding form. In Resolution 2231, for example, the United Nations Security Council endorsed the so-called “Iran Deal” on nuclear non-proliferation, making certain of its terms obligatory via its Chapter VII authorities.²³⁸

counterparts do not seek to create a legal relationship, the *pacta sunt servanda* principle does not apply; only the good faith principle.”).

²³² See *supra* note 52 and accompanying text.

²³³ See, e.g., The Financial Action Task Force (FATF), at http://www.fatf-gafi.org/pages/0,3417,en_32250379_32235720_1_1_1_1_1,00.html (FATF issues “recommendations” that are non-binding, but which have become the global standard for combating money laundering and terrorist financing).

²³⁴ See *supra* note 198.

²³⁵ Selig S. Harrison, *Time to Leave Korea?*, FOREIGN AFFAIRS (Mar./Apr. 2001).

²³⁶ See, e.g., Colombia Response, *supra* note 85 (Non-binding agreements have “no legal implication for the Republic of Colombia as a subject of international law.”); Mexico Response, *supra* note 109 (“[N]on-binding’ instruments are eminently political in nature since they set forth the will and intent of the signing authorities, and therefore they DO NOT have legal implications.”); U.S. Response, *supra* note 72 (“As non-legally binding instruments are neither governed by, nor give rise to rights or obligations under, domestic or international law, there are no legal effects associated with them.”).

²³⁷ Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, 11 September 1998, 2244 U.N.T.S. 337 (“Rotterdam Convention”); see also Rotterdam Convention, “History of the Negotiation of the Rotterdam Convention,” at <http://www.pic.int/TheConvention/Overview/History/Overview/tabid/1360/language/en-US/Default.aspx>.

²³⁸ See UNSC Res. 2231 (July 2015).

- In terms of indirect domestic legal effects, some political commitments—*e.g.*, the Kimberly Process on Conflict Diamonds, the Wassenaar Arrangement—may have their terms codified into domestic law by additional discretionary acts of political will expressed through a State’s legislature.²³⁹
- Political commitments may also be employed as vehicles for interpreting other legally binding agreements. The ILC, for example, has concluded that subsequent agreements or subsequent practice used for purposes of treaty interpretation under VCLT Article 31(3) “require[] a common understanding regarding the interpretation of a treaty which the parties are aware of and accept. Such an agreement may, but need not, be legally binding for it to be taken into account....”²⁴⁰ Interpreters may, moreover, employ political commitments without any of the additional discretionary acts that are necessary in converting political commitments into international or domestic legal commitments.
- Similarly, international courts and tribunals have shown a willingness to have political commitments set relevant standards of behavior that can be used to evaluate a State’s treaty compliance. In a 2011 WTO ruling, for example, a Dispute Settlement Panel found that several non-binding political commitments generated under the auspices of the International Dolphin Conservation Program constituted the “relevant international standard” for purposes of measuring U.S. compliance with its WTO Technical Barriers to Trade Agreement.²⁴¹

What about using the international legal doctrine of estoppel to require continued State performance of its political commitments? Scholarship has long debated whether, under the right circumstances, a political commitment might cause others to rely on participants continuing the agreed behavior as a matter of good faith, even if not required by the (non-binding) agreement itself.²⁴² This is the same logic, for example, that explains the legal force of certain unilateral declarations.²⁴³ Member States do not appear enthusiastic about this possibility.²⁴⁴ Moreover, where an agreement is clearly “non-binding” it will be difficult to establish that other States’ reliance on continued performance is reasonable (in a legal sense). As the *Chagos Arbitration* Tribunal emphasized: “Not all reliance, even to the clear detriment of a State, suffices to create grounds for estoppel. A State that elects to rely to its detriment upon an expressly non-binding agreement does not, by so doing, achieve a binding commitment by way of estoppel. Such reliance is not legitimate.”²⁴⁵ Still, the matter may remain open to debate, and States should at least be aware of the possibility that some might invoke estoppel in the context of certain political commitments.

5.4 The Legal Effects of an Inter-Institutional Agreement: *States should expect the legal effects of an inter-institutional agreement to track to whatever category of agreement—a treaty, a political commitment, or a contract—it belongs.*

5.4.1 *States may presume that inter-institutional treaties and contracts will trigger the responsibility of the State as a whole.*

²³⁹ See, *e.g.*, Clean Diamond Trade Act, Public Law 108-19 (Apr. 25, 2003) (implementing the “Kimberley Process,” which included a political commitment to regulate trade in conflict diamonds); Wassenaar Arrangement, at <http://www.wassenaar.org>.

²⁴⁰ ILC, *Subsequent agreements and subsequent practice in relation to the interpretation of treaties*, Text of the draft conclusions adopted by the Drafting Committee on second reading, Seventieth session, UN Doc. A/CN.4/L.907 (11 May 2018).

²⁴¹ See WTO, *United States—Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products—Panel Report* (15 Sept 2011) WT/DS381/R, ¶¶7.707 and 7.716; see also Pauwelyn, *supra* note 209, at 155-56.

²⁴² See, *e.g.*, Schachter, *supra* note 49, at 301 (suggesting estoppel might apply where there is a gentleman’s agreement and reasonable reliance on it); Aust, *supra* note 162, at 807, 810-11 (suggesting estoppel may apply to certain political commitments, but not mere statements of political will); but see KLABBERS, *supra* note 3, at 138-40 (insisting an agreement cannot be non-binding if it has legal effects); see also *supra* note 211.

²⁴³ See *supra* note 2.

²⁴⁴ See, *e.g.*, *supra* note 219. Peru, however, notes that political commitments may trigger a State’s good faith (rather than *pacta sunt servanda*) which might suggest some solicitude for an estoppel claim in the right circumstances. *Supra* note 214.

²⁴⁵ *Chagos Arbitration*, *supra* note 132, at 177, ¶445.

5.4.2 *Nonetheless, States should be sensitive to the fact that in certain cases, a State or its institution may claim that legal responsibility for an inter-institutional agreement extends only to the State institution entering into the agreement.*

5.4.3 *Where States have differing views of the legal responsibility accompanying a binding inter-institutional agreement, they should align their views, whether by both agreeing to have the States bear responsibility under the inter-institutional agreement or agreeing to limit responsibility to the institutions concluding it and reflect this agreement in the text of the respective instrument.*

5.4.4 *States should exercise any available discretion to avoid giving legal effects to an inter-institutional agreement where one or more of the institutions involved did not have the requisite authority (or general capacity) to make such an agreement from the State of which it forms a part.*

Commentary: Inter-institutional agreements are not, by definition, associated with any particular type of international agreement. They may be binding (whether as treaties or contracts) or non-binding (as political commitments). Which type of agreement exists will be a function of the capacities of the institutions involved and the methods of identification employed.²⁴⁶ Once the status of an inter-institutional agreement becomes clear, so too will its legal effects. Inter-institutional treaties may generate the same primary and secondary international legal effects as well as any domestic legal effects accorded by a State's legal system. The legal effects of inter-institutional contracts, like inter-State ones, will flow from the relevant governing law, while inter-institutional political commitments will not generate any direct legal effects, although States should be cognizant that they could still generate some indirect ones.²⁴⁷

There is, however, one area where inter-institutional agreements—particularly inter-institutional treaties—raise a novel question. Specifically, to whom does an inter-institutional treaty's legal effects apply—the institution alone or the whole of the State with which it is associated? A number of Member States' practices suggest the latter view; even where the parties to a treaty are State institutions, its effects will still extend to the State as a whole.²⁴⁸ This appears to be the case regardless of whether the State institution is part of the national government or a sub-national territorial unit. It is, moreover, the position taken by the ILC in the ASR. ASR Article 4(1) provides:

The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State and whatever its character as an organ of the central government or of a territorial unit of the State.²⁴⁹

²⁴⁶ For a definition of inter-institutional agreements, see *Guideline 1.5* and accompanying commentary. On the capacity of State institutions to conclude treaties, political commitments, and contracts, see *Guidelines 2.2, 2.4, and 2.6*. The methods for identifying treaties, political commitments and contracts are laid out in detail in Section 3 of these *Guidelines* and the accompanying Commentary.

²⁴⁷ Jamaica Response, *supra* note 71 (describing domestic legal effects of inter-institutional agreements including their being “open to the interpretation of domestic courts”); U.S. Response, *supra* note 72 (“The legal effects associated with contracts governed by domestic law are governed by the terms of the contract and the domestic law applicable to it.”); *see also* Dominican Republic Response, *supra* note 46 (non-binding agreements done at the agency or sub-national level “are in no sense binding”).

²⁴⁸ *See, e.g.*, Jamaica Response, *supra* note 71 (“International legal responsibility lies with the State. At the domestic level however, the agency or sub-national territorial unit has a responsibility to the Government to ensure that its obligations are performed under the Agreement”); U.S. Response, *supra* note 72 (“The United States considers treaties (as defined in Article 2 of the VCLT) concluded by its agencies to create legal obligations applicable to the United States, though in practice performance of those agreements generally rests with the agency that enters into them.”). Outside the region, several States have adopted a similar view. *See, e.g.*, Switzerland Guide to Treaties, *supra* note 123, at 25 (“Under international law, it is the Swiss Confederation (see art. 6 VCLT) – and not the administrative unit, which does not have any legal personality – that can be held responsible for the obligations undertaken.”).

²⁴⁹ ASR, *supra* note 138, Art. 4(1); *see also id.*, Art. 4(2) (“Any organ includes any person or entity which has that status in accordance with the internal law of the State.”). It is important to note, moreover, that the ILC intended to differentiate the attribution of legal responsibility to a State under ASR Article 4 from the treaty law questions of who can represent a State in treaty-making. *See id.*, at

Given these views, *Guideline 5.4.1* articulates a starting presumption: States may reasonably expect that an inter-institutional treaty will bind the States to which the institutions belong, not just the institutions themselves.

Such a presumption may generate at least three advantages for States. First, it may provide greater certainty to all States and institutions engaged in treaty-making. Knowing that a State is expected to stand behind commitments governed by international law and made by its institutions may encourage other States and their institutions to engage in such treaty-making. Second, it will ensure a more consistent set of direct legal effects for all treaties (rather than having to elaborate different effects for inter-State treaties from inter-institutional ones). Third, this approach comports with the basic architecture of public international law. If most State institutions are not discrete international legal persons, it follows that international law will resist according their activities direct legal effect, but rather attribute them to the State of which they form a part. Indeed, we would normally expect that it would be a State, rather than a State institution, that would decide whether and when to invoke international legal dispute settlement with regard to an inter-institutional agreement.

Despite such advantages, State practice on unitary State responsibility is not entirely uniform. Several States take the view that international legal responsibility could lie with the concluding institution, *not* the State as a whole, with one State—Mexico—adopting this view expressly.²⁵⁰ While accepting that treaties concluded by the Mexican State bind Mexico, Mexico cites its federal structure to suggest that “it would be unconstitutional for [Mexico] to assume responsibility for interinstitutional agreements concluded by state and municipal areas and entities since this would encroach on the authorities conferred upon them by the Constitution itself.”²⁵¹ Instead, Mexico considers those inter-institutional agreements governed by international law only have effects for the institutions that conclude them.²⁵² Although it did not elaborate its position in great detail, one State – Panama – acknowledged “the possibility that a new international custom has arisen” with respect to responsibility for inter-institutional agreements.²⁵³

These *Guidelines* are not designed to resolve the discrepancy in how far inter-institutional treaty obligations extend. They may, however, help raise awareness among States that this is an issue to look for when their institutions pursue binding international agreements. Moreover, the consensual nature of the international legal order suggests a practice that States may use to avoid the issue. In cases where two States hold different views of how far an inter-institutional treaty binds, they may agree to a uniform position.

- States could, for example, agree to treat their institution’s treaty commitment as equivalent to treaties made in the name of the two States; or
- States could specifically consent to having the effects of an inter-institutional treaty extend only to the institutions involved.

States could include such conditions in the inter-institutional treaty itself or they could agree to them separately, whether generally or on a case-by-case basis. They would ideally do so in advance, although it would be possible to reach such an accommodation after the inter-institutional treaty has come into existence. Such a practice might be novel, but it provides a way to bridge divergent views on

39(5) (Commentary on Ch. II). For a discussion of the latter, see Guideline 2.1 and accompanying commentary. There is room, in any case, for further work to assess how exactly these two concepts interact conceptually and in practice.

²⁵⁰ Hollis, Second Report, *supra* note 10, at ¶38-40 (describing views of Peru and Uruguay); Panama Response, *supra* note 69; Mexico Response, *supra* note 109.

²⁵¹ Mexico Response, *supra* note 109. In addition, Mexico claims that “[i]t would also be unlawful [under Mexican Law] for the federal government to assume that responsibility, since the interinstitutional agreement was concluded without observing the formalities established by the Law on the Conclusion of Treaties.” *Id.* Peru denies that its institutions can conclude “treaties” but acknowledges that its inter-institutional agreements may create “a legal relationship ... only for the institutions entering into them”. It does not, however, explain what law would govern that legal relationship. Peru Response, *supra* note 66.

²⁵² Mexico Response, *supra* note 109.

²⁵³ Panama Response, *supra* note 69.

responsibility that otherwise might lead to disagreements or the need for some form of dispute resolution.

Finally, there is a question of what, if any, legal effects States and other stakeholders should accord binding inter-institutional agreements concluded where one or more of the institutions involved did not follow the appropriate domestic procedures? In other words, how should States deal with unauthorized inter-institutional agreements? Giving such agreements domestic legal effects is likely to be problematic, especially within the State where the requisite procedures were not followed. In the Dominican Republic, for example, when its Deputy Secretary of State for Foreign Affairs concluded an MOU with the Inter-American Commission on Human Rights without following the constitutional rules for judicial review and National Congress approval, the Supreme Court treated the MOU as null and void.²⁵⁴

A number of Member States, moreover, believe that the failure to comport with domestic procedures may also preclude giving inter-institutional agreements international legal effects. Colombia, for example, has indicated that it “is not responsible for agreements concluded in violation” of domestic conditions for the legality of its international agreements.²⁵⁵ Mexico emphasizes the personal liability of those who sign an inter-institutional agreement where the Secretariat of Foreign Affairs’ Legal Department has not issued its views.²⁵⁶ Other States offer a more nuanced take, suggesting that international legal responsibility for an unauthorized inter-institutional agreement may best be determined based on the “nature of the agreement and circumstances surrounding its conclusion.”²⁵⁷

Guideline 5.4.4. proposes a best practice where States exercise any available discretion to decline to give legal effects to unauthorized inter-institutional agreements. The qualifier referencing “available discretion” is included to make clear that this guideline only applies where the State has a choice on whether or not to accord an agreement legal effects; it does not countenance avoiding legal effects that the State is required to afford, whether by international or domestic law. Still, where States have discretion, it would seem that best practice counsels against giving legal effects to unauthorized inter-institutional agreements. According inter-institutional treaties (or contracts) legal effects could incentivize State institutions to violate their own domestic laws and procedures if they perceive the benefits of reaching agreement with foreign actors as outweighing the domestic consequences. These incentives would be especially perverse if the institution shared the costs of unauthorized agreements (in terms of responsibility and liability) with the State as a whole – the very State whose procedures were not followed.²⁵⁸

6. Training and Education Concerning Binding and Non-Binding Agreements

6.1 Training and Education Relating to Binding and Non-Binding Agreements by States:

States should undertake efforts to train and educate relevant officials within a Foreign Ministry and other relevant ministries or agencies to ensure that they are capable of:

- (i) identifying and differentiating among the various types of binding and non-binding agreements;*
- (ii) understanding who within the State has the capacity to negotiate and conclude which agreements;*
- (iii) following any and all domestic procedures involved in such agreement making; and*

²⁵⁴ Dominican Republic Response, *supra* note 46.

²⁵⁵ It is worth recalling that some States (like Colombia) do not accept treaty-making by its institutions. As such, Colombia does not view the issue of international legal responsibility to arise for inter-institutional agreements involving Colombian institutions; any binding agreements concluded by such institutions would be governed by domestic public law with legal responsibility limited to the concluding institution. Colombia 2020 Comments, *supra* note 47; *see also* Ecuador Response, *supra* note 46.

²⁵⁶ Mexico Response, *supra* note 109.

²⁵⁷ Jamaica Response, *supra* note 71; *see also* Peru Response, *supra* note 66.

²⁵⁸ This would, however, run counter to the presumption of validity accorded treaties done in violation of domestic procedures in the inter-State context by VCLT Article 46. *See supra* note 77. That said it is not clear that Article 46 constitutes customary international law. *See Klabbers, supra* note 77, at 557.

(iv) *appreciating the legal and non-legal effects that can flow from different types of international agreements.*

Commentary: As these *Guidelines* make clear, existing State practice with respect to international agreements is of critical importance to international law and international relations. Yet, it is also clearly not some simple set of tools that States and their officials may apply intuitively. Extant variations in definitions, capacities, methods of identification, procedures, and effects, require expert knowledge and attention to ensure a State is able to advance its foreign policy interests while avoiding confusion, misunderstandings, and disputes (legal or otherwise). As such, it is important for States to devote the resources to educate relevant officials on these topics.²⁵⁹

Guideline 6.1 focuses on ensuring suitable training and education for Foreign Ministry officials on the various aspects of international agreements. Foreign Ministry officials are often charged with overall responsibility for a State's treaty practice. It makes sense, therefore, that States ensure that they have sufficient expertise to differentiate the State's treaties from the rising practice of other forms of international agreements, including binding inter-State contracts and inter-institutional agreements. Where needed, such training should also be extended to other relevant officials and offices.

Having well-trained officials across the region will help improve existing practices and alleviate existing confusion over both the status of various agreements (such as those bearing the heading "MOU") as well as with which institutions other States may conclude binding and non-binding agreements. Increased knowledge around the various types and effects of binding and non-binding agreements may allow Foreign Ministry officials to advise decision-makers on the relative trade-offs in pursuing one type of agreement over another.

6.2 Training and Education Relating to Inter-Institutional Agreements: *Where a State authorizes inter-institutional agreements, it should undertake efforts to train and educate relevant officials of a government agency or sub-national territorial unit to ensure that they are capable of:*

- (i) *identifying and differentiating among the various types of binding and non-binding agreements;*
- (ii) *understanding who within the State has the capacity to negotiate and conclude which agreements;*
- (iii) *following any and all domestic procedures involved in such agreement making; and*
- (iv) *appreciating the legal and non-legal effects that can flow from different types of international agreements.*

Commentary: Not all States will authorize inter-institutional agreements, whether as treaties, contracts, or political commitments.²⁶⁰ For those that do, however, it will be necessary to ensure that institutions with an agreement-making capacity are sufficiently trained to use that capacity appropriately. This training may involve national-level exercises where non-Foreign Ministry officials of the national government are educated in international agreements, and just as pertinently, the appropriate domestic procedures to authorize them. Where sub-national territorial units can make agreements, they would benefit from similar training and education. Such efforts may mitigate situations where an institution acts without authority or otherwise enters into commitments to the detriment of the State as a whole. Increased knowledge around the various types and effects of binding and non-binding agreements may allow State institutions to develop an agreement practice that aligns with its interests while also accommodating national foreign policies and procedures.

* * *

²⁵⁹ The Working Group on Treaty Practice solicited views on training relating to both binding and non-binding agreements. The responses revealed a diversity of formal and informal processes by which relevant treaty officials educate other officials, both in the Foreign Ministry itself and elsewhere in other ministries or agencies. *See, e.g.,* Working Group on Treaty Practice, *supra* note 40, at 4, 6-7, 22, 24 (detailing training and guidance offered by treaty officials in Canada, Finland, Germany, Israel, Japan, Korea, Mexico, and Spain).

²⁶⁰ *See Guideline 2.2* and accompanying commentary.

2. Access to public information

Documents

CJI/RES. 255 (XCVI-O/20)	Proposal on an Inter-American Model Law 2.0 on access to public information
CJI/doc. 607/20	Proposal on an Inter-American Model Law 2.0 on access to public information

* * *

At the 92nd Regular Session of the Inter-American Juridical Committee (Mexico City, 26 February – March 2, 2018), Dr. Dante Negro called the attention of the members to the theme of access to public information, reminding them that the General Assembly has granted a mandate to revise the Inter-American Model Law on Access to Public Information in the light of the new themes to be incorporated into the text of same, suggesting that the CJI appoint a member to participate in the process of prior consultations.

He informed those present that the Department of International Law is carrying out consultations with prominent social actors to prepare a proposal for the CJI to analyze when the occasion presents itself.

Dr. Luis García-Corrochano suggested that a revision be made of the themes studied by the rapporteurs of other institutions, such as the *Institut de Droit International*, in order to identify possible input material for the work of the CJI.

The Chair concluded that there exists a need for the CJI to resume the themes of the revision of the Inter-American Model Law on Access to Information and the principles related to the handling of personal data; delimiting the mandate is all that remains to be done.

Dr. Luis García-Corrochano offered to work on the issue for the time being, subject to the discussion being re-opened in August in the light of the mandates granted by the General Assembly.

In June 2018, the General Assembly of the OAS requested the Department of International Law “to continue working on identifying thematic areas in which it considers it necessary to update or broaden the Model Inter-American Law on Access to Public Information, duly taking into consideration also the latest regional and global developments in the area of protection of personal data and to forward its findings to the Inter-American Juridical Committee”, resolution AG/RES. 2927 (XLVIII-O/18).

During the 93rd Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, 6 – 16 August, 2018), the topic was not discussed.

During the 94th Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, February, 2019), Dr. Dante Negro, Director of the Department of International Law (DIL), referred to the initiatives undertaken by the Department in compliance with the mandate of the OAS General Assembly requesting the DIL to identify thematic areas in order to “update or broaden the Model Inter-American Law on Access to Public Information”, approved in 2010 (which has had significant impacts on the region), and to forward its findings to the CJI for further consideration and development (paragraph ix of resolution AG/RES. 2905 (XLVII-O/17), “Strengthening of Democracy”).

The consultation process of the Department of International Law was conducted through a questionnaire based on Chapter II of the Model Inter-American Law that received responses from “12 public entities in 11 member countries, in addition to 10 civil society organizations, experts and other entities, including the Inter-American Commission of Women (CIM).”

The activity served to identify six topics of major interest: proactive transparency, rules governing exceptions, document (file) management, public information within the judiciary, persons required to provide information (political parties and trade unions), and oversight bodies (*órganos garantes*).

Once those topics had been identified, the Department began consultations among experts through four workshops: one focused on civil society organizations and the other three on national authorities. Replies were received from specialists, members of oversight bodies, and the largest NGO network in the

region: the Regional Alliance for Free Expression and Information. These workshops received financial backing from the “Eurosocial” program and the RTA (“international exchange network for bodies and/or public entities that have supervisory functions in transparency and the right of access to public information”).

The workshops were instrumental in harmonizing and agreeing on texts that have a common denominator. So far, the following topics have been addressed: i. definitions, scope, right of access and interpretation; ii. pro-active transparency; iii. system of exceptions; and, iv. document management.

The new vision regarding the publication of information, attaching more importance to disclosure than to publication schedules, was included in the proposed Model Law, along with mainstreaming of the gender perspective. Regarding exceptions, the 2010 Model Law catalog has been trimmed and divided into two parts: restricted information (i.e., information temporarily excluded from disclosure to the public in view of a clear, probable and specific risk of harm to public interests) and confidential information (to which public access is banned under the Constitution or by law due to the existence of a legally protected personal interest). A specific chapter on national security has also been included. Finally, two topics not included in the proposal presented on this occasion are expected to be addressed: oversight bodies and access to information in the judiciary.

Dr. Luis García-Corrochano thanked Dr. Negro for the work submitted, and agreed to serve as the rapporteur for this topic, in a context in which access to information is emerging as a core and necessary component of the rule of law. He highlighted some of the limitations of transparency particularly in respect of the autonomy and independence needed in the executive and judicial branches of government. He also noted the existence of some cross-cutting issues in activities that have a social impact, including oversight of political parties.

The Chair mentioned the importance of the subject and, based on her own experience, illustrated some of the difficulties facing the Judiciary, especially regarding panel judges whose minutes of discussions cannot be disclosed because that would undermine their own autonomy. She also mentioned economic issues involving the part played by States, especially the equilibria required in governmental contracts, which, when disputed, force the authorities to disclose inside information that would not be requested in a private context. She expressed her fears regarding the use of evidence prior to lawsuits being filed that might jeopardize the action of the State in litigation in which it is a party and raise issues involving freedom of the press and access to information. She therefore invited the rapporteur to address the issue of reservations in both the judicial and contractual spheres.

Dr. Carlos Mata suggested that the rapporteur bear in mind the current status of the subject in the Hemisphere, as most countries have enacted legislation establishing procedures for access to information and have established oversight bodies to ensure “sound practices”. The Committee should therefore take such case law and regulatory developments into account.

Dr. Milenko Bertrand asked the rapporteur to address the topic of conflicts arising in connection with the protection of personal data relating to the privacy of public servants, and to attempt to distinguish between public and private activities. In addition, he mentioned the entrepreneurial State in countries in which a number of services (health care, drinking water supplies, etc.) have been privatized, and in which a balance needs to be struck between the well-being of the population and private competition.

Dr. George Galindo referred to the relationship between the inviolability of diplomatic records and access to information, especially in respect of a clash between national law and existing instruments, and asked Dr. Negro whether that matter had been addressed. In this regard, Dr. Negro explained that, as this topic had not been dealt with specifically, it would be included in the section on confidentiality. In this context, Dr. Milenko Bertrand mentioned the argument of people seeking information on the negotiations of free trade agreements, which mentions the fact that once those agreements are ratified, information concerning them should be disclosed for the sake of “democratic legitimacy”: a demand that could be detrimental to diplomacy and international law. Dr. Carlos Mata agreed with other members of the Committee that one of the major challenges for the rapporteur would be how to deal with matters

requiring discretion, such as diplomatic relations or in-house discussions of collegiate bodies in the upper echelons of the Judiciary.

Dr. Dante Negro pointed out that all the concerns mentioned were already contemplated in the proposal submitted by the Department of International Law (conduct of international relations, due process, deliberative processes in collegiate bodies, and so on.)

The rapporteur for this topic thanked everyone for their interventions, noting that he also shared the legitimate concerns that had been mentioned. Reservation is part and parcel of the management of international affairs. Therefore, a balance must be struck between the public interest and the need for reservation. It is a sensitive issue and therefore the Committee's proposal must take that balance into account. Access is a right of citizens but cannot limit the capacity to act of the organs of state officials.

During the 95th Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, July 31 to August 9, 2019) the rapporteur for the topic, Dr. Luis García Corrochano, referred to the advanced study prepared by the Department of International Law, entitled "Update or expansion of the Inter-American model law on access to public information," (document DDI/doc.3/19 rev.1), noting in particular the following elements:

- The development of active transparency;
- The composition of the guarantor body for access to information; and
- Divergences regarding the administration of public funds or donations, in light of the necessary transparency in the use of resources.

Dr. José Moreno thanked the Department of International Law for its work and spoke in favor of control in relation to the administration of public funds for international cooperation.

Dr. Milenko Bertrand suggested including specific sanctions for the responsible party or verifying whether what is already in place is sufficient. In relation to the concept "document", its meaning should be revised to include, for example, the recordings of public hearings.

Dr. Mariana Salazar expressed appreciation for the presentation work and the inclusive process that has allowed a large variety of people to participate. She suggested that the issue of exceptions with respect to information that should be reserved be left to States. She inquired about the issue of the time limit for reservations, in the light of some practices where time limits are often reset.

Dr. Espeche-Gill noted the level and subtlety of the discussions within the Committee.

The Chair of the Committee expressed her opinion on oversight of authorities through the review of public documentation and the confidentiality of private data, which implies the protection of rights of higher rank. She also urged the rapporteur to take into account the role of States with respect to particular issues that require their protection.

The rapporteur appreciated the issue of State sanction and supported the proposal to reflect and clarify the concept of "document." With regard to extendable deadlines, he suggested seeking reasonableness and trying to put a lock on extensions. He also urged that provision be made for the protection of certain information that might constitute an undue advantage. He concluded by thanking the Department of International Law for the document that had been presented.

Dr. Dante Negro explained that the mandate of the CJI was to expand the 2010 model law and therefore there was time to address existing concerns. That model law already included some of the above-mentioned definitions, such as the definition of documents and the reference to criminal and administrative penalties. Accordingly, the text that the CJI would adopt should be read as a supplement. The square brackets around the dates indicated a reference for the States concerning the deadlines according to the existing rules.

The Chair requested members to submit their proposals to the rapporteur by December 15 that year.

During the 96th Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, March, 2020) the rapporteur for this topic, Dr. Luis García-Corrochano referred to the comments made during the

discussion last August, 2019, such as the issue of exceptions in the field of security, economic or State defense issues, or those related to the subjects bound by the obligation of transparency, among others. He said that no comments had been submitted within the time allowed, and therefore asked the plenary to adopt the report and consider it finalized.

Dr. Eric Rudge requested further explanation of a statement made by the Chair in previous discussions, namely on the type of information that needs protection by States. In this regard, the rapporteur explained that sensitive information is related to security, economic and even legal issues when dealing with international litigation cases. Therefore, the reservation of certain data refers to the operation of public entities in specific situations, which should not apply to regional governments; in addition, there would have some time constraints, because eventually such information would have to be released.

Dr. Mariana Salazar highlighted the relationship between the issue of personal data on which she is acting as rapporteur and the importance of maintaining consistency in the developments that the Committee achieves on both issues. As an example, she stressed that the model law already includes the rights of access, rectification, cancellation and operation, which are issues that are being proposed for inclusion in the updating of the Principles on the personal data protection.

Dr. George Galindo asked the rapporteur if there are any provisions on the classification of information (access to information and state security). He also referred to the prerogatives of the civil servant to extend the duration of confidentiality, and resources in case of requests for access to information, particularly for matters protected by confidentiality. In this regard, the rapporteur stressed the existence of a guarantor body that should participate, also including sensitive issues. The criteria used to determine or classify a situation are sensitive and are in the hands of the States. Dr. Galindo also mentioned a decision in England establishing that the inviolability of files, archives and diplomatic information is opposable *erga omnes*, which imposes a duty of protection should a Ministry of Foreign Affairs obtain information from a foreign source.

Dr. José Moreno thanked the rapporteur and the DIL for supporting the work, in the light of the efforts and the high degree of participation. He in turn supported the proposal for approval of the work by the plenary of the Committee.

Dr. Espeche mentioned the confidential classification of certain information in diplomatic circles, in which the issuer/transmitting person imposes or tries to impose respect due to privacy.

The Chair, Dr. Correa, thanked the rapporteur and praised the contribution that the study might have in the area of the fight against corruption, in addition to the parameters attributed to exceptions.

On Friday, March 6, the Committee approved by unanimity the resolution "Proposal for the Inter-American Model Law 2.0 on access to public information" that introduces the final report, registered as document CJI/doc.607/20. On March 25, 2020, the documentation was forwarded to the President of the Permanent Council in accordance with the mandate of the General Assembly.

The following documents were adopted by the Committee in February 2020:

CJI/RES. 255 (XCVI-O/20)

**PROPOSAL ON AN INTER-AMERICAN MODEL LAW 2.0
ON ACCESS TO PUBLIC INFORMATION**

THE INTER-AMERICAN JURIDICAL COMMITTEE,

BEARING IN MIND:

That the OAS General Assembly, through Resolution AG/RES. 2931 (XLIX-O/19) "Strengthening Democracy", under item xii on "Access to Public Information and Protection of Personal Data", requested that the Department of International Law continue the extensive consultations begun in 2018 with the Focal Points of the Inter-American Program on Access to Public

Information, taking into account the contributions of civil society, in order to update the 2010 Model Inter-American Law on Access to Public Information;

That the Department of International Law complied with this request after an intensive process of consultation with the support of the “Red de Transparencia y Acceso a la Información (RTA)” and Eurosocial, taking into account the comments and suggestions made in the framework of such consultations, submitted a Proposal on a Model Law 2.0 (Document DDI/Doc.3/19 a, corr.1) to the Inter-American Juridical Committee for consideration at its 95th Regular Session held in July-August 2019;

That the General Assembly requested the Inter-American Juridical Committee to forward its Proposal on a Model Law 2.0 to the political entities in the Organization before the fiftieth regular session of the General Assembly;

RECALLING the importance of access to public information as a tool that increases the levels of transparency in public management; allows for an effective battle against corruption; fosters open competition, investment and economic growth; empowers various sectors of the population, including those in situations of vulnerability; and is a fundamental component of the exercise of democracy;

UNDERLINING the enormous impact of the 2010 Model Inter-American Law on Access to Public Information, whose tenth anniversary is celebrated this year, on both the adoption of new laws and legislative reform processes in many countries of the region, as well as the recognition of stronger guarantees for citizens through the establishment and constitution of the respective bodies that guarantee the right of access to public information;

WHEREAS the region needs to continue moving ahead with the establishment of standards that unpin firmer greater guarantees for the citizens of the continent in terms of access to public information, in the light of the new challenges the are appearing and within the framework of good practices developed during the past ten years.

RECOGNIZING the importance of having a Model Inter-American Law on Access to Public Information 2.0 designed to drive important aspects in this area, fostering development and legal harmonization in the region, and continuing to forge ahead in the battle against corruption, with the consolidation of democracy and the promotion of better public management in our countries.

RESOLVES:

1. To approve the Proposal on an Inter-American Model Law 2.0 on Access to Public Information (CJI/doc. 607/20), appended to this Resolution.
2. To thank the rapporteur on this topic, Dr. Luis García-Corrochano, for presenting the final version of the Proposal on a Model Law, which also includes comments and suggestions from the other members of the Inter-American Juridical Committee.
3. To forward this Resolution and the Proposal on a Model Law 2.0 to the OAS General Assembly for its due knowledge, consideration and approval.
4. To request the Department of International Law, in its capacity as the Technical Secretariat of the Inter-American Juridical Committee, to disseminate this Proposal on a Model Law 2.0 as widely as possible among the various interested parties, as it did with the 2010 Inter-American Model Law on Access to Public Information,.

This resolution was adopted unanimously at the regular session held on March 6, 2020, by the following members: Doctors José Antonio Moreno Rodríguez, Luis Garcia-Corrochano Moyano, Ruth Stella Correa Palacio, Milenko Bertrand-Galindo Arriagada, Miguel A. Espeche-Gil, George Rodrigo Bandeira Galindo, Mariana Salazar Albornoz and Eric P. Rudge.

* * *

CJI/doc. 607/20

**PROPOSAL ON AN INTER-AMERICAN MODEL LAW 2.0 ON
ACCESS TO PUBLIC INFORMATION**

Explanatory Note

This document constitutes the conclusion of the work performed in compliance with OAS General Assembly resolution AG/RES. 2905 (XLVII-O/17), *Strengthening Democracy* paragraph (ix). The resolution directs the Department of International Law (hereinafter DIL) to “consult with the focal points of the Inter-American Program on Access to Public Information¹ as well as civil society, to identify the thematic areas that require updates or further development in the Model Inter-American Law on Access to Public Information (“the Model Law”), adopted by the General Assembly in 2010,² and to convey the results of this process to the Inter-American Juridical Committee for consideration and further development”.

In order to best fulfill its mandate, the DIL executed the activities that have been reported³ to the Inter-American Juridical Committee (CJI) in a timely and detailed manner, including:

- ❖ conducting a survey, sent out to more than 4,000 individuals and institutions, including the Inter-American Commission of Women (CIM), the Inter-American Commission on Human Rights (IACHR) aimed at identifying the areas where the Model Law could be further developed;
- ❖ organizing four workshops held between April 2018 and May 2019, which were attended by 152 specialists from CSOs as well as authorities from 15 Member States, including many focal points of the Inter-American Program on Access to Public Information, as well as civil society organizations (CSOs); and
- ❖ organizing meetings to collect input and specific recommendations from 26 CSOs from 14 Member States: Argentina, Brazil, Chile, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Paraguay, the United States, Uruguay and Venezuela.

The topics identified as priorities for revision were: exceptions regime, active transparency, document management, guarantor bodies, political parties and public information within the judiciary branch, all of which became the focus and substance of the workshops held with the guarantor bodies and civil society. In that context, three action items were decided by consensus:

- ❖ focus the collective efforts in the development of agreed upon texts on guarantor bodies, exceptions regime, subject entities, active transparency, definition and scope of the right of access to public information;
- ❖ to leave the matter of document and management in the hands of expert consultants, as the highly technical content of a model law would require very specialized knowledge; and attach to the revised draft Inter-American Model Law on Access to Public Information (Model Law 2.0) a proposed Model Law on Document Management and its Application Guide, although these two latter documents would not technically be a part of Model Law 2.0; and
- ❖ to postpone the discussion of the issue of access to public information in the possession or custody of the judiciary for another time, incorporating the input of information officers from the judicial branches and experts that may contribute a more comprehensive perspective of the particular intricacies of the judicial processes, among them the need for classifying certain information at specific moments in the process, the implications of disclosure on the protection of victims, witnesses and minors, etc.

It is important to stress that the gender perspective was borne in mind throughout this undertaking, recognizing the opportunity to propose provisions that make the Model Law 2.0 one of the first legal instruments of the Inter-American System to incorporate a gender perspective right from the initial outline. To this end, the DIL organized a workshop focused solely on analyzing issues

¹ AG/RES. 2885 (XLVI-O/16).

² AG/RES. 2607 (XL-O/10).

³ Document DDI/Doc.3/19 rev.1

pertaining to gender and access to information, attended by specialists whose contributions greatly enriched the agreed texts.

In July 2019, the DIL submitted a document ⁴ for consideration by the members of the IAJC, including all agreed texts on these issues. Regarding the basis thereof, the IAJC approved the following proposal for the Model Law on Access to Public Information.

* * *

**PROPOSAL ON AN INTER-AMERICAN MODEL LAW
ON ACCESS TO PUBLIC INFORMATION 2.0**

TABLE OF CONTENTS

CHAPTER I. DEFINITIONS, SCOPE, RIGHT OF ACCESS AND INTERPRETATION

Definitions

Scope and purpose

Right of access to public Information

Interpretation

CHAPTER II. MEASURES TO PROMOTE OPENNESS

Active transparency

Classes of key information subject to proactive disclosure

Responsibilities of the subject entity with regard to active transparency

Publication schemes

Other laws and mechanisms

Previously disclosed information

CHAPTER III. ACCESSING INFORMATION HELD BY PUBLIC AUTHORITIES

Request for Information

Requirements of requests for Information

Interpretation of requests for Information

Forwarding requests for Information

Third party response to notification

Cost of reproduction

Display of Documents

Information Officer

Document search

Document management

Missing Information

Response period

Extension

Notice to the requester

CHAPTER IV. EXCEPTIONS REGIME

Exceptions to Disclosure

Supremacy of the Public Interest

Human rights

⁴ Document DDI/Doc.3/19 rev.1

Acts of corruption
 Entity responsible for classification
 Generic classifications
 Authority to declassify
 Confidential Information
 Reserved Information
 Defense and national security
 Harm Test
 Public Interest test
 Generalities of classification
 Classification of Information
 Declaration of confidentiality
 Declaration of reserve
 Declassification of Information
 Revision of the exceptions regime
 Registry of classified Information
 Partial disclosure
 Maximum duration of reserve
 Non-Existent Information
 Filing of appeals
 Recourse against a failure to respond
 Other laws

CHAPTER V. APPEALS

Internal appeal
 External appeal
 Resolution
 Judicial review
 Burden of proof

CHAPTER VI. GUARANTOR BODY

Creation
 Characteristics
 Composition
 Requirements to be a commissioner
 Selection procedure
 Obligations of commissioners
 Term of office
 Removal or suspension of commissioners
 Duties and powers of Guarantor Body
 Budget
 Reports of subject entities
 Reports of the Guarantor Body
 Civil and criminal liability
 Administrative offenses

CHAPTER VII. PROMOTIONAL AND COMPLIANCE MEASURES

Monitoring and compliance

Training

Formal Education

CHAPTER VIII. TRANSITORY PROVISIONS

Abbreviated title and entry into force

Regulations

ADDENDA

* * *

INTER-AMERICAN MODEL LAW ON ACCESS TO INFORMATION 2.0**CHAPTER I. DEFINITIONS, SCOPE, RIGHT OF ACCESS AND INTERPRETATION****Article 1. Definitions**

1. In this Law, unless the context otherwise requires:
 - a) “Public Interest Activity” refers to those subjects or areas of management that should be resolved in government political decisions, at any of the levels of administrative, legislative or judicial political organization, and that seek to serve the maximum interest of the community;
 - b) “Senior Officials” refers to any official within a Public Authority whose total annual salary exceeds [USD\$100,000];
 - c) “Public Authority” refers to any governmental authority and to the private organizations falling under the third paragraph of Article 2 of this Law;
 - d) “Document” refers to any written Information, regardless of its form, source, date of creation or official status, whether or not it was created by a Public Authority, political parties, unions and non-profit organizations holding the document and whether or not it was classified as confidential;
 - e) “Public Funds” refers to the financial resources, whether tax-related or not, that are generated, obtained, or originated by the State, regardless of who manages those resources;
 - f) “Unions” refers to the association of persons and/or companies engaged in the same work and whose main objective is mutual support, wherein they seek the well-being of the group they represent;
 - g) “Information” refers to any type of datum in the custody or control of a Public Authority, Political Party, Union and Non-Profit Organizations.
 - h) “Personal Information” refers to information regarding a living person who is or may be identified through such Information;¹
 - i) “Information Officer” refers to the individual or individuals appointed by a Public Authority pursuant to Article 18 of this Law;
 - j) “Non-profit organization” refers to entities recognized by the State that engage in activities designed to serve the public interest, whose purpose is not to make a profit, that have a specific mission and are independent of the State.
 - k) “Political Party” refers to public interest entities with their own legal status and assets, recognized by national legislation, the purpose of which is to promote the people’s

¹ This definition has been taken from the Principles on Privacy and Personal Data Protection in the Americas, approved during the 84th Regular Session of the Inter-American Juridical Committee (CJI/doc. 450/14).

participation in democratic life, contribute to the formation of representative political bodies and, as citizen organizations of citizens, to enable citizen access to the exercise of public power;

- l) “Publish” refers to the act of making Information accessible to the general public and includes printing, broadcasting and electronic forms of dissemination; and
- m) “Interested Third Parties” refers to persons who have a direct interest in preventing the disclosure of Information they provided voluntarily to a Public Authority, because such disclosure either affects their privacy or their commercial interests.

Article 2. Scope and purpose

1. This Law establishes the broadest possible application of the right of access to Information that may be in the possession, custody or control of any Public Authority, Political Party, Union and Non-Profit Organization, and that is based on the principles of *pro homine* and *in dubio pro actione* in accordance with which one ought to seek the interpretation most favorable to the exercise of that right.

2. This Law is also based on the principle of maximum disclosure, so that any Information held by subject entities shall be complete, timely and accessible, subject to a clear and narrow exceptions regime to be defined by law as well as legitimate and strictly necessary in a democratic society.

3. This law applies to:

- a) any Public Authority belonging to any branch of government (executive, legislative and judicial) and at all levels of the internal governmental structure (central or federal, regional, provincial or municipal);
- b) independent or autonomous bodies, organizations or entities owned or controlled by the government, acting by virtue of powers granted by the Constitution or by other laws; and
- c) Public Funds, as well as any individual or legal entity that receives or manages public resources or carries out acts of authority at the national or federal level.²

3.1 This Law shall likewise apply to private organizations, Political Parties or similar associations, Unions, guilds and Non-Profit Organizations, which must respond to requests for Information but only with respect to the Public Funds or benefits received or the public functions and services performed. In the event that said Public Funds or benefits exceed [XX% of their annual budget / the amount of \$XX], the above entities shall also comply with the obligations of active transparency provided in this Law.

4. No public authority shall be exempt from the requirements established in this law, including the legislative and judicial branch, supervisory institutions, intelligence services, armed forces, police, other security bodies, Chiefs of State and government, and the divisions thereof.

Subject entities shall document any action deriving from the exercise of their powers, responsibilities or functions.

5. In the event of any inconsistency, this Law shall prevail over any other law.³

² Comment: the term “public benefits” should not be interpreted broadly, so as to include any financial benefit received from the government.

³ Comment: While the Model Law does not contain a provision that includes within its scope information in the possession of private companies that is necessary for the exercise or protection of internationally recognized human rights, it is noted that some states, including South Africa, have adopted this approach.

Article 3. Right of access to public information

1. Any person requesting Information from any Public Authority covered by this Law shall have the following rights, subject only to the provisions of Chapter IV of this Law:
 - a) to be informed whether or not the Public Authority holds Documents containing the Information requested or from which that Information may be derived;
 - b) if the Public Authority that received the request holds said Documents, to be promptly notified accordingly;
 - c) if said Documents are not delivered to the requester, to appeal the failure to deliver the Information;
 - d) to make anonymous requests for Information;
 - e) to request Information without having to justify the reasons why it is being sought;
 - f) to be free from any discrimination that may be based on the nature of the request; and
 - g) to obtain the Information free of charge or at a cost not exceeding the cost to reproduce the Documents.
2. The requester shall not be sanctioned, punished or prosecuted for exercising the right of access to Information.
3. The Information Officer shall make reasonable efforts to assist the requester with regard to the request, to respond to the request accurately and completely and, subject to applicable regulations, to provide timely access to the Documents in the format requested.
4. The Guarantor Body shall make reasonable efforts to assist the requester in connection with an appeal filed in response to a refusal to disclose Information.⁴

Article 4. Interpretation

1. Anyone tasked with the interpretation of this Law, or any other legislation or regulatory instrument that may affect the right to Information shall adopt the reasonable interpretation that ensures the most effective right to information.
2. When several institutions have jurisdiction over access to public Information and the protection of personal data, close coordination should be sought so that both rights are harmoniously protected.

CHAPTER II. MEASURES TO PROMOTE OPENNESS

Article 5. Active transparency

1. All subject entities shall proactively disseminate the key Information established by this Law, without the need for any request for such Information.
2. All subject entities shall allow the broadest access to such Information so as to permit interoperability in an open data format⁵ as well as determine strategies for the identification,

⁴ Comment: to meet this requirement, it is considered a good practice to make a free legal advisory service available to requesters who need it during the administrative or legal proceeding on access to public Information.

⁵ Comment: *Open data* is understood to mean data that can be used, reused and redistributed. They should be in a free and unrestricted format so that derivative services can be created from them.

generation, organization, publication and dissemination of such Information so that it can be easily reused⁶ by society.

3. The Guarantor Body is responsible for:
 - a) periodically ensuring that subject entities fully implement these obligations;
 - b) designing policies that facilitate the coordination of efforts and tasks carried out by subject entities in order to comply with their active transparency obligations;⁷
 - c) issuing the technical guidelines it deems appropriate for establishing information publication formats so as to facilitate the proper standardization thereof and ensuring that such information is accurate, reliable, timely, consistent, comprehensive, updated, accessible, comprehensible, and verifiable and satisfies the principle of non-discrimination.
 - d) establishing the criteria and protocols for removing key information, ensuring in any case that access to the record of that Information remains available through other mechanisms; and
 - e) establishing the administrative sanctions corresponding to the head of the administrative unit of the subject entity in the event of a failure to fulfil these obligations.

Article 6. Classes of key Information subject to proactive disclosure

1. The following are the key classes of Information subject to proactive disclosure⁸ by a subject entity:

- A. General Information on the subject entity, including:
 - a) a detailed description of services provided directly to the public, including Information on their standards and service protocols, as well as procedures to be followed and formats to be used for obtaining said services;
 - b) a description of their organic structure, the location of their departments and offices, and hours of service to the public;
 - c) strategic programs and work plans, as applicable, as well as the outcomes, outputs and impacts obtained in the performance of their work;
 - d) file classification chart and the document arrangement catalogue or similar instruments.
 - e) simple but complete description of procedures to be followed for making requests for Information and filing appeals as well as complaints regarding actions or omissions of the subject entity;
 - f) relevant Information on the content of their publication schemes;
 - g) all laws, regulations, resolutions, policies, guidelines or manuals or other documents containing interpretations, practices or precedents regarding the subject entity's performance of its functions, that affect the general public;
 - h) reports that pursuant to legal provisions are generated in the performance of their powers, responsibilities or functions, broken down as much as possible;

⁶ Comment: The objective of reusing Information is to share it among the largest number of people, using all available media including, *inter alia*, the website, broadcast media, television and the print media.

⁷ Comment: The Guarantor Body should verify that declassified Information becomes actively published Information.

⁸ Comment: The publication of this Information must be organized by subject, in sequential or chronological order, without grouping, generalizing or modifying concepts, so that people can be informed correctly and without confusion.

- i) description of their internal and external oversight, reporting and monitoring mechanisms, as well as their governance codes and the content of audit reports;
- j) index of classified Information, as well as Information on the area responsible for that information;
- k) index of Information classified as confidential; and
- l) index of Information that has been recently declassified.

B. Information on public officials⁹

- a) Information on the total number of officials, their names, the positions they hold and their place in the hierarchy, as well as their roles and duties, all broken down by gender and other categories relevant to the role of the subject entity, particularly with reference to higher level positions;
- b) a detailed description of the powers and duties of the highest ranking officials, as well as the procedures they follow in adopting decisions;
- c) salary scales corresponding to all categories of officials, including all components and sub-components of their salaries. This Information should be updated whenever there are position reclassifications, salary increases or changes in the method of payment;
- d) salaries, including bonuses, risk premiums, compensation in cash and in kind, and all other income from any source,¹⁰ including Information on the existing gender-based salary gap;
- e) representation expenses and per-diems received;
- f) sworn statements of interests and assets, or their equivalent;
- g) names of officials who benefit from licenses, permits and concessions in general;
- h) mechanisms for evaluation of Senior Officials;
- i) calendars¹¹ of public officials who are in contact with the public;
- j) invitations to compete for public positions and consulting assignments, as well as the result of those processes;
- k) description of personnel selection and contracting procedures, regardless of the contract form.
- l) list of individuals or legal entities that for whatever reason are allowed to use public resources or carry out acts of authority, the amounts they utilize, the calls and criteria for their selection, as well as the reports that said persons submit on how those resources are used and allocated; and
- m) list of public officials who have been subject to firm and/or final administrative sanctions, specifying the reason for the sanction and the provisions on which the sanction was based.

C. Financial Information

- a) budget and spending plans corresponding to the current fiscal year as well as budgetary execution, breaking the information down by item, and indicating which specific projects and subsidies are intended to meet the needs of certain groups of society, including women;
- b) year-end account statements corresponding to prior years;

⁹ Comment: The following section applies to any public official understood as someone who receives Public Funds for his services, regardless of how hired and includes advisors and consultants.

¹⁰ Comment: a record must be kept of donations that public servants may receive.

¹¹ Comment: Information related to private meetings in which public servants participate must be disclosed, whether their purpose is lobbying, the management of particular interests with respect to the decisions they make or any other purpose.

- c) description of procurement policies, guidelines and procedures, as well as contracts awarded;¹²
- d) Information on public works projects and projects that use Public Funds, generated during the planning, award, contracting, execution, supervision and liquidation stages, as well as the evaluation of results;
- e) Information on the beneficiaries of tax exemptions or tax incentives;
- f) studies, analyses, statistics and other similar documents produced with financing from public resources;
- g) financial management rules and control mechanisms;
- h) audit and other reports, prepared by agencies responsible for the supervision of financial aspects, including the principal performance indicators on how the budget is executed as well as a summary of classified sections as applicable;
- i) amounts assigned to expenses for any type of social communication and official publicity programs or campaigns, broken down by type of media, contract number and purpose;
- j) list of companies and persons that have breached contracts with the subject entity; and
- k) information on all outlays by the subject entity to publicize, promote, explain or defend a policy or decision.

D. Citizen Participation Mechanisms

- a) description of mechanisms or general procedures for citizen participation; the forms of citizen participation that are binding and open government in nature; and mechanisms for social control, social comptrollership, social oversight or the like directed to promoting citizen participation in accountability and in combating corruption, with respect to both subject entities and guarantor bodies;
- b) description of the results of the use and implementation of those mechanisms or procedures broken down by gender and age;
- c) repository of all requests made by persons as well as the responses made to them, for which subject entities shall create, publish and maintain on their website as well as in the reception area of all their offices accessible to the public, a log of requests and disclosures of all documents disseminated in response to requests made in accordance with this Law; and
- d) summary of all appeals, complaints or other actions filed by persons.

E. Needs of Specific Groups

- a) relevant Information needed to promote greater gender equity¹³ such as calculation of the salary gap, information on existing programs benefiting women, statistics or indicators related to labor inclusion, health, and other aspects.
- b) relevant and necessary Information on social programs intended to meet the needs of other specific groups of society such as minors, seniors, afro-descendants, the lesbian, gay, bisexual, transgender and intersex (LGBTI) community and the members of indigenous community, as well as persons with disabilities.
- c) detailed Information on indicators of progress and statistics that can be used to verify compliance in the implementation of gender equity, as well as on meeting the needs of other specific groups of society, including the impact generated for such groups.

¹² Comment: To comply with this requirement, subject entities may make use of the OECD Council's "Recommendation on Fighting Bid Rigging in Public Procurement."

¹³ Comment: The Transparency and Access to Information Network prepared a report called "Diagnostic and Methodological Study for Incorporating the Gender Perspective in Transparency and Access to Information Policies in Latin America," which could be an important input for meeting this requirement.

- d) list of subsidies granted to those sectors of society, broken down by group.
- e) other indicators related to issues of social impact that, consistent with their functions, they should disseminate.
- f) Information on the standards of human rights protection contained in international treaties, as well as recommendations, reports or resolutions issued by public agencies of the State or international organizations on the subject of human rights and the actions they have carried out for their implementation.

Article 7. Responsibilities of the subject entity with regard to active transparency

1. The subject entity should be sure to make available to those without Internet access a physical space with computer equipment and the assistance of qualified staff facilitating access to information in the entity's possession, custody or control.

2. Each subject entity shall appoint an Information Officer, who shall be responsible for complying with the active transparency requirement while adhering to the principles of gratuity, non-discrimination, timeliness, accessibility and integrity.¹⁴

3. The Information Officer should ensure that the information disclosed on websites can be processed and is in selectable format,¹⁵ meaning that data can be copied electronically for later use or processing.

4. The Information Officer shall ensure that all Information published is accompanied by the date of its latest update.

5. The Information Officer shall ensure updating, at least every (three months), unless another provision establishes a different period, of the key Information published by the subject entity, taking into consideration the production cycles of such Information.

6. The Information Officer shall ensure the annual creation and filing of a digital image of the website that contains all the key Information and information established in the publication scheme.

Article 8. Publication schemes

1. In addition to the key information established in Article 6, any subject entity may design, adopt and implement a publication scheme containing Information in its possession, control or custody to be disseminated proactively without any specific request.

2. When designing and implementing its publication scheme, the subject entity shall take into consideration the need to:

- a) meet the citizens' most relevant needs for useful knowledge regarding that Information;
- b) minimize the need for individuals to submit requests regarding the Information;

¹⁴ Comment: The gratuity principle is understood to mean the principle whereby obtaining and consulting Information should be free of cost, with requesters paying only the value, when applicable, of the materials used or shipping costs.

The principle of non-discrimination is understood to mean that there should be no barriers to access to Information for all or any one of the reasons established in the Inter-American Convention against All Forms of Discrimination and Intolerance, adopted by the OAS in 2013.

The principle of timeliness is understood to mean that Information should be provided in the least amount of time possible, avoiding undue delays, through simple and expeditious procedures.

The principles of accessibility and integrity are understood to mean that the Information should be complete, comprehensible, useful, reliable, truthful and available in formats accessible through a simple and effective search system.

¹⁵ Comment: *Selectable format* means a free format that allows the Information to be reused.

- c) promote the gradual inclusion of Information, the periodic updating of these schemes, and their non-regression through the use of indicators of progress; and
 - d) promote equality of opportunities for all sectors of the population, through the inclusion in publication schemes of Information that is useful and relevant to their particular interests and needs, such as that relevant to minors, women, the elderly, afro-descendants, the LGBTI community, and members of indigenous communities, as well as persons with disabilities, ensuring that the latter are provided reasonable adjustments with regard to accessibility mechanisms.
3. Subject entities shall inform the Guarantor Body of their publication schemes and that body may, if it deems advisable, make appropriate recommendations that shall be binding in nature. The publication schemes shall be updated on a gradual and ongoing basis.
4. The Guarantor Body shall have the authority and competence to determine whether or not the Information contained in the publication schemes is subject to the exceptions regime.
5. The Guarantor Body may approve model publication schemes for specific subject entities in order to harmonize such schemes, without prejudice to considering the particular characteristics and needs thereof.

Article 9. Other laws and mechanisms

- 1. This Law does not affect the operation of any other legislation that:
 - a) requires that the Information contained in Documents in the possession, custody or control of the subject entity be available to the public;
 - b) allows anyone to access to the Documents in the possession, custody or control of the subject entity;
 - c) requires the publication of Information concerning the operations of the subject entity.
- 2. Whenever anyone makes a request for Information pursuant to that law or administrative act, said request shall be processed in an equally favorable manner as if it had been made under this Law.

Article 10. Previously disclosed Information

- 1. Subject entities shall, in the simplest way possible, guarantee and facilitate requesters' access to all previously disclosed records.
- 2. Requests for Information contained in logs of requests and disclosures shall be published without delay when that Information is in electronic format. If not, it shall be published no later than [three] business days following the submission of a request.
- 3. When the response to a request has been delivered in electronic format, it shall be made public immediately on the subject entity's website.
- 4. In the event the same Information is requested a second time, it shall be made public proactively on the subject entity's website, regardless of the format in which it is found.

CHAPTER III. ACCESSING INFORMATION HELD BY PUBLIC AUTHORITIES

Article 11. Request for Information

- 1. The request for Information may be filed in writing, by electronic means, verbally in person, by phone, or by any alternative means, with the relevant Information Officer. In all cases, the request shall be properly logged pursuant to Article 11.2 of this Law.
- 2. Unless the Information can be provided immediately, all requests shall be registered and assigned a tracking number, which shall be provided to the requester along with contact information for the Information Officer assigned to the request.

3. No fee shall be charged for making a request.
4. Requests for Information shall be registered in the order in which they are received and handled in a fair and non-discriminatory manner.

Article 12. Requirements of requests for Information

1. A request for Information shall contain the following:
 - a) contact information for the receipt of notices and delivery of the Information requested;
 - b) a sufficiently precise description of the requested Information, in order to allow for it to be located; and
 - c) the preferred form in which the Information is to be provided.
2. In the event that the form in which the Information is to be provided is not specified, the requested Information shall be delivered in the most efficient and cost-effective manner for the Public Authority¹⁶.

Article 13. Interpretation of requests for Information

1. The Public Authority in receipt of a request must reasonably interpret its scope and nature.
2. In the event that the receiving authority is uncertain as to the scope and nature of the requested Information, it must contact the requester for clarification. The receiving authority must make reasonable efforts to assist the requester in connection to the request, and respond accurately and completely.

Article 14. Forwarding requests for Information

1. If the receiving Public Authority reasonably determines that it is not the proper authority to handle the request, it must, as soon as possible and in any case within [five] working days, forward the request to the appropriate Public Authority for processing and notify the requester that his/her request has been routed to another Public Authority for processing.
3. The forwarding Public Authority must provide the requester with contact information for the Information Officer at the Public Authority where the request has been routed, in order to allow the requester to follow-up as needed.¹⁷

Article 15. Third party response to notification

Interested third parties shall be informed of the existence of a request for Information within [5] from the receipt thereof, and be given [10] days to make written representations to the receiving Public Authority either:

- a) consenting to disclosure of the requested Information; or
- b) stating the reasons why the Information should not be disclosed.

¹⁶ Comment: The requester need not provide their name on the request for Information. However, insofar as the request concerns personal Information, the requester's name may be required.

¹⁷ ALTERNATIVE: If the receiving Public Authority reasonably determines that it is not the proper authority to handle the request, it must, within the [five] business days following receipt of the request, identify the appropriate authority to the requester.

Article 16. Cost of reproduction

1. The requester shall only pay for the cost of reproduction of the requested Information and, if applicable, the cost of shipping, if so requested. Electronic delivery of Information shall be free of charge.

2. The cost of reproduction shall not exceed the actual cost of the material in which the Information is reproduced; cost of shipping shall not exceed the market value of same. For this purpose, the Guarantor Body shall periodically establish what they deem to be the fair market value.

3. The Public Authorities shall provide information free of all charges, including reproduction and shipping, for any low-income person as defined by the Guarantor Body.

4. The Guarantor Body will set additional rules regarding fees, which may include the possibility that the Information be provided free of charge if it is deemed to be in the public interest, or the possibility of setting a minimum number of pages to be delivered free of charge.

Article 17. Display of Documents

Public Authorities shall facilitate access to Documents by making the originals available for consultation in facilities suited for such purpose.

Article 18. Information Officer

1. The head of the Public Authority responsible for responding to requests must designate an Information Officer who shall be the focal point for implementing this law within said Public Authority. The contact information for each such Information Officer must be posted on the website of the Public Authority and made readily available to the public.

2. The Information Officer shall, in addition to any obligations specifically provided for in other sections of this Law, have the following:

- a) to promote within the Public Authority the best possible practices in relation to the maintenance, archiving and disposal of Documents; and
- b) to serve as a central contact within the Public Authority for receiving requests for Information, for assisting individuals seeking to obtain Information and for receiving individual complaints regarding the performance of the Public Authority in the disclosure of Information.

Article 19. Document search

Upon receipt of a request for Information, the Public Authority in receipt of the request must undertake a reasonable search for the Documents which best respond to the request.

Article 20. Document management

The [body responsible for archives] must develop, in coordination with the Guarantor Body, a Document management system which will be binding on all Public Authorities.

Article 21. Missing Information

When a Public Authority is unable to locate the Information responsive to a request, and records containing such Information should have been maintained, it shall be required to make reasonable efforts to gather the missing Information and deliver it to the requester.

Article 22. Response period

1. Each Public Authority must respond to a request for Information as soon as possible and in any event, within [twenty] working days of its receipt.
2. In the event that the request has been forwarded from one Public Authority to another, the effective date of receipt shall be that on which the appropriate authority received the forwarded request. In no event shall such date be greater than [ten] working days from the date in which the initial the request was first received by a Public Authority authorized to receive requests.

Article 23. Extension

1. Where a request for Information makes it necessary to search for or review a great deal of Documents, or the need to search offices physically separated from the receiving office, or the need to consult with other Public Authorities prior to reaching a determination on the disclosure of the requested Information, the Public Authority processing the request may extend the response time by up to an additional [twenty] business days.
2. In the event that the Public Authority fails to satisfy the request within [twenty] business days, or, if the conditions specified in paragraph 1 are met, the failure to respond to the request within [forty] business days shall be deemed a denial of the request.
3. In exceptional cases, involving large amounts of Information, the Public Authority may approach the Guarantor Body to request an extension greater than [forty] business days in order to respond to the request.
4. Where a Public Authority fails to meet the deadlines set forth in this article, no charge should be imposed for providing the Information. Furthermore, any Public Authority that fails to meet such deadlines must obtain prior authorization from the Guarantor Body to deny the Information or make a partial disclosure.
5. Under no circumstance may a third party notification excuse the Public Authority from complying with the terms and deadlines established in this law.

Article 24. Notice to the requester

1. As soon as the Public Authority has reasonable grounds to believe that satisfaction of a request will either incur reproduction charges in excess of the standards set by the Guarantor Body or take longer than [twenty] business days, it shall inform the requester and allow requester the opportunity to narrow or modify the scope of the request.
2. Public Authorities shall guarantee access to the Information in the form requested, unless this would:
 - a) harm the Document;
 - b) infringe on copyrights not held by Public Authority; or
 - c) be impractical because of the need to delete or redact some Information contained in the Document, pursuant to Chapter IV of this Law.
3. Where Information requested in electronic format is already available on the internet, the Public Authority may simply indicate the exact URL where the requester may access the Information.
4. Where the Information is requested in a non-electronic format, the Public Authority may not answer the request by making reference to a URL.
5. Where Information is provided to the requester, the latter shall be notified and informed of any applicable fees and/or arrangements for access.

6. In the event that all or part of the Information is withheld from a requester because it falls under the exceptions to disclosure under Chapter IV of this Law, the requester must be given:

- a) a reasonable estimate of the volume of material that is being withheld;
- b) a description of the precise provisions of this Law applied for the withholding; and
- c) notification of the right to appeal.

CHAPTER IV. EXCEPTIONS REGIME

Article 25. Exceptions to disclosure

Subject entities may deny access to Public Information only under the assumptions considered in this chapter and under the following categories¹⁸ of Information:

- a) Reserved Information: that public Information that is temporarily excluded from public knowledge due to a clear, probable and specific risk of damage to public interests and in compliance with the requirements specified in this Law.
- b) Confidential Information: that private Information held by subject entities to which public access is prohibited by constitutional or legal mandate due to a legally protected personal interest.

Article 26. Supremacy of the public interest

No subject entity may refuse to indicate whether or not a Document is in its power or refuse to disclose such Document, in accordance with the exceptions contained in Articles 32 and 33 hereunder, unless the harm caused to the protected interest is greater than the public interest¹⁹ of obtaining access to the Information.²⁰

Article 27. Human rights

1. The exceptions contained in Article 33 may not be applied in cases of serious violations of human rights²¹ or crimes against humanity.
2. In these cases the authority competent to qualify these acts as violating human rights shall be [the Guarantor Body], at the request of the subject entities or any person.
3. The competent authority shall protect the right to privacy of victims and shall employ the methods it deems necessary for this purpose, such as redacting or other similar mechanism.

¹⁸ Comment: The list of exceptions should be exhaustive and not include any clause extending these categories to “all others that may be established by legislation.”

¹⁹ Comment: *Information of public interest* refers to Information that proves to be relevant or beneficial to society and not simply of individual interest, the disclosure of which is useful so that the public understands the activities carried out by the subject entities, such as information referring to public health, the environment, public safety, socioeconomic and political matters and transparency in public management. This definition takes up the points included in the decision of the European Court of Human Rights in the SIOUTIS v. GREECE case.

²⁰ Comment: Based on the principle of non-regression of public Information, a specific datum or Information of public interest that has already been disclosed in a specific format cannot cease to be made public based on a political decision.

²¹ Comment: This connotation may be expanded to encompass cases wherein the violation has not yet been established but there is a well-founded presumption or imminent threat that it will occur.

4. Information related to violations of human rights is subject to a high presumption of disclosure; in no case may it be classified by invoking reasons of national security.²²

5. In States subject to transitional justice processes, wherein truth, justice, reparation and there are guarantees of non-repetition, the integrity of all Documents that contain such Information must be protected and preserved and the documents must be published immediately.²³

Article 28. Acts of corruption

1. The exceptions contained in Articles 32 and 33 may not be invoked in the case of Information related to acts of corruption by public officials as defined by current laws and the Inter-American Convention against Corruption.

2. In these cases the authority competent to qualify the Information as related to acts of corruption shall be [the Guarantor Body] at the request of the subject entities or any person.

Article 29. Entity responsible for classification

1. The [supreme authority of subject entity] shall be responsible for classifying Information, except as provided in Articles 32 and 33.²⁴

2. Only specifically authorized or designated officials may classify Information. When an official without this power feels that certain Information should be classified, that Information may be considered classified for a brief period of no more than [5] business days until the designated official has reviewed the recommendation on classification.

3. The identity of the person responsible for a decision on classification must be reachable or identified in the Document, so as to ensure adequate accountability.

4. Public officials designated by law may delegate their original classification power to as few hierarchical subordinates as is viable from an administrative point of view.²⁵

Article 30. Generic classifications

1. The classification of Information shall be an individual and case-based operation and subject entities shall not make generic classifications by law, decree, agreement or any other analogous instrument.

2. In no case may Information be classified before it has been generated.

Article 31. Authority to declassify

The Guarantor Body is empowered to order the declassification of information that does not meet the requirements set forth herein.

²² Comment: This article seeks to promote accountability for these violations, so that an effort is made to provide the victim with opportunities to gain access to effective reparations.

²³ Comment: There is a preponderant public interest with regard to disclosing Information to society as a whole on the human rights violations committed under the previous regime.

²⁴ Comment: A good practice is the creation of Transparency Committees, which may include the Information Officer, the heads of the Document management unit and the internal control body. Those committees meet periodically and their powers include the classification of information.

²⁵ Comment: It is considered good practice to publish the number of persons authorized to classify Information, and the number of persons who have access to classified Information.

Article 32. Confidential Information

1. Subject entities may deny access to public Information when such access could harm the following private interests:

- a) the right to privacy, including privacy related to life, health or safety, as well as the right to honor and to one's image;
- b) personal data²⁶ that require the consent of their owner for their disclosure;
- c) legitimate commercial and economic interests;²⁷ and
- d) patents, copyrights and commercial secrets.

The public servants'²⁸ sphere of privacy is reduced according to their degree of responsibility. Consequently, public servants responsible for decision-making shall have a smaller sphere of privacy. Thus, in the event of conflict, the public interest shall prevail.

2. The exceptions in the preceding paragraph shall not apply when:

- a) the individual has expressly consented to the disclosure of his personal data;
- b) the circumstances of the case clearly indicate that the Information was delivered to the subject entity as part of the Information that should be subject to the disclosure regime;
- c) the Information is found in public records or publicly accessed sources;
- d) the Information is public in nature in accordance with this Law;
- e) there is a judicial order [that seeks] and/or [authorizes its publication];
- f) its publication is required for reasons of national security and general safety;
- g) when the Guarantor Body has ordered the declassification and disclosure of said Information;
- h) when it is transmitted among subject entities and between them and the subjects of international law, in terms of treaties and inter-institutional agreements, provided the Information is used for the exercise of those entities' own powers.

3. These exceptions shall not be applicable with respect to matters related to the functions of public officials, or when more than [20] years have passed since the death of the individual in question.

4. The heads of subject entities shall have knowledge of and maintain a registry of the public servants who based on the nature of their powers have access to the files and Documents classified as confidential. In addition, they shall ensure that said public servants are knowledgeable about their responsibility in the handling of classified Information.

5. Confidential Information shall remain confidential indefinitely, unless is it declassified by the Guarantor Body, in the case of personal data and with the consent of their owner, or when expressly determined by law.

6. Once Information has been classified, the Guarantor Body is authorized and competent to verify whether the Information meets the requirements of classification; to fulfil this duty, it may view the Information. This power cannot be delegated.

²⁶ Comment: Subject entities shall disclose Information in accordance with the provisions of the *Statement of Principles for Privacy and Personal Data Protection in the Americas* adopted by the Inter-American Juridical Committee at its eightieth regular session, through resolution CJI/RES. 186 (LXXX/O-12).

²⁷ Comment: In cases where the Information on legitimate commercial and economic interests has been provided to the subject entity on a confidential basis, said Information shall remain exempt from disclosure.

²⁸ Comment: The personal data of public servants are public to the extent that such data relate to the exercise of the position or inherent to the public service provided.

Article 33. Reserved Information

1. Subject entities may deny access to public Information when there is a clear, probable and specific risk of significant harm. Reserved Information shall be that which:

- a) disrupts the future free and frank provision of advice within and among the subject entities;
- b) may undermine the conduct of international negotiations and relations;
- c) imperils anyone's life, human dignity, safety or health;
- d) contains opinions or recommendations that form part of the deliberative process of public servants, as long as a final decision has not been adopted;
- e) affects due process rights or undermines the conduct of judicial cases or administrative procedures, as long as they have not been decided;
- f) compromises the State's ability to manage the economy in the event of economic emergency decreed by law; and
- g) might cause serious harm to the activities of verification, inspection, audit,²⁹ investigation,³⁰ prevention or prosecution of crimes.

2. The exceptions contained in paragraphs a) and g) shall not apply to facts, the analysis of facts, technical information and statistics.

3. The exception under paragraph g) shall not be applied to the results of a particular examination or audit, once they have been completed.

4. Subject entities may deny access to public Information when allowing access would constitute a violation of restricted official communications, including legal Information that should be considered privileged.

5. If a document contains parts that should be rated as classified, the subject entity shall prepare public versions, deleting what is not suitable for disclosure.

Article 34. Defense and national security

1. The judicial branch, the legislative branch, chiefs of State and government, supervisory institutions, intelligence services, armed forces, police, and other security bodies may restrict the public's right to access Information when there are reasons of national security, but only when such restrictions comply with all the other provisions established in this Law, and the requested Information falls under one of the following categories:

- a) Information on ongoing defense plans,³¹ operations and issues of capacity during the period in which the Information has operational utility.³²
- b) Information on the production, capacities or use of weapons systems³³ and other military systems, including communications systems.³⁴

²⁹ Comment: Once they are completed, audits constitute key Information and their dissemination must be proactive, i.e., without need for any requests for Information.

³⁰ Comment: Information from completed investigations in cases that are not prosecuted shall be publicly accessible.

³¹ Comment: Military operations that have already been carried out must be disclosed to third parties to ensure the right to the truth. In the event this Information has been destroyed, it shall be reconstructed by the competent authority.

³² Comment: It should be understood that the phrase "during the period in which the Information is of operational utility" requires disclosing the Information once it is assumed that this does not mean revealing data that could be utilized by enemies to learn the State's ability to react, its capacities, its plans, etc.

- c) Information on specific measures intended to safeguard the State's territory, critical infrastructure³⁵ or fundamental national institutions (*institutions essentielles*) against threats, use of force or sabotage, the effectiveness of which depends on restricting its disclosure.
- d) Information intrinsic to or derived from intelligence services' operations, sources and methods, provided they concern matters related to national security.
- e) Information related to matters of national security provided by a foreign State or intergovernmental agency with an express expectation of confidentiality and other diplomatic communications to the extent that they involve matters related to national security.

2. It is considered good practice for national legislation to establish an exclusive list of limited categories of information, such as the above.

Article 35. Harm test

1. When in response to a request for Information, delivery thereof is denied on the grounds that the Information is reserved, the subject entity shall apply the harm test.

2. The harm test must establish that the disclosure of Information may generate real, demonstrable and identifiable harm.³⁶

In applying the harm test, the subject entity shall certify in writing that:

- a) the disclosure of Information represents a real, demonstrable and identifiable risk of significant injury to a legally protected right clearly identified in a law. A hypothetical harm or injury may not be used as justification;³⁷
- b) the lack of a less harmful alternative to disclosure of the Information, to satisfy the public interest of disseminating the information;
- c) the risk of harm that such disclosure would involve exceeds the public interest in the dissemination of the Information;
- d) the limitation is consistent with the principle of proportionality³⁸ and represents the least restrictive means available for avoiding harm;

³³ Comment: The States' maintenance and publication of a weapons control list is good practice encouraged by the Inter-American Convention on Transparency in Conventional Weapons Acquisition and the Arms Trade Treaty.

³⁴ Comment: Said Information includes data and technological innovations and Information on production, capacity and use. Information on budget items related to weapons and other military systems should be available to the public.

³⁵ Comment: "Critical infrastructure" refers to strategic resources, assets and systems, of such importance to the State that their destruction or incapacity would have a debilitating impact on national security.

³⁶ Comment: The criteria of real, demonstrable and identifiable harm should be understood as follows:

Real harm: The Information requested represents a real risk to the public interest; hypothetical harm cannot be used as a justification for secrecy.

Demonstrable harm: If said information were disclosed, it would entail greater damage to the public interest than if it were not provided.

Identifiable harm: The delivery of the Information would entail a greater impact on the parties involved in the events described above. Similarly, a public servant who improperly breaks the secrecy of proceedings or provides copy thereof or the Documents appearing in the investigation may be subject to an administrative or criminal liability procedure, as applicable.

³⁷ Comment: It is not enough for the subject entity to argue that there is a risk of harm; it must also provide specific and substantial reasons supporting its assertions. The issuance of certificates or another similar type of instrument by a minister or other official does not constitute sufficient arguments to demonstrate that a legal good is affected.

- e) the restriction does not subvert the very essence of the right to Information; and
 - f) the concurrence of the requirements of timeliness, legality and reasonability.³⁹
4. The subject entity shall in all cases indicate the specific legal provision on which it bases the reserve.⁴⁰

Article 36. Public Interest Test

1. When invoking the existence of grounds for confidentiality in response to a request for Information, the subject entity shall apply the public interest test.

2. The public interest test should be performed based on the elements of suitability, necessity and proportionality, when there is a collision of rights.

For these purposes, the following definitions shall apply:

- a) *suitability*: the legitimacy of the right adopted as prevailing. This must be appropriate to achieve a constitutionally valid purpose or suitable for achieving the intended purpose;
- b) *necessity*: the lack of less harmful alternatives for opening up the Information to satisfy a public interest.
- c) *proportionality*: the balance between the harm and benefit to the protected public interest, such that the decision represents a greater benefit to the population than the harm potentially caused by the disclosure and dissemination of the Information.

Article 37. Generalities of classification

Classification may be established partially or completely according to the content of the Information, and shall be consistent with the principles and provisions set forth in this Law.⁴¹

³⁸ Comment: Proportionality must be understood as the balance between harm and benefit to the public interest, so that the decision made represents a greater benefit than the harm it could cause to the population.

³⁹ Comment: The requirements of timeliness, legality and reasonability must be understood in the following context:

- *Timeliness*: the reserve should be established for a specific period of time so that the reserved Information does not lose its public nature and thus when the grounds for the reserve disappear, the Information must be disseminated without restriction;
- *Legality*: the subject entity must conduct an analysis of the existing legal framework and demonstrate that the limits on the exercise of the right of access to public Information are aimed at protecting rights of similar or greater importance. In other words, it must prove that the requested Information falls under one of the grounds for exception provided in this Law; and
- *Reasonability*: it is not enough for the subject entity to cite legislation that authorizes it to deny the information because it considers it reserved. It must also justify the adoption of a limitation and provide a basis for the classification. This will reduce arbitrary action by public servants who have the power to classify information and will avoid unjustified denials of access to the Information.

⁴⁰ Comment: In view of the burden of proof that Public Authorities have when reserved information, it is advisable to adopt rules (laws, regulations, guidelines, guides, agreements, etc.) that facilitate and specify the manner in which the harm test will be conducted, in that, on the one hand, Public Authorities would have a detailed procedure for its application and, on the other hand, individuals would have certainty regarding the elements that must be present in the reserve.

⁴¹ Comment: Subject entities may only classify Information that exists; classification may not predate the existence of the Information.

Article 38. Classification of Information

1. Prior to their adoption, the rules and procedures governing the classification of Information should be subject to a process of open consultation wherein people have the opportunity to express their proposals and observations.

2. The rules and procedures approved to govern classification must be broadly disseminated.

3. When the information has parts or sections that are reserved or confidential, in order to handle a request for Information, subject entities shall develop a public version in which classified parts or sections are redacted, providing a generic indication of their content and supporting and justifying their classification.

Article 39. Declaration of confidentiality

1. Confidential Information shall be classified in accordance with the public interest test.

2. The confidential nature of the Information held by subject entities shall be declared through an administrative action that should contain the following Information at a minimum: ^[1]_{SEP}

- a) date of the administrative classification action: corresponds to the date when the declaration of confidentiality was issued;
- b) administrative office: the office that according to the of the subject entity's organizational chart generated or holds the confidential Information.
- c) Information to be classified: individualized Information classified as confidential; indicating the case number, document, file, official letter, level, report, etc. ^[1]_{SEP}
- d) persons or agencies authorized to access that Information, preserving the confidential nature thereof, if any. ^[1]_{SEP}
- e) legal foundation: provisions of Article 32 supporting the classification.
- f) justification: subject entities shall provide the motive for the classification being made, i.e., they shall specify the special reasons or circumstances that led them to conclude that the particular case falls within the assumptions provided in the Law.
- g) signature of the public servant who authorizes the classification: act of the senior authority of the subject entity, of the person acting by delegation or, as applicable, the Information officer.

3. Confidential information⁴² shall be labeled with the word "CONFIDENTIAL,"⁴³ which shall be placed in a spot visible to anyone who accesses it.

Article 40. Declaration of reserve

1. Information shall be classified as reserved on a case by case analysis, through the application of a harm test.

2. At the time the Information is classified, a resolution declaring the reserve must be issued, which indicates:

- a) the subject entity that produced the Information;

⁴² Comment: If the declaration of confidentiality covers the entire Document, there will be no need to identify its individual components. If only some of its component sections are classified as confidential, that circumstance shall be noted in the declaration of confidentiality.

⁴³ Comment: In any case, based on the type of confidential Information involved, the subject entities may establish special labeling systems the meaning of which is comprehensible only to those who have authorized access, making identification difficult for anyone else.

- b) the date or the event to which the reserve refers;
- c) the authority that adopted the decision to reserve the Information;
- d) persons authorized to access that Information;
- e) distinction between the portions of the Information that are subject to confidentiality or reserve and those that are available for access by the public; and
- f) the duration of the reserve.

Article 41. Declassification of Information

Information classified as reserved shall be public when:

- a) the causes that led to their classification cease to exist;
- b) the classification period expires;
- c) there is a resolution of the Guarantor Body or the judiciary that determines the existence of a public interest reason that prevails over the reserve of the Information; and
- d) the senior authority of the corresponding administrative unit of the subject entity considers declassification appropriate, in accordance with the provisions of this Law.

Article 42. Revision of the exceptions regime

The Guarantor Body shall periodically revise the list of exceptions established in this Law and recommend to the Legislative Branch the exclusion of those matters that no longer merit the nature of secret or confidential information or that for other reasons it feels should be excluded as grounds for secrecy or confidentiality.⁴⁴

Article 43. Registry of classified Information

1. Subject entities shall, through their Information officers, submit to the Guarantor Body every six months an index of information classified as reserved or confidential.

2. The Guarantor Body shall publish that Information in open formats on the day following its receipt. Said index shall indicate the area that generated the Information, the name of the Document, the type of classification, whether a complete or partial classification is involved, the date when classification begins and ends, its justification and, as applicable, the sections of the Information that are classified and whether an extension is in effect. In no case may the index itself be considered as classified Information.

Article 44. Partial disclosure

In those circumstances in which not all the information in a Document is exempt from disclosure in accordance with the exemptions indicated in Article 33, an edited version of the Document must be prepared redacting only the portions of the Document that are subject to exception. The non-exempt Information shall be made public and delivered to the requester.

The subject entity shall make a note on the Document stating the reasons why certain Information has been suppressed.

Article 45. Maximum duration of reserve

1. The exceptions referred to in Article 303 are not applicable to a Document that is more than [5] years old. When a subject entity wants to reserve the Information, this duration

⁴⁴ Comment: this Information may be submitted in the annual report that the Guarantor Body presents to the Legislative Branch.

may be extended for another [5 years] with the approval of the Guarantor Body. The duration of the reserve shall start on the date when the Information is first classified.⁴⁵

2. Under exceptional circumstances, when in the judgment of the subject entity it is necessary to again extend the period of reserve of the Information, a duly founded and justified request shall be made to the corresponding Guarantor Body, applying the harm test and indicating the new period of reserve, at least three months prior to expiration of the original term.

3. Within no more than [7] business days, the Guarantor Body shall issue a resolution in which it may extend, modify or deny the requested period of reserve. The Information will continue to be reserved until the Guarantor Body makes a decision.

4. No type of Information may be reserved indefinitely.

5. In no event may the total period of secrecy exceed [10] years, including any extensions.

Article 46. Non-Existent Information

1. The subject entity may not refuse to deliver Information by unjustifiably alleging that it does not exist. The declaration that Information does not exist must always be proven and preceded by a properly documented search process in different administrative units.

2. The existence of Information is presumed when it pertains to the authority, duties and functions that the domestic legal framework grants to the subject entities, or to the commitments undertaken by the State at the international level.

3. Where certain powers, responsibilities or functions have not been exercised, the response must be justified based on the grounds supporting the inexistence of the Information.

4. If the requested Information is not found in the files because there is no obligation to generate it, this shall not be considered to mean that it doesn't exist but rather a lack of legal authority.

5. When declaring that the requested Information is inexistent, the subject entity shall assure the requester that it used an exhaustive search criterion, which it shall describe in its response to the requester, in addition to indicating the circumstances of time, manner and place that led to the inexistence of the Information.

6. The subject entity must duly prove the facts if the Information does not exist due to natural disasters, the commission of some crime, or if its elimination was authorized negligently or illegally. In all these cases, if the Information is of public interest, the subject entity shall do everything possible to reconstruct it.

7. The senior authority of the corresponding administrative unit shall be immediately informed of cases in which the institution for which it is responsible denies public Information by alleging the inexistence thereof, including the identification of the person or public official responsible for keeping the Information. The senior authority of the administrative unit shall in these cases:

- a) analyze the case and take the necessary measures to locate the Information;
- b) issue a resolution confirming that the Information does not exist;
- c) ensure, provided this is materially possible, that the Information is generated or replaced (when it should exist) to the extent possible based on its powers, responsibilities or functions. With prior verification of the inability to generate the Information, there should be a well-founded and reasoned exposition of the reasons

⁴⁵ Comment: The standard ISO15489 on Document management establishes that the assessment process falls to the producer of the information, which shall determine the period of secrecy of the Information.

why, in the specific case, it did not exercise those powers, responsibilities or functions, which shall be communicated to the requester; and

d) immediately notify the supervisor of the subject entity and the Guarantor Body, the internal control body or the equivalent which, as applicable, shall initiate the administrative liability or other appropriate procedure.

8. The Guarantor Body is responsible for verifying that the information does not exist by means of:

- a) an on-site examination of the institutional files of the subject entity that declared the inexistence of the Information, to determine whether the Information search procedures were properly executed and confirm whether or not the Information actually exists;
- b) half-yearly requests to all subject entities of cases in which Information has been denied by alleging its inexistence. Said data shall be disclosed in the annual report referred to in Article 66; and
- c) requesting the responsible administrative unit to prepare a declaration of inexistence, in which the search actions are detailed.

Article 47. Filing of appeals

1. Anyone has the right to appeal the subject entity's decision not to deliver the requested Information by alleging one of the grounds contained in the exceptions regime.

2. This right includes the ability to challenge the declaration of reserve, made by a subject entity, before the Guarantor Body through the appeal procedure established in Chapter V of this Law.

Article 48. Recourse against a failure to respond

1. When the requester does not obtain a response in the established period, said requester may file a complaint with the Guarantor Body.

2. The complaint must be filed within [thirty] business days from the date in which a response should have been received by the requester; otherwise, the complaint may be rejected.

3. The Guarantor Body shall verify within a period of [five] business days whether the request for Information to the subject entity complies with the requirements of Article 12. If it does, the Governing Body shall admit the case and allow a period of [three] business days for the subject entity to justify the reasons why it did not provide a timely response to the request.

4. Once the period for the subject entity to justify its non-responsiveness has elapsed, the Guarantor Body shall verify, within [ten] business days, whether or not the requested Information is reserved or confidential. If the information is open for public access, the Guarantor Body shall issue a resolution ordering that the requester be given access to the Information.

Article 49. Other laws

The provisions on reserve or confidentiality of Information contained in other laws shall be consistent with the bases, principles and provisions established herein and may in no event contravene this Law.

In the event that other laws prescribe longer classification periods, those set forth in this Law shall prevail.

CHAPTER V. APPEALS**Article 50. Internal appeal⁴⁶**

1. A requester may file an internal appeal with the head of the Public Authority within [60] business days from the date in which the term for obtaining a response has expired, or from the date of any other breach of the rules set forth in this Law for responding to a request for Information.

2. The head of the Public Authority must issue a written and sufficiently reasoned decision within [10] business days from receipt of the notice of appeal, and deliver a copy of said decision to the requester.

3. Should the requester decide to file an internal appeal, the full term for resolution thereof must expire before an external appeal may be pursued.

Article 51. External appeal

1. Any requester who believes that his or her request for Information has not been processed in accordance with the provisions of this Law, shall have the right to file an appeal with the Guarantor Body regardless of whether an internal appeal has been pursued.

2. Said appeal shall be filed within no more than [60] business days from the expiration of the terms for responding to a request for Information or to an internal appeal, as provided by this Law.

3. The request for an appeal shall contain:

- a) the public authority with which the request was filed;
- b) the contact information of the requester;
- c) the grounds upon which the appeal is based; and
- d) any other information that the requester considers relevant.

4. Upon receiving an appeal, the Guarantor Body may attempt to mediate between the parties with an aim to disclose the Information without exhausting a formal appeal process.

5. The Guarantor Body shall log the appeal in a centralized tracking system and inform all interested parties, including interested third parties, about the appeal and their right to participate in such process.

6. The Guarantor Body shall set clear and nondiscriminatory rules regarding the processing of appeals which ensure that all parties have an appropriate opportunity to appear in the process.

7. In the event the Guarantor Body is uncertain as to the scope and/or nature of a request and/or appeal, it must contact the appellant to clarify what is being requested and/or appealed.

Article 52. Resolution

1. The Guarantor Body shall decide appeals, including attempts to mediate, within [60] business days and may, in exceptional circumstances, extend this timeline by another [60] business days.

2. In deciding the case, the Guarantor Body may:

- a) deny the appeal; or

⁴⁶ Comment: An internal appeal should not be mandatory, but instead optional for the requester before proceeding to the external appeals process.

- b) require the Public authority to take such steps as may be necessary to comply with its obligations under this Law, such as, but not limited to, providing the Information and/or reducing the fee;

3. The Guarantor Body shall serve notice of its decision to the requester, the Public Authority and any interested party. Where the decision is unfavorable to the requester, the latter shall be informed of the right to appeal.

4. If a Public Authority does not comply with the Guarantor Body's decision within the time frame set forth in said decision, the Guarantor Body or the requester may file petition the [appropriate] court to compel compliance therewith⁴⁷.

Article 53. Judicial review⁴⁸

1. A requester may file a case with the court only to challenge a decision of the Guarantor Body, within [60] days of notice of the adverse decision or the expiration of the term for responses provided herein.

2. The court shall come to a final decision on all procedural and substantive aspects of the case as early as possible.

Article 54. Burden of Proof

1. The Public Authority shall have the burden of proof to establish that the requested Information is subject to one of the exceptions contained in Articles 32 and 33 above. In particular, the Public Authority must establish:

- a) that the exception is legitimate and strictly necessary in a democratic society based on the standards and jurisprudence of the Inter-American System;
- b) that disclosure of the Information would cause substantial harm to an interest protected by this Law; and
- c) that the likelihood and gravity of that harm outweighs the public interest in disclosure of the Information.

CHAPTER VI. GUARANTOR BODY

Article 55. Creation⁴⁹

This Law creates a Guarantor Body that will promote and guarantee the right of access to public Information as well as the faithful implementation and interpretation of this Law.

Article 56. Characteristics⁵⁰

- 1. The Guarantor Body⁵¹ shall be a body that has its own legal personality and is:

⁴⁷ Comment: The manner of enforcing the Guarantor Body's decisions in accordance with paragraph 4 will vary from country to country.

⁴⁸ Comment: These rules are based on the assumption that in many countries courts have all of the inherent powers needed to process these types of cases, including for example imposing sanctions on Public Authorities. Where this is not the case, these powers may need to be explicitly given to them through the access to public Information law.

⁴⁹ Note: Model Law 1.0 had an *Information Commission*; Model Law 2.0 considers it necessary to replace it with a newly created and more evolved *Guarantor Body*.

⁵⁰ Note: unlike Model Law 1.0, an article is created detailing the essential and non-essential characteristics with which the Guarantor Body must be created.

- a) established by law.
- b) autonomous and independent, with the ability to decide on the execution of its budget.
- c) specialized and impartial.
- d) authorized to impose penalties, within its areas of competence.

Article 57. Composition

- 1. The Guarantor Body shall be composed of (five or more) commissioners.⁵²
- 2. The Guarantor Body should reflect a diversity of experience and talent, as well as gender parity.

Article 58. Requirements to be a commissioner

Commissioners must meet the following minimum requirements:

- a) be a citizen in full possession of the inherent political and civil rights;
- b) have knowledge and proven experience in the field covered by this Law, in order to ensure independent judgment and impartiality;
- c) have a good reputation, not have been convicted of a crime involving fraud or dishonesty in the past five years, and not have been convicted of corrupt acts as defined in the Inter-American Convention against Corruption and under domestic law.

Article 59. Selection procedure

Commissioners shall be nominated by a majority of [two-thirds] of the members of the [Legislative Branch] and appointed by the [Executive Branch], in a process that adheres to the following principles:

- a) public participation in the nomination process;
- b) transparency and openness; and
- c) publicity of the list of candidates considered most suitable for the position.⁵³

⁵¹ Comment: Each State may consider the Guarantor Body to be preferably:

- i) established at the constitutional level;
- ii) not subordinated to any branch, body, or institution of government;
- iii) collegiate, or with accountability mechanisms;
- iv) independent of local transparency bodies, in the case of Federal States.

⁵² Comment: It is preferable that Guarantor Bodies be composed of an odd number of commissioners greater than or equal to five (5), since a body composed of three (3) may isolate or obstruct the opinion and participation of one of the commissioners in cases where the other two are closely aligned philosophically, personally, or politically—a dynamic that is less likely to arise in a collegial body of five or more members.

Each State may consider the possibility of selecting alternate commissioners. Alternate commissioners may be those who, while not having been chosen during the selection process, have nonetheless obtained the best scores. In any case, it must be ensured that the absence/vacancy of a commissioner does not hinder the operation of the Guarantor Body.

⁵³ Comment: In order to increase confidence in the institution, it is preferable that both the Executive and the Legislative Branches participate in the selection process; that any decision of the Legislative Branch be adopted by a qualified majority sufficient to guarantee bipartisan or multi-partisan support (e.g., 60 percent or 2/3); that the public and civil society have the opportunity to participate in the nomination process; and that the process be transparent. There are two main approaches: appointment by the Executive Branch, with the nomination and approval of the Legislative Branch; and appointment by the Legislative Branch, with the nomination or approval of the Executive Branch.

Article 60. Obligations of commissioners

1. Commissioners shall perform their duties on a full-time basis.
2. Commissioners may not hold any other employment, position, or commission except in academic, scientific, or philanthropic institutions.⁵⁴

Article 61. Term of office

1. The term of office of the commissioners shall be [5] years, renewable for a single additional term.
2. The election of commissioners must be alternated and held at staggered intervals, in order to prevent the mandate of more than two thirds of its members from expiring in the same year and to ensure the continuity of service, as well as to guarantee the autonomy and political independence of the Guarantor Body.
3. Commissioners shall remain in office until their replacements are elected.⁵⁵

Article 62. Removal or suspension of commissioners

1. Commissioners may only be removed or suspended from office following a process that is similar in nature to that by which they were appointed or for a situation that warrants removal from office, including:
 - a) a final judgment of conviction for a criminal offense or punishment for violating ethical standards of conduct;
 - b) infirmity that directly affects the individual's capacity to discharge his or her duties;
 - c) serious constitutional violations or breaches of this Law, or the mismanagement of Public Funds and resources;
 - d) refusal to comply with any of the disclosure requirements inherent to their position, such as the public disclosure of salary or benefits; and
 - e) negligent or bad faith disclosure or use of sensitive or confidential information.
2. Any commissioner who has been removed or suspended from office has the right to appeal such removal or suspension to the Judicial Branch.

Article 63. Duties and powers of the Guarantor Body⁵⁶

The Guarantor Body shall have all the powers necessary to perform the functions described in this Law, including the following:

I. Interpretation of the Law:

- a) interpret this Law and ensure that its correct interpretation by subject entities.

II. Implementation of the law:

- a) monitor and ensure *ex officio* compliance with this Law;
- b) support Public Authorities in the implementation of this Law; and
- c) implement a set of indicators to measure the proper application of this Law.

⁵⁴ Comment: It is recommended that commissioners serve on a full-time basis and that their salary be tied to an externally fixed sum in order to strengthen their independence.

⁵⁵ Comment: It is recommended that commissioners hold office for no longer than 12 years, including any re-election.

⁵⁶ Note: Unlike Model Law 1.0, Model Law 2.0 includes a list detailing the duties and powers of the Guarantor Body.

III. Regulations:

- a) propose legislative initiatives in the area of its competence;
- b) make recommendations on existing and proposed legislation in the area of its competence;
- c) propose, coordinate, or, where appropriate, approve the Regulations to the Law on Access to Public Information and the internal rules necessary for the proper performance of its duties, including the design of its organizational structure; and
- d) draft guidelines for the handling of public, confidential, and classified Information in the possession of subject entities.

IV. Information asset registers:

- a) keep a record of requests for access to Information, responses, results, and costs of reproduction and delivery.

V. Direct internal policies:

- a) provide guidance to subject entities in the design, implementation, and assessment of actions to disseminate public Information; and
- b) promote the homogeneity and standardization of Information disseminated by the subject entities, through the adoption of guidelines, templates, and any means deemed appropriate.

VI. Digitalization of Information and information and communication technologies:

- a) promote and guide the digitalization of public Information in the possession of subject entities as well as the use of modern and adaptable information and communication technologies.

VII. Open data:

- a) ensure that key Information is increasingly disclosed in an open data format; and
- b) provide technical support to reporting entities in the preparation and dissemination of Information in an open data format.

VIII. Orders:

- a) issue binding decisions and orders; and
- b) disclose the orders issued, particularly among the subject entities, in order to standardize the enforcement of this Law.

IX. Requests for Information:

- a) promote the development and implementation by the subject entities of a modern computer system for the intake of requests through a single window; and
- b) prepare forms for the submission of requests for information, which are not binding but will serve as a general guide for regulated entities and will contain the requirements established in [Article 23 of Law 1.0].

X. Dispute resolution:

- a) resolve disputes relating to the classification and declassification of classified or confidential information, applying the principle of maximum openness; and
- b) create and offer free and expeditious mechanisms for the resolution of disputes that may arise between subject entities and Information requesters, and mediate and/or adjudicate such disputes.

XI. National security:

- a) request the cooperation of institutions in the national security and defense sector to obtain technical inputs to ensure the appropriate declassification of Information.

XII. Inspections and investigations:

- a) in the context of a proceeding, to summon individuals, request searches, and receive the sworn testimony of persons deemed to be in possession of Information relevant to the performance of their functions;
- b) verify and review public Information in the possession of any subject entity, through on-site inspections. This Information may include classified or confidential Information;
- c) these proceedings include, *inter alia*, the supervision and observation of the request intake system of the subject entities in order to verify that they adequately respond to requests for Information; and
- d) issue the appropriate preventive/precautionary measures by means of a reasoned order, *inter alia*, to request a copy of the Information in dispute, regardless of its classification; notify the offender's supervisor of the alleged conduct and the existence of the proceeding before the Guarantor Body; and request that the head of the regulated entity take special measures to safeguard and back up the Information in question.

XIII. Compliance lists:

- a) adopt the necessary guidelines for monitoring compliance with this Law, including the periodic publication of the list of subject entities that comply/fail to comply with the provisions of this Law, including the incorporation of a gender perspective; and
- b) publish a list identifying the subject entities against which the highest number of complaints was received.

XIV. Reports of violations:

- a) refer cases of suspected administrative or criminal misconduct to the competent bodies.

XV. Penalties and enforcement measures:

- a) establish and carry out enforcement measures, including public and private reprimands, fines, and others.

XVI. Legal Recourse:

- a) serve as a second instance for persons who are dissatisfied with the resolutions of the subject entities;
- b) in the case of Federated States, serve as a second instance in the event of denial by local bodies;
- c) resolve individual complaints, which may be filed at any time under the legally established guidelines and procedures;
- d) hold oral and public hearings to determine the classification or declassification of Information, as appropriate;
- e) call witnesses and produce evidence in the context of an appeal; and
- f) as the result of an appeal, the Guarantor Body may, *inter alia*, order the declassification of Information and consequently its release.

XVII. Training:

- a) promote and implement training and awareness programs directed at subject entities, in particular public servants, and provide any technical support they may require on matters within their competence.

XVIII. Public awareness:

- a) hold workshops, conferences, seminars, and other similar activities to publicize the importance of the right of access to public Information as a tool to ensure transparency;

- b) sign cooperation agreements with all kinds of public and private organizations that promote access to public Information; and
- c) disseminate this Law and promote its understanding among the general public through the publication and dissemination of guides and other similar resources on the relevance of the right of access to Information and its practical application, taking into account accessibility criteria for groups in situations of vulnerability.

XIX. Constitutional challenges:

- a) bring unconstitutionality actions in matters within its competence to challenge federal or state laws as well as international treaties signed by the Executive Branch and ratified by the Legislative Branch that violate the right of access to public Information.

XX. International conventions:

- a) ensure compliance with the obligations undertaken by the State in international conventions, specifically regarding access to public Information, including the Inter-American Convention against Corruption and the United Nations Convention against Corruption.

XXI. Coordination with national archives:

- a) cooperate with the entity in charge of the national archives in the creation and use of the criteria for cataloguing and conserving Documents, in the organization of the archives of the agencies and entities subject to this Law, as well as in other areas of mutual interest.

Article 64. Budget⁵⁷

1. The Legislative Branch must approve the budget of the Guarantor Body, which must be sufficient for it to properly discharge its duties.
2. The creation of new bodies shall guarantee the provision of sufficient human, budgetary, and material resources for them to perform their duties, as this is the only way to guarantee sufficient conditions for the proper application of this Law.

Article 65. Reports of subject entities⁵⁸

1. Subject entities shall submit annual reports to the Guarantor Body detailing the activities they carry out to comply with this Law. This report shall include, at a minimum, information on:
 - a) number of requests for Information received, granted in whole or in part, and of requests denied, disaggregated by gender where possible, as well as any other Information related to indigenous groups, economically disadvantaged persons, women, persons with disabilities, Afro-descendants, and others, for purposes of evaluating the implementation of this Law. In order to collect this Information, reporting entities may use Information request forms⁵⁹ with minimum fields to be completed by the requesters;
 - b) number of requests responded extemporaneously, including justification for any delay;
 - c) details of the sections of this Law that were invoked to deny, in whole or in part, requests for Information and the frequency with which they were invoked;

⁵⁷ Note: Model Law 2.0 introduces a specific article on the budget of the Guarantor Body.

⁵⁸ Note: Model Law 2.0 details the information that both the report of the Guarantor Body and the report of the subject entities should contain.

⁵⁹ Comment: The omission of the requirement to complete the information request forms shall not be grounds for invalidating such request.

- d) response time to requests for Information;
- e) number of appeals filed to contest the denial of Information, disaggregated by gender;
- f) fees charged for the reproduction and delivery of the requested Information;
- g) activities undertaken to meet the obligation to disclose key Information and those undertaken to implement the open State policy;
- h) activities carried out to implement proper document management;
- i) activities to provide training and education to public servants; and
- j) gender-disaggregated statistics and information demonstrating compliance with this Law.
- k) difficulties observed in complying with the Law.

2. The Guarantor Body may gradually expand the above list as it deems advisable to verify compliance by the subject entities with the provisions of this Law. To this end, the Guarantor Body will issue the guidelines it deems necessary.

Article 66. Reports of the Guarantor Body

The Guarantor Body shall publish annual reports on its activities and on the implementation of the Law. Said report shall include at least the following:

- a) a systematized summary of the Information received from subject entities in compliance with this Law;
- b) the number of appeals filed, disaggregated by gendered including those from the various public authorities, their grounds, results, and status;
- c) number of penalty proceedings filed and their current status;
- d) list of public servants penalized for failure to comply with this Law; and
- e) disaggregated statistical Information that makes it possible to identify and define inequalities that require the adoption of differentiated measures and the measures and proposals that will be undertaken in order to narrow the gaps between different sectors of society. Criminal and Civil Responsibility

Article 67. Civil and criminal liability

1. No one shall be subjected to civil or criminal action, or to any employment detriment, for any action taken in good faith in the exercise, performance or purported performance of any power or duty in terms of this Law, as long as they acted reasonably and in good faith.

2. It is a criminal offense to willfully destroy or alter Documents after they have been the subject of a request for Information.

Article 68. Administrative offenses

- 1. It is an administrative offense to willfully:
 - a) obstruct access to any Document in contravention of Chapter II of this Law;
 - b) prevent the performance by a Public Authority of its duty under Chapters II and III of this Law;
 - c) interfere with the work of the Guarantor Body;
 - d) fail to comply with provisions of this Law;
 - e) fail to create a Document either in breach of applicable regulations and policies or with the intent to obstruct access to Information; and
 - f) destroy Document without authorization.
- 2. Anyone may make a complaint about an administrative offense as defined above.

3. Administrative sanctions shall be governed vt the administrative law of the State and may include a fine [of up to x times the minimum wage], a suspension of a period for [x] months/years, termination, or a separation or restriction from service for [x] months/years].

4. Any sanctions ordered shall be posted on the website of the Guarantor Body and the respective Public Authority within five days of the imposition thereof.

CHAPTER VII. PROMOTIONAL AND COMPLIANCE MEASURES

Article 69. Monitoring and compliance

1. The [legislative body] should regularly monitor the operation of this Law, in order to determine whether changes and improvements are necessary to ensure all Public Authorities comply with the text and spirit of the Law, and to ensure that the government is transparent, remains open and accessible to its citizens, and guarantee the fundamental right of access to Information.

Article 70. Training

- 1. The Information Officer shall ensure the provision of appropriate training for the officials of the Public Authority on the application of this Law.
- 2. The guarantor Body shall assist Public Authorities in providing training to officials on the application of this law.

Article 71. Formal Education

1. The [Ministry of Education] shall ensure that core education modules on the right to Information are provided to students in each year of primary and secondary education.

CHAPTER VIII. TRANSITORY PROVISIONS

Article 72. Abbreviated title and entry into force

- 1. This Law may be cited as the Access to Public Information Law of [year].
- 2. This Law shall be effective on the date of its promulgation by [insert name of relevant official such as President, Prime Minister], regardless of which it shall become effective automatically [six] months after its approval in the absence of a promulgation.
- 3. The Guarantor Body shall have up to 6 months from the date in which this Law becomes effective to appoint its personnel, establish its internal processes, disseminate information proactively and carry out any other action needed for its full operation.

Article 73. Regulations

1. This Law must be properly regulated within [1] year of its entry into force, with active involvement of the Guarantor Body.

* * * *

ADDENDUM A: MODEL INTER-AMERICAN LAW ON DOCUMENT MANAGEMENT

ADDENDUM B: IMPLEMENTATION GUIDE FOR THE MODEL INTER-AMERICAN LAW ON DOCUMENT MANAGEMENT

* * * *

MODEL INTER-AMERICAN LAW ON DOCUMENT MANAGEMENT

INTRODUCTION AND PURPOSE

Document management and file administration in government entities are some of the most important aspects for the effective implementation of a country's law on access to information and transparency. The inability to locate the information may become an obstacle in managing information requests, while inappropriate file management may delay compilation of requested information.

Therefore, it is fundamental to ensure that Document and file management policy is consistent with policies on information access policies, transparency, open government, and open data.

The success of transparency and access to public information initiatives depends to a large extent on the quality, reliability, and accessibility of the public archives with custody of that information. If the archives are not properly organized and well managed, it will be very complicated to confirm the authenticity and integrity of public information or meet the established deadlines for responding to the public and management. However, adequate archive management controls with effective standards and procedures, allow members of the public and public officials to trust not only the reliability of the data extracted from the archives, but also in the existence of a complete Documentary record of the activities of public administrations.

The public administration generates and receives a considerable amount of Documentation as a result of the necessary activities to fulfill its purposes and as a record of those activities. These Documents constitute a legacy that is an essential part of the collective historical memory. At the same time, it is also constantly providing information on the powers of the public administration, which means that special attention should be given to processing, custody, and distribution of public Documents, particularly in a context of transparency and access to information.

Said Documents contain information that constitutes a valuable resource and an important asset for the subject entity. They are important not only for the institution internally, but also have an external dimension in that they guarantee rights and duties for the administration as well as private citizens, and may be subject to control and verification, as well as be used to audit the administration's activities. Therein lies the importance of a standardized Document management policies and procedures that ensures that they are accorded the proper attention and protection, while enabling their probative value and information content to be preserved and retrieved more efficiently and effectively through the use of standard practices and processes based on good practice.

Document and archive management is a crosscutting process in all institutions, making it an integral part of all the processes carried out in an institution's different areas. Streamlining Documentation through its various phases ensures effective and adequate management by integrating processing strategies for Documents—whether in conventional or electronic media—in an institution's overall management.

MODEL INTER-AMERICAN LAW ON DOCUMENT MANAGEMENT

CHAPTER 1. DOCUMENT MANAGEMENT POLICY

Article 1. Documents and files

1. In the context of this law, "Document" shall mean any written information, regardless of its form, origin, date of creation, or official nature; whether or not it was created by the obligated entity that has possession of it; whether or not it is classified as confidential, and regardless of its medium or technology platform.

2. For the purposes of this law, “Archive service” means the service responsible for the functions of Document management, conservation, and administration.

3. Documents and Archive Services must be properly organized and well managed to ensure the quality and integrity of public information, as well as to meet established response times to the public and the subject entity itself.

4. Documents and archives must be managed with adequate controls and standards, as well as with effective procedures, so that members of the public and public officials alike can trust not only in the reliability of the data extracted from the archives, but also in the existence of a complete Documentary record of the activities of the subject entities.

Article 2. Implementation of Document management policy

1. Every obligated entity shall define a Document and archive management policy as a declaration of intent that includes lines of action and objectives that it wishes to achieve as an institution in relation to the Documents that it produces or receives in the performance of its functions and activities.

Comment: The implementation of a Document management policy at the core of institutions is a democratic obligation of our administrations that should be aligned with other high-level strategic policy goals, such as transparency, access to public information, good governance, and accountability, since Documents constitute the basis and foundation of open government as well as underpinning the principles of transparency, civic participation, and partnership.

2. The Document and archive management policy will govern the practices of those responsible for their management and of anyone else who generates or uses Documents in the course of their activities, including:

- a. Establishment of standards and good practices.
- b. Design of procedures and deadlines.
- c. Provision of services related to their management and use.
- d. Integration of the Document management system with the systems and processes of the obligated entity or institution.
- e. Oversight and audit for accountability.

Article 3. Appointment of an authority to lead the management policy

1. All regulated entities shall establish a unit or agency for the formulation and leadership of Document management policy, which will guarantee that Document management decisions, actions, and activities conform to the legal framework and are duly Documented.

2. The senior management of the obligated entity must appoint a specific representative who, aside from their other responsibilities, should ensure that the Document management policy and system are established, implemented, and maintained in accordance with the necessary requirements.

Article 4. Document management processes

1. The Document management policy of the obligated entity comprises the different Document management processes addressed herein below.

2. The Document management policy shall implement a system of regular oversight and evaluations—at intervals agreed upon within the obligated entity—of all or part of its Document management processes, as a commitment to quality and continuous movement.

CHAPTER 2. DOCUMENT IDENTIFICATION, CLASSIFICATION, AND DESCRIPTION

Article 5. Archive identification

1. For the purposes of this law, “Identification” shall mean the Document management process used to review and study the actions carried out within an institution that provide knowledge of every aspect of the Documentation that the institution manages and keeps.

Comment: The fundamental objective of Identification is to gain a thorough knowledge of the institution producing, creating, or receiving the Documents in the exercise of its competencies, its organizational evolution over time, the administrative processes with which it has been operating, and all the provisions and regulations that affect the formal procedures it carries out. With that thorough knowledge, it will be possible to define the Document series that are the essential building blocks for developing all the other Document management processes in an institution.

Article 6. Document classification

1. For the purposes of this law, “Document Classification” shall mean a Document management process based on the systematic structuring of activities, institutions, or the Documents they generate into categories according to conventions, methods, or standards of procedure, all logically organized and represented in a Document management system.

Comment: Document Classification is used to design all Document management actions and strategies within an institution, since its result provides essential added value for planning and determining numerous subsequent actions, such as the establishment of Documentary conservation periods, the information access procedure, and the possibilities of recovering information and Documents from among all those managed by the subject entity.

2. The tool resulting from Document Classification is the regulated entity's Document Classification chart, to be used for correct classification of all Documents generated by the subject entity.

3. It is the institution's responsibility to prepare a Document Classification chart in collaboration with the units responsible for Document creation and/or management, and to code that chart so that it includes all the activities carried out in the subject entity and their Documentary record.

Article 7. Document description

1. In the context of this law, the main aim of description is to represent Documents in a comprehensible manner, providing information about the context of their creation, their organization, and their content, as well as to facilitate access to them.

Comment: Archival description is directly linked to the prior processes of Identification and classification, since information can only be described if it is properly organized. Moreover, the mere fact that an archive is well organized does not, in itself, guarantee that the information it contains can be accessed and consulted. For that, its contents need to be described. A fond cannot be properly appraised, conserved, and disseminated if its contents, institutional provenance, and the functions that prompted its creation and use—i.e., its context—are not known.

2. Institutions should develop a gradual plan for Document description. This plan should ignore the medium in which Documents are stored and the stage in their lifespan.

CHAPTER 3. DOCUMENT APPRAISAL, TRANSFER, AND DISPOSAL

Article 8. Document Appraisal

1. For purposes of this law, “Appraisal” shall mean the archival processing phase that consists of analyzing and determining the primary and secondary values of Document series and establishing time frames for Transfer, access, and retention or Disposal, whether total or partial.

Comment: All Appraisal systems should rest on three pillars: first, it must be governed by regulatory standards; second, it must be under the direction of an authority with vested powers and responsibilities; third, it must produce and apply decisions, which are normally reflected in what are generally known as retention calendars or Document retention tables.

2. Appraisal procedures, which include Document selection, Disposal, and Transfer, should be designed to avoid arbitrary destruction of Documents as well as their needless accumulation.

3. Documents may never be disposed of as long as they have administrative force and continue to have probative value of rights and obligations.

Comment: It is essential to guarantee the information needed to know what activities institutions have carried out and to conserve that which is necessary, at first, for institutional management purposes, and subsequently, for research and history.

It would be desirable for Appraisal to occur not only when Documents enter archives, but also as early as the Document production stage. If we begin with rationalizing Document production and use, we can standardize procedures, and the production of useless Documents can be avoided; at the same time control and regulation of access to them can be defined, as can the time frames for Transfer, Disposal, or conservation.

4. Each subject entity shall establish an institutional Appraisal committee. This committee will be responsible for approving Document Appraisal tables or retention calendars.

5. Documents necessary for the normal operation of institutions and the services they provide or that serve as support for and recognition of rights and/or obligations, whether institutional or individual, should not be disposed of.

6. In some cases, serious economic sanctions and sometimes even criminal proceedings may result from the irregular destruction of Documents

7. All decisions taken and reports issued by Appraisal committees shall be Documented to provide evidence that they were permitted and authorized under the relevant law and norms.

8. The Appraisal and Disposal process shall be framed within a transparent and reliable system that is consistent with quality assurance systems and integrates the archive with the institution’s management systems.

Article 9. Document Transfer

1. For the purposes of this law, “Transfer” shall mean the usual procedure for entering material in an archive by transferring fractions of Document series once they have reached the time limit set by the rules established in the Appraisal for each stage of the lifespan of Documents.

Comment: Document Transfer shall be a process included in the Document management policy of the obligated entity. Its purpose is to ensure that Documents are properly processed in the most appropriate archive for that purpose. Thus, the accumulation of Documents in different centers and units is avoided, as are the adverse effects of that accumulation, while the most appropriate service is provided for each phase of the Documents’ lifespan.

2. All obligated entities shall establish a Transfer calendar, understood as a management instrument that governs the physical Transfer of Documents to the storage areas managed by the

archive. Under this calendar, each unit shall have an assigned period for effecting the Transfer of Documents.

3. All Document Transfers are to be accompanied by a delivery report or form which should provide the necessary information about the Documents being transferred.

4. In the case of the Transfer of electronic Documents, provision shall be made for the compatibility of formats and media.

5. Electronic Document Metadata should be transferred along with the Document in order to enable its identification, authenticity, and any conservation procedures that may be necessary in the future.

6. The Documents shall be accompanied by other supplementary Documentation, such as indications of use and access privilege procedures; procedures to prevent, correct, and discover losses of or alterations to information; and indications of conservation procedures in connection with deterioration of the media and/or technological obsolescence.

7. Documents to be transferred shall be adapted to a durable format.

Article 10. Document Disposal

1. For purposes of this law, "Disposal" shall mean the process by which Documents are destroyed or computer systems are decommissioned or wiped, once their value (administrative, legal, informational, historic, testimonial) has been analyzed and found to be worthless for all purposes.

2. All Document Disposal shall be based on a decision regulated and authorized by the Appraisal Committee and at the highest level of the obligated entity, and shall be set forth in an express authorization by the management of the regulated entity that includes the type of Document to be disposed of and the time period that the reviewed Documentation is to be conserved.

3. Disposal shall ensure the impossibility of the disposed-of Document's reconstruction or subsequent use.

Comment: Strip-cut or cross-cut shredding is the most appropriate method for disposing of paper Documents. Paper is shredded into strips or particles whose size is chosen based on the level of protection required for the information contained in the Documents to be destroyed. In the case of Documents containing especially sensitive information, shredding into small particles is recommended.⁶⁰

4. If the Documentation to be disposed of is stored on computer media, the Appraisal Committee shall decide if it is to be securely wiped, understood as the procedure for the Disposal of data or files from a medium or set of media that enables those media to be reused (by means of overwriting, demagnetization, cryptographic wiping, etc.); or destroyed, meaning the process of rendering storage media containing electronic Documents physically unusable (by breaking into pieces, crushing, melting, shredding, etc.). The decision will depend on the medium or system of storage and the type of information it contains.

5. Documents shall be disposed of securely, with the same level of security as they had throughout their life cycle.

6. Disposal shall be done under proper supervision, in the presence of a responsible party of the regulated entity, who will attest to the action, and with control of the work to ensure the quality and relevance of said processes.

7. If the Disposal is done by an externally contracted company, the entity shall monitor compliance with all agreed Disposal requirements.

⁶⁰ The particles of material for Documentation containing especially sensitive information are recommended to have a surface area of < 2000 mm² or strips of indeterminate length and width of < 12 mm, as recommended in ISO Standard BS EN 15713:2010 *Secure Destruction of Confidential Materials. Best practices code.*

8. The Disposal shall be Documented in a Disposal record that contains all essential data to attest to said Disposal. That record shall be signed by the Appraisal Committee.

9. The Appraisal Committee of each institution shall coordinate the Appraisal and Disposal of Documents with the General Archive of the Nation or its equivalent, in order to prevent the destruction of information of historical value, as established in the respective national laws.

CHAPTER 4. INFORMATION ACCESS AND SECURITY

Article 11. Access to public Documents

1. Access to public information is the fundamental right of persons to consult information in the possession, custody, or control of public authorities in the exercise of their functions. To the extent that such information is recorded in the form of Documents, one may also speak of the right to access public Documents.

2. The archive of media and Documents shall be done so as to guarantee proper conservation of their location and consultation, and to allow the right of access to public information to be realized.

3. The policy on access to public information shall be approved at the highest level of responsibility, together with guidelines for its implementation.

4. At a minimum, the Document setting out that policy should contain:

- a. The obligated entity's declaration of principles regarding access to public Documents and a list of its commitments, which shall clearly recognize people's right of access to public Documents in the broadest possible terms, on an equal and impartial footing, including the possibility of challenging denials of access.
- b. Clear information on existing restrictions, the reasons for them, and their legal and juridical bases.
- c. Clear information on the necessary administrative procedure, if any, for requesting access to Documents.

5. The policy on access to public information shall be evaluated periodically, including the level of compliance therewith, and mechanisms shall be established to correct its shortcomings or make improvements to it. This task shall include identification of indicators on the exercise of the right of access to public information.

6. The policy on access to public information shall be publicly disseminated and available to users at all times.

Article 12. Analysis of legal access to Documents

1. Analysis of legal and regulatory access is a technical process that entails the identification, for each Document series, of categories of content that may warrant a restriction on access to Documents as recognized by law, and the determination, in accordance with said law, of the legal time limits on access, as appropriate, that may apply.

2. Appropriate security measures shall be implemented that guarantee confidentiality in cases where it is required.

3. Possible means of facilitating total or partial access to Documents shall be made available.

4. Access and security tables or charts shall be prepared as an instrument in which rights of access and the system of applicable restrictions are identified.

Article 13. Management of Document access requests

1. The subject entity shall provide reference information on its Documents—including those subject to any type of restriction—and the procedure for requesting access to them.

2. The obligated entity shall provide direct access to public information without the need for any kind of procedural formalities; to information or Documents classified as unrestricted on the basis of the accessibility analysis process; and to internal users or those legally authorized to access restricted-access Documents

3. The obligated entity shall make available to the public standardized access request forms with clear instructions for their completion, that are in line with the provisions of the access to public information law.

Article 14. Access restrictions and control

1. Public authorities shall implement, in relation to their Document and archive management systems, the necessary security measures and access controls to prevent, in accordance with the legally established rights and restrictions, unauthorized access to confidential information.

2. Public authorities shall establish the necessary mechanisms to allow partial access to Documents or conceal certain data—with users advised in advance of that fact—through data masking, de-personalization or anonymization, partial access to files, or other similar mechanisms.

3. The security measures and controls on Document access should be established in accordance with the law, applicable technology, and, in particular, the obligated entity's information security policy.

4. A user permissions register shall be established as one of the main access control instruments.

5. Controlling access to Documents shall consist of applying the appropriate access conditions to each Document and to allow each user to access and use Documents according to those conditions and the permissions assigned to them in the user permissions register.

6. The necessary measures shall be instituted to control physical access to premises where Documents or the equipment and systems used to store them are located, in order to prevent unauthorized entry.

7. A monitoring system shall be implemented to supervise Document access, use, or handling, by means of tracing mechanisms (Document access log, audit trails, etc.).

Article 15. Minimum security measures for Documents containing personal data

1. Public authorities shall adopt measures to protect the security of personal data and prevent their unauthorized alteration, loss, transmission, or access.

2. Obligated entities shall assign one or more security officers responsibility for coordinating and controlling the application of security measures.

3. The duties and obligations of each user or user profile with access to personal data and information systems shall be clearly defined and Documented.

4. The security officer should adopt the necessary measures so that staff can easily familiarize themselves with the security rules that apply to the performance of their duties, as well as the consequences to which they could be liable in the event of a breach.

5. The copying or reproduction of Documents containing personal data should only be done under the supervision of personnel authorized by the security officer.

6. A register shall be established that logs access and identifies which authorized person has accessed Documentation containing personal data, and on what date. In instances where such Documentation has been loaned, the return date for the Documentation shall be logged.

7. Procedures shall be implemented to ensure the integrity of Documentation, such as a Document index or sequential numbering of its pages.

8. A security Document shall be drawn up that sets out the measures, standards, action protocols and rules for ensuring the level of security ; as well staff duties and obligations in relation to Document access.

9. For password-based authentication mechanisms, there should be an assignment, distribution, and storage procedure that ensures password confidentiality and integrity.

Article 16. Exercise of the rights of access, rectification, cancellation, and objection of personal data

1. The owners of personal data or their accredited representatives are entitled to request obligated entities for the information contained in Documents about them, be informed about the purpose for which that information has been gathered, directly consult the Documents containing their data, and demand the rectification, update, nondisclosure, or deletion of information that concerns them.

2. The obligated entity shall respond to the requests that it receives and set a maximum time limit for issuing and notifying a decision in the rights protection procedure.

3. Where a decision approves a request, the obligated entity shall ensure that the rights are effectively exercised and set down the manner of their realization in writing.

Article 17. Information security

1. Public authorities shall create the necessary conditions for confidence in the use of electronic media by means of measures to ensure the security of systems, data, communications, and electronic services, so that persons and public administrations can exercise rights and fulfill duties through those media.

2. Public authorities shall manage information security within the institution and shall maintain the security of resources and information assets that are accessible by staff or external personnel.

3. All staff accessing information should be aware of and accept their responsibility with respect to security. Public authorities shall provide staff with the necessary training to perform that task properly.

4. Infrastructure and repositories must be protected by means of access control mechanisms.

5. Any system should consider the security requirements of Documents for their entire lifespan.

6. A plan of action shall be developed to minimize the effects of a catastrophe, in order to safeguard the integrity, availability, and preservation of information.

7. Public authorities shall ensure that their staff maintain professional secrecy, not divulge restricted information, and respect confidentiality where appropriate.

Article 18. Reuse of information

1. For the purposes of this law, reuse of public sector information means the use by natural or legal persons, whether for-profit or non-profit, of information in the possession, custody, or control of the obligated entity, for purposes other than the ones that those Documents originally had in the public service mission for which they were produced.

2. The reuse of public sector information offers significant economic potential and added value, as it facilitates the development and creation of new products, services, and markets.

3. A consistent legal framework shall be created with an objective and subjective sphere of application, as shall all the rules of development that may be necessary to enable public information to be reused and made available to any natural or legal person, whether private or public.

4. That legal framework shall include limitations compatible with the Access to Public Information Law; that is, it shall list those public Documents or categories of Documents not amenable for reuse of public-sector information (e.g., Documents and information that affect the security of the State, Documents protected by copyright or industrial property rights, etc.) in accordance with standards in force.

5. The conditions for reuse shall include such aspects as the guarantee that Documents will not be altered or their information falsified or distorted, that the source be stated, etc.

CHAPTER 5. DOCUMENT CONSERVATION AND CONTINGENCY MANAGEMENT

Article 19. Preparation of an integrated Document conservation plan

1. For the purposes of this law, conservation is the array of processes and measures designed, on one hand, to preserve Documents or prevent their possible physical alteration, and on the other, to restore those that have been altered.

2. Institutions shall ensure the security and integrity of Documents over time through procedures set down in internal regulations or process manuals.

3. The obligated entity shall design and implement a conservation plan for the Document fonds in its custody.

4. All the staff in the various units of each obligated entity shall be trained in good practices and preventive conservation, especially those with responsibilities in archives.

5. Each facility should have an officer in charge to ensure that archive depositories or rooms where equipment and systems on which Documents are stored fulfill the necessary requirements to enable their normal operation.

6. Electronic Documents must be conserved, as must analog Documents, as evidence of acts for responsibility and memory purposes, while maintaining their authenticity, reliability, integrity, and availability. This conservation should involve information technology specialists, Document managers, and archivists.

Article 20. Custody and control of facilities

1. The obligated entity shall give close attention to the necessary technical and environmental conditions for housing its Document fonds as a prerequisite for the choice or construction of the building where it will reside.

2. In order to ensure the correct design and construction of an archive building, the obligated entity shall provide the architects or engineers all the necessary information in relation to environmental guidelines, security features, disaster prevention, secure Document transportation, and use of appropriate furniture to ensure the success of the project.

3. Archive Document repositories should be separate from other offices and not be in a high-traffic area. If possible, they should also be situated well away from places with high temperature and hygroscopic variations (such as walls and attics) or areas vulnerable to flooding (such as basements).

4. Documentation circuits must not be interfered with by staff who do not belong to the obligated entity or unauthorized public officials. All exits shall be appropriately signed to facilitate evacuation and intervention in an emergency.

5. The obligated entity shall ensure that it selects appropriate archive furniture to contribute to the better preservation of the fonds in its custody. That selection must also include high-density storage systems to minimize the space needed for the fonds in its custody.

6. Archives with electronic Documents in their custody shall employ digital preservation strategies and tools to address the challenges of media durability and technological obsolescence. Depending on the medium and the type of information it contains, consideration shall be given to the most appropriate preservation option: media renewal, information migration to durable formats, information Transfer between technology platforms, information system emulation, etc.

Article 21. Environmental control

1. Archives shall comply with national standards on occupational risk prevention.

2. An evaluation shall be done of environmental factors that could affect Documents. To that end, there shall be monitoring of humidity and temperature fluctuations, intensity and length of Document exposure to light, the presence of dust and pollution in archive repositories, insect population, and periodic inspections to check for signs of pest activity.

3. Inspection routines shall be developed for rooms and repositories to check for the presence of micro-organisms in response to biodegradation; biocide misuse shall be monitored, and a healthy environment shall be ensured through maintenance and cleaning of humidification, dehumidification, and ventilation equipment in archive repositories.

4. Conservation standards and appropriate handling techniques for overall hygiene maintenance shall be observed.

Article 22. Preparation of a contingency management plan

1. Each obligated entity shall design a contingency management plan for institutional archives, which shall be considered one of the pillars of the general preventive conservation plan.

2. The obligated entity shall be responsible for providing instruction to the members of contingency committees, contingency teams, and salvage brigades for safeguarding the Document fonds in the custody of those authorities.

3. At a minimum, the contingency management plan shall include information about the building, essential Documents, evacuation routes, chains of communication to be activated in emergencies, basic instructions and action protocols, and damage assessment forms.

Article 23. Risk assessment

1. A risk assessment shall be done to identify the protection strengths and weaknesses of each center. To that end, the following variables shall be assessed:

- a. Analysis of the region's climate and geological factors.
- b. The building's location.
- c. Update the building plans, showing evacuation routes, the electrical system, and water conduits.
- d. Location of toxic products.
- e. A review of the state of the building, installations, and fonds.

2. The information compiled in the risk assessment shall be materialized in a risk map that serves as a guide for establishing and monitoring inspection routines. The risk map must be kept current and enable action priorities to be established.

CHAPTER 6. AWARENESS RAISING AND USER ASSISTANCE SERVICES

Article 24. Awareness raising and gender policy

1. The obligated entity shall raise awareness of the Documents in its possession.
2. The obligated entity shall develop an awareness program, taking into account the type of user being targeted, as well as analyzing needs in terms of media and awareness-raising actions to be carried out (exhibits, guided tours, publications, social media accounts, educational services, etc.)
3. The obligated entity shall disseminate information of interest to women, particularly concerning gender discrimination and violence, and shall produce, based on the information in its possession, custody or control, statistics on violence and discrimination against women and other related qualitative and quantitative information.
4. The obligated entity shall have a budget with which to operate that service properly.

Article 25. Assistance to the administration by archive services

1. The archive shall keep permanently available for the administration the Documents that the latter has generated and transferred to it.
2. The archive must be able to answer queries and manage through a regulated procedure administrative loans of any Document to the administration that produced the Document series in its custody.

Article 26. Public assistance

1. The archives of public authorities must have an assistance area to act as intermediary between, on one hand, users and, on the other, Documents and archival information, whether on-site or, in particular, virtual. It will be in charge of:
 - a. Addressing requests for archival information
 - b. Providing access to Documents
 - c. Document reproduction
2. The range of public assistance services offered by the archive shall be available in writing and publicly disseminated.
3. In general, such services shall be free of charge and equally accessible to all without restriction. However, in certain circumstances, they may or must be subject to restrictions where the law so requires.
4. A multichannel service shall be established for attending to archival information requests: in person, by telephone, by mail (postal or electronic), or via web-based services (instant messaging, CRM system forms).
5. On-site access to Documents should occur on suitable premises, by the appropriate means, and with sufficient technical and administrative staff.
6. The conditions on the use of the contents of the archive's digital objects available online or of copies obtained or provided shall be clearly set out and stated to users in writing.

CHAPTER 7. ELECTRONIC MANAGEMENT

Article 27. Interoperability

1. The information systems and supported procedures of public authorities must have the ability to share data and enable the exchange of information and knowledge with each other. This capacity of information and communication technology (ITC) systems and the business processes they support to exchange data and enable the exchange of information and knowledge is known as interoperability.

2. Interoperability should have a threefold dimension: organizational, semantic, and technical. A fourth dimension, the temporal, is also included, which requires the obligated entity to guarantee access to information throughout the lifespan of electronic Documents.

3. Interoperability should be an instrument that simplifies the organizational complexity of the obligated entity.

4. The obligated entity should strive to be technology neutral, ensuring a free choice of alternatives for people and avoiding any kind of technological discrimination.

Article 28. Metadata

1. The purposes of this law, “Metadata” shall mean those data that describe the context, content, and structure of electronic Documents and files and their management over time.

2. Public authorities should ensure the availability and integrity of the Metadata of the information in their possession, custody, and control.

3. Electronic Document management Metadata should be articulated in Metadata schemes that match the particular characteristics and management needs of each obligated entity.

4. The Metadata that the obligated entity identifies as necessary for its Document management processes should be incorporated in the electronic Document management systems.

Article 29. Digitization

1. Minimum requirements must be established for electronic images produced by digitization, which should be defined by standardizing the basic parameters for those processes.

2. The digitization process should cover format standardization, quality levels, technical conditions, and the associated Metadata.

3. The electronic image obtained from digitization should be true to the original content and ensure its integrity.

4. A necessary part of the digitization process is preventive maintenance and routine checks to ensure the quality of the image and its Metadata.

CHAPTER 8. STAFF PROFILES AND DOCUMENT MANAGEMENT TRAINING

Article 30. Senior management

1. The senior management of the subject entity shall define the overall orientation of the Document and archive management policy in order to:

- a. Give coherence to all the operations of the entire obligated entity in the area of the management.
 - b. Require staff to adopt the inherent requirements and duties of Document management and custody.
 - c. Ensure that the processes of the obligated entity and the Documents it generates are transparent and comprehensible.
 - d. Ensure for the benefit of external interested parties (law courts, regulators, auditors, members of the public, etc.) that Documents are appropriately managed.
2. Although senior management may delegate responsibility for Document management and custody to the rest of the institution's staff, it shall retain ultimate responsibility with respect to accountability.
3. Should the complexity of the obligated entity so require, senior management shall appoint a Document and archive management representative at the operational level, whose role, responsibilities, and competencies must be clearly defined.

Article 31. Middle management

1. The heads of management units are responsible for ensuring that the personnel under their supervision create, maintain, and protect Documents as an integral part of their work, in accordance with previously established policies, procedures, and norms.
2. Middle managers shall encourage and hold regular interdisciplinary meetings including staff who create and have custody of Documents as part of their responsibilities, IT technicians, and archive technicians of the obligated entity, in order to develop, implement, review, and improve management systems in their spheres of action as well as to create, safeguard, and process authentic, complete, and available Documents.

Article 32. Archive technicians

1. The technical personnel qualified in the area of archives and Document management are responsible for every aspect of archival processing and correct Document management in the obligated entity, including the design, implementation, and maintenance of the Document management system and its operations.
2. Archive technicians are a crosscutting, highly qualified human resource, essential for the obligated entity in the areas of communication, awareness, advisory services, and training of personnel in archive and Document management throughout the obligated entity.
3. Archive technicians must work in collaboration with ICT technicians on the design, implementation, and improvement of the management system, on information architecture, on information security, and on information access and recovery.

Article 33. Communication plan

1. The communication plan shall ensure that the procedures and benefits of Document and archive management are understood throughout the obligated entity. It shall clearly explain the Document management guidelines and situate the procedures and processes in a context that enables the reasons for the need for Document management to be understood.
2. The communication plan shall articulate procedures to ensure that the Documents related to the obligated entity's Document and archive management policy are accessible to and reach all its members, and it is advisable to make a package of Documents with information on strategic responsibilities and procedures readily accessible.

Article 34. Work team awareness

1. The obligated entity must ensure the awareness and buy-in of all the personnel and that they are mindful of:
 - a. The importance of each of their individual activities and how they help to achieve the objectives of the Document and archive management system.
 - b. The main aspects of the Document and archive management system associated with their work and the benefits of their improved performance.
 - c. The importance of carrying out the obligated entity's policy and Document and archive management procedures.
 - d. The risks and consequences of failure to adhere to established procedures.

Article 35. Continuing education plan

1. One of the strategies of the obligated entity shall be to design a continuing education plan and appoint a person with the appropriate seniority to have responsibility for the program, provide it with the necessary resources, and be in charge of its design and execution.
2. Education shall be given to all personnel of the obligated entity who generate, maintain, or have custody of Documents (as well as executive officers and senior management), external contractors, volunteers, and anyone else who is in charge of all or part of an activity in which Documents are created and incorporated in the obligated entity's Document management systems, taking into account their duties and responsibilities.
3. The training needs analysis shall be based on periodic personnel surveys, personnel performance evaluations, and analyses of weaknesses, risks, or gaps in Document and archive management in the obligated entity.
4. The training must be periodically evaluated and reviewed through:
 - a) Measurement of its performance
 - b) Audits
 - c) Contrasting staff competency levels with the objectives of the education program.
5. Periodic reviews will be done, both of the education contents, and of its orientation, in order to ensure its effectiveness and adequacy to changes that may occur in the context (legal, social, administrative, etc.) in which the obligated entity is situated and in the internal Document and archive management system itself.
6. The necessary adjustments shall be made to the education plan to achieve ongoing improvement, and mechanisms shall be designed so that personnel who have already received education can benefit from the improvements introduced in new activities.
7. The level of satisfaction of persons who have participated in education activities shall be evaluated (for example, by means of satisfaction surveys).

Article 36. Miscellaneous provisions

With its entry into force, this law derogates all other norms of equal or lesser rank that oppose or contradict the provisions of this law.

* * *

APPLICATION GUIDE
MODEL INTER-AMERICAN LAW
ON DOCUMENT MANAGEMENT

TABLE OF CONTENTS

CHAPTER 1. DOCUMENT MANAGEMENT POLICY

- 1.1.Documents and files
- 1.2.Implementing a document management policy
- 1.3.Document management processes

CHAPTER 2. DOCUMENT ANALYSIS, CLASSIFICATION, AND DESCRIPTION

- 2.1.Archive analysis
- 2.2.Document classification
- 2.3.Document description

CHAPTER 3. DOCUMENT APPRAISAL, TRANSFER, AND ELIMINATION

- 3.1.Document appraisal
- 3.2.Document transfer
- 3.3.Document elimination

CHAPTER 4. INFORMATION ACCESS AND SECURITY

- 4.1.Access to public documents
- 4.2.Analysis of legal access to documents
- 4.3. Management of document access requests
- 4.4.Access restrictions and control
- 4.5.Minimum security measures for documents containing personal data
- 4.6.Exercise of the rights of access, rectification, cancellation, and objection of personal data
- 4.7.Information security
- 4.8.Reuse of public information

CHAPTER 5. DOCUMENT CONSERVATION AND CONTINGENCY MANAGEMENT

- 5.1.Preparation of an integrated document conservation plan
- 5.2.Custody and control of facilities
- 5.3.Environmental control
- 5.4.Preparation of a contingency management plan
- 5.5.Risk assessment

CHAPTER 6. AWARENESS RAISING AND USER ASSISTANCE SERVICES

- 6.1.Awareness raising
- 6.2.Assistance to the administration by archive services
- 6.3.Public assistance

CHAPTER 7. ELECTRONIC ADMINISTRATION

- 7.1.Interoperability
- 7.2.Metadata
- 7.3.Digitization

CHAPTER 8. STAFF PROFILES AND DOCUMENT MANAGEMENT TRAINING

- 8.1. Senior management
- 8.2. Middle management
- 8.3. Archive technicians
- 8.4. Communication plan
- 8.5. Work team awareness
- 8.6. Continuing education plan

BIBLIOGRAPHY AND RESOURCES

* * * *

CHAPTER 1. DOCUMENT MANAGEMENT POLICY

Definition of a document management policy

A document management policy is a declaration of intent adopted by the whole institution as a strategic pillar that sets out the main areas of activity, processes, responsibilities, and objectives in the area of document and archive management.

- 1.1. Documents and files
- 1.2. Implementing a document management policy
- 1.3. Appointment of an authority to lead the management policy
- 1.4. Document management processes

According to the main technical and regulatory references in archival matters, it is considered good practice for institutions to establish, maintain, document, and promulgate their own document management policy that defines documentary procedures and practices to ensure that the institution's information needs are covered and has the added benefit of facilitating accountability to stakeholders.

1.1. Documents and files

Definition of document

A document is defined as any information created, received, and kept as evidence, testimony, and an asset by an institution in the course of its activities or by virtue of its legal obligations, regardless of medium or technology platform.

The term "document" is always understood to be synonymous with "archive document"; that is, the material evidence of a deed or act carried out by physical or legal persons, whether public or private, in the exercise of their functions, with certain material and formal characteristics.

Definition of archive service

The archive service is the area responsible for document management, retention, and administration functions.

Description of the good practice

Initiatives in relation to transparency and access to public information depend to a large extent on the quality, reliability, and accessibility of the public archives with custody of that information. If the archives are not probably organized and well managed, it will be very complicated to confirm the authenticity and integrity of public information or meet the established deadlines for responding to the public and management. However, when there are adequate archive management controls in place, with effective standards and procedures, both members of the public and public officials can trust not only in the reliability of the data extracted from the archives, but also in the existence of a complete documentary record of the activities of public administrations.

The public administration generates and receives a considerable amount of documentation as a result of the necessary activities to fulfill its purposes and as a record of those activities. Such documents are not only important for the institution internally, but also have an external dimension

in that they guarantee rights and duties for the administration as well as private citizens, and may be subject to control and verification, as well as be used to audit the administration's activities.

Public administrations generate a documentary heritage that is an essential part of the collective historical memory. At the same time, it is also constantly providing information on the powers of the public administration, which means that special attention should be given to processing, custody, and distribution of public documents, particularly in a context of transparency and access to information.

Documents contain information that constitutes a valuable resource and important asset for the institution.

Most of activities of public administrations that were once based on paper documents and files have been either partially or completely automated. As administrations migrate to an on-line environment, electronic documents, files, and archives will become the basis for:

- Managing resources
- Serving the public
- Measuring progress and results
- Protecting the rights and duties of all persons and of the administration itself.

Recommendations

1. Adopting standardized document management criteria is essential for the administration and society in general, as it allows documents to be protected and preserved as proof and evidence of their functions and activities.

2. Standardizing document management policy and procedures ensures:

- a. Proper attention to and protection of documents;
- b. That their probative value and information they contain can be efficiently and more-effectively preserved and recovered through the use of standardized practices and processes based on good practice.

3. Streamlining documentation through its various phases ensures effective and adequate management by integrating processing strategies for documents—whether in conventional or electronic media—in an institution's overall management.

1.2. Implementing a document management policy

Definition of a document management policy

A document management policy is a declaration of intent adopted by the whole institution as a strategic pillar that sets out the main areas of activity, processes, responsibilities, and objectives in the area of document and archive management.

Description of the good practice

The scope of a document management policy, insofar as the institution's creation and control of documents are concerned, should include high-level strategies capable of supporting all the functions and activities that the institution performs, as well as protecting the integrity of documents for as long as necessary.

The successful implementation of a document management policy in any institution yields a series of benefits:

- It helps the institution to fulfill its objectives more effectively and with a high degree of efficiency thanks to the definition of a set of documents, applications, and management processes adequate to the institution's needs and objectives.
- It ensures transparency and traceability in decision-making within the institution and recognizes the responsibility of management and other members of the institution, as well as their capacity for good governance.
- It enables the institution as a whole to operate effectively by optimizing its activities and protecting its interests and the rights of current and future stakeholders.

- Activities are carried out in accordance with the legal, regulatory, technical, and accountability requirements that apply to the institution.

Recommendations

1. The institution's senior management should visibly and proactively support the implementation and maintenance of a document management policy and include it as an indispensable resource for achieving the institution's strategic objectives.

2. The document management policy should be designed taking account of the following elements:

- a. It should be aligned with the institution's basic purpose and facilitate the achievement of its objectives.
- b. It should include commitments to satisfy requirements and continuous improvement.
- c. It should be disseminated throughout the institution and be available to all personnel involved in the creation, maintenance, and use of documents.

3. The document management policy should be supported by a package of documents that includes the procedures, guidelines, models, and other documents that make up the institution's document and archive management system.

4. The institution should facilitate and encourage training and instruction for its personnel responsible for the creation and maintenance of documents, in keeping with the guidelines and procedures contained in the document management policy.

5. It is suggested that the document management policy include the following:

- a. It should be founded on a preliminary analysis of how the institution actually functions, with document management procedures designed accordingly.
- b. It should be as consistent as possible with the applicable standards on document and archive management at both national and international levels.
- c. It should be presented using systems that facilitate its comprehension (relying on plain language, as opposed to technical jargon, and simple explanatory graphics, instead of complex diagrams).
- d. Concrete objectives should be specified to gauge progress in implementation of the document management policy.

1.3.Appointment of an authority to lead the management policy

Definition of leadership

Leadership is the set of management or executive skills by which an individual can influence a particular group of persons and make them work enthusiastically as a team to meet goals and objectives. It is also understood as the capacity to take the initiative, manage, rally, promote, incentivize, motivate, and evaluate a group or team.

Description of the good practice

Establish a unit or agency in the administration, institution or organization to develop and lead the document management policy. This will make it possible to ensure that document management decisions, measures, and activities are established in accordance to law and properly documented. The authority designated to lead the document management policy, depending on the context where it is implemented, may be an archive management unit, a national records office, regional or local agencies, etc.

The International Council on Archives encourages national or regional archives to play a key role in supporting document management in public administrations.

Recommendations

1. An executive will first be assigned chief responsibility in the area of document management with a view to the allocation of the necessary resources, supervision of the various stages of implementation, and relevant activities planning.

2. The senior management of the institution should appoint a specific management representative who, aside from their other responsibilities, should:

- a. Ensure that the document management policy and system are established, implemented, and maintained in accordance with the necessary requirements;
- b. Be committed to communicating and raising awareness about the document management policy and archival processing throughout the institution;
- c. Be committed to ensuring the sufficiency of technical, material, and human resources;
- d. Be responsible for ensuring that the roles and responsibilities set out in the document management policy and system are correctly assigned and documented and that the staff who perform those duties have the appropriate competencies and receive the necessary training.

3. As an option, senior management may appoint a representative for document management and archives at the operational level, should the size and complexity of the institution and its document management processes make that appropriate.

1.4.Document management processes

Definition of process

A process is a linked sequence of activities that produce an added value to meet the needs of another person or unit, whether inside or outside the institution.

Description of the good practice

According to the leading technical and regulatory models for managing organizations and archives, it is regarded as a good practice for institutions to standardize and document their working processes in order to facilitate completion of tasks, objectives, and activities, thereby homogenizing all actions, facilitating continuous improvement of processes, and supporting continuing education for the institution's personnel.

By analyzing processes, institutions can identify the creation, incorporation, and control of those documents that they handle in the course of their various procedures. It also provides the necessary basis for determining the following:

- Identification of all the documents needed to document a particular function or activity performed in the institution.
- Development of functional classification charts to identify, organize, and locate documents.
 - The continuity of links between documents and their context within the institution.
 - Establishing guidelines or rules for identifying and managing the institution's documents over time.
 - Identifying the owners of and responsibilities for documents over time.
 - Setting appropriate time frames for the retention or elimination of documents by the institution, in accordance with its functions and activities.
- Analyzing risk management and defining an information security and control policy in the context of the institution's document management system.

That analysis of processes should crystallize into the standardization of its procedures, which will help boost effectiveness and efficiency in the institution's day-to-day running by allowing the corporate strategy to be deployed based on a clear and precise identification of all its activities and responsibilities.

Standardizing procedures also depends on all the institution's personnel working together as a team, which makes it possible to incorporate the key element of participatory management and training as one of the main continuous improvement objectives.

The systematic operation that comes from standardizing procedures in an institution offers a number of advantages:

- It allows expected outcomes in an institution to be predicted.
- It ensures that operations are conducted homogeneously throughout the institution, following the same guidelines, and that they are uniformly documented.
- It facilitates assignment and identification of responsibilities.
- It facilitates communication and relations among the institution's members.

Recommendations

1. Documenting procedures continues to be the tool most used for meeting the requirements set down in international quality standards, and the same thing is true for the institutions' management standards based on their documents. Hence, documenting procedures and standardizing them are pivotal in quality assurance and document management.

2. Before documenting anything, in order to ensure that procedures are standardized in the most suitable way possible, the following elements must first be identified:

- a. What procedures does the institution carry out? What are the objectives of each procedure? Who benefits from those procedures (otherwise known as users)? What added value does the institution offer with that procedure?
- b. Who is responsible for each procedure and who participates in it?
- c. How specifically does the institution perform the various activities that go into the procedure?

3. Once those elements have been identified it is advisable to consider creating a package of documents that reflects everything that has been identified. To adequately document standardized procedures within an institution, a management tool known as a process map can be developed. A process map is not the hierarchical organizational chart of an institution, but functional flowchart of the business activities that the institution carries out in order to deliver added value to its users.

4. If the standardization of procedures in any institution is to achieve the desired result, it must be accompanied by a firm and resolute strategy to encourage education of the institution's staff in the areas of quality assurance and continuous improvement, stimulating buy-in, continuing education, and teamwork by everyone in the institution.

CHAPTER 2. DOCUMENT ANALYSIS, CLASSIFICATION, AND DESCRIPTION

Definition of intellectual control

Intellectual control is the set of operational processes for document management that serve to address the intellectual needs of an institution's users in the area of document management, the added value of which becomes a fundamental resource for managing all the other institution's documentary or management processes.

2.1. Archive identification

2.2. Document classification

2.3. Document description

This section examines good practices related to archive management processes whose purpose is to maintain effective intellectual control of documents kept in the archives and to have appropriate representations of those documents, so that the information contained in the fonds can be effectively managed.

2.1. Archive analysis

Definition of analysis

Analysis is the set of preliminary management activities that are used to analyze the actions performed in an institution and to map the full extent of the types of documents being handled. Analyzing any organization's organizational and functional structure reveals the way in which the documents handled by that organization are managed.

Description of the good practice

According to the main technical and regulatory references in archival matters, it is considered good practice for institutions to analyze their objectives and strategies, legal framework, structure, risk factors, and all the activities they carry out, together with the documentation that they have produced and continue to produce in connection with those activities, so as to garner as much knowledge as possible about the institution, its competencies, and all the changes that it has undergone over time, in order to establish on that basis a document management system that addresses all its expectations and realities.

An analysis is an intellectual activity that consists of conducting a thorough investigation of the document producer— i.e., the institution—and the different types of documents that it handles. Therefore, it is considered that the analysis must be done before the document and archive management system is implemented and be based on the following information that must be gathered:

- The institution's past and current objectives and strategies.
- The institution's past and present hierarchical structure.
- The legal, economic, or political framework that affects or has affected how the institution functions.
- The institution's past and present critical factors or weaknesses.
- The institution's past and present functions, activities, and operations.
- The institution's past and present business flows and processes.
- Types of documents previously and currently handled by the institution in connection with its process flows
- The document management system or systems previously and currently used by the institution.

A thorough analysis of this nature will yield a comprehensive knowledge of the institution's requirements and needs. That knowledge is known as the organization of the fonds and offers a comprehensive overview of the institution's fonds. That system of organization can be used to design basic tools in the various document management processes (classification charts, document appraisal or retention tables, document disposition, series organization, etc.).

Recommendations

1. The first step before any other in effectively implementing a document management policy is analysis, since that will make it possible to ensure that the management system ultimately designed and implemented is tailored to the structure and needs identified.

2. Information gathering should be systematic and encompass different sources, including analysis of regulatory documentation, analysis of documentation produced by the institution itself, interviews with the institution's staff, etc. The greater the number of information sources, the greater the knowledge of the institution.

3. It is advisable to systematize all the administrative categories that support the institution's structure, as well as functional categories, as that will reflect the entire institution from a document perspective. This systematization is known as the principle of origin and allows all the documentation of an institution to be organized in the most effective way possible, thus avoiding mixing documents from different categories as well as their decontextualization.

4. It is recommended that the analysis be done starting with various fundamental—not necessary consecutive—elements:

- a. Analysis of the organization. This consists of examining the institution that handles the documents. To carry it out, the most advisable thing is to gather all the legislation in force and extract it according to a uniform approach. The legislation will provide information about the organizational structure and basic functions, as well as their evolution over time. This organic analysis can also be completed with an examination of documents and staff interviews; however, it is better to use such sources for analyzing other elements.
- b. Analysis of functions. This consists of examining an institution's functions, activities, and processes. The compilation of the legal framework yields information about the

institution's basic functions, which will need to be supplemented with information on each function's lower tiers (activities, processes, actions). Those procedures will not appear in the legal framework but they can be examined through document analysis and staff interviews.

- c. Document analysis. This consists of examining an institution's different document types and series. Once the information has been extracted from the organizational and functional analysis, it will be necessary to verify how it is reflected in the institution's documents. Therefore, the main source of information for this area of analysis is the actual documents handled by the institution (types or collections of documents produced in the course of a particular activity).

2.2. Document classification

Definition of document classification

Document classification is the basic operational process for designing the set of document management procedures or strategies in an institution, the result of which offers essential added value for planning and determining numerous subsequent procedures, such as establishing document retention periods, information access methodology, or the possibilities of information and document retrieval from the document repository.

Description of the good practice

According to the main technical and regulatory references on document management, it is considered good practice for institutions to develop a document classification chart that reflects all the institution's activities and supports all document management processes.

The classification chart is the fundamental tool for the regular functioning of any institution as well as for developing any document management process.

In concrete terms, a classification chart offers an institution the following advantages:

- It establishes linkages between different documents managed in the institution.
- It ensures that documents are denominated in a consistent manner over time.
- It assists with information retrieval and the documents containing that information.
- It allows security and access levels to be defined for collections of documents classified by documentary series.
- It enables levels of clearance to be granted to individuals.
- It distributes responsibility for management of document groupings.
- It distributes documents for the effective performance of the institution's work.
- It facilitates establishing appropriate time frames and measures for the appraisal (retention or elimination) of each document.

The classification chart should be based on the functions or activities that are carried out in the institution. A functions-based classification system can provide a systematic and effective framework for document management. A functions examination performed during the preliminary analysis of the institution will yield knowledge about all the institution's activities and situate them in the context of the objectives and strategies set by management.

The classification chart is a tool that reflects the functions, activities, and operations of an institution. It can be used to develop other tools of critical importance for other document and archive management processes in an institution (thesauri, indexing rules, series catalogues, access and appraisal tables, document elimination and retention, etc.)

Recommendations

1. A classification chart can reflect the simplicity or complexity of any institution. Therefore, the preliminary analysis first done of the institution must be as thorough as possible in order to gain as much knowledge as possible about the activities and documents being handled.

2. The classification chart should be designed in partnership with those who create and manage the documents, since it is they who are most familiar with the day-to-day workings of their respective procedures.

3. The classification chart should be reviewed regularly to take account of the institution's changing needs, thus ensuring that its structure is kept up to date and reflects any alterations that may occur in its functions or activities.

4. The classification chart should be structured hierarchically as follows:

- a. The first level reflects the function.
- b. The second level reflects the activities that make up the function.
- c. The third level reflects the groups of operations or procedures that go into each activity.

More levels may be included depending on the complexity of the institution's functions. The degree of precision of the classification chart must be determined by the institution that it represents and reflect the complexity of each of the functions carried out in it.

5. Those responsible for developing the classification chart can confirm if their tool is functioning properly by checking that it meets the following parameters:

- a. The chart uses the denominations that appear in its functions and activities structure, not those of the units that make up the institution.
- b. The chart is pertinent to the institution and seeks coherent linkage between the various units that share information and document groupings based on the way in which its functions interrelate.
- c. The hierarchical structure of the classification chart goes from the broadest to the narrowest concept; in other words, from the high-level functions of the institution to the most specific operations or actions.
- d. The terms used in the chart are unambiguous and reflect the daily practice of the institution.
- e. The chart is composed of a sufficient number of groupings that contemplate all the functions that generate or manage documents.

2.3. Document description

Definition of document description

Document description is an essential function not only in the processing of archival information that facilitates access to archives and information about documents by means of descriptive instruments, but also for understanding the context and content of documents, their provenance, the functions that they reflect, the matters that they concern, their characteristics, and volume.

Description of the good practice

Archival description is directly linked to the prior processes of analysis and classification, since information can only be described if it is properly organized. Moreover, the mere fact that an archive is well organized does not, in itself, guarantee that the information it contains can be accessed and consulted. For that, its contents need to be described.

Therefore, description is an essential requirement for other processes, such as those associated with document appraisal, archive dissemination, and archive reference and consultation services. A fonds cannot be properly appraised, conserved, and disseminated if its contents, institutional provenance, and the functions that prompted its creation and use are not known.

Recommendations

1. Archive documents must be represented in a comprehensible way that provides information about the context of their creation, institution, and contents.

2. One of the primary aims of implementing the technical function of description is to facilitate access to documents.

3. Correct description of the information contained in documents will make it possible to verify the authenticity of the provenance of those same archive documents.

4. Before taking any steps with regard to archival description, a diagnostic study of the situation must be carried out.

5. The government will propose steps for the design of a description policy for its institutions or system of archives.

6. An archival description plan or institutional archive systems should be established in institutions.

7. Archival policies that apply to the whole institution or system of archives will be adopted in accordance with the guidelines set by the respective governing entities for archival matters.

CHAPTER 3. DOCUMENT APPRAISAL, TRANSFER, AND ELIMINATION

3.1.Document appraisal

3.2.Document transfer

3.3.Document elimination

3.1 Document appraisal

Definition of document appraisal

Document appraisal is an archival processing phase that consists of analyzing and determining the primary and secondary values of document series and establishing time frames for transfer, access, and retention or elimination, whether total or partial.

Definition of retention calendar

The retention calendar is the instrument resulting from the appraisal of document series produced by an institution. The calendar identifies series and types of documents, as well as documents classed as essential; it also assigns retention time frames and standardizes retention formats.

Description of the good practice

It is considered good practice for the institution to design and implement an appraisal system, including several processes that go into series identification and, therefore, the activities they record and analysis of the value of documents in order to propose their selection for permanent retention or elimination and the relevant time frames.

Appraisal is an integral part of information and document management policies and systems.

All appraisal systems should rest on three pillars: first, it must be governed by a regulatory law; second, it must be under the direction of an authority with vested powers and responsibilities; third, it must produce and apply decisions, which are normally reflected in what are generally known as appraisal calendars.

This section groups together the good practices that will enable this procedure to be optimized.

Recommendations

1. The organization's management must approve the appraisal standards. Irregular destruction of documents can give rise to severe financial penalties in some cases and in some countries liability to criminal prosecution. It is essential for the institution to have rules on the approval of retention time frames for its documents and regularized destruction systems.

2. The subject of appraisal per se are document series, understood as the collection of individual or compound documents produced by an institution that reflects one or more activities or processes carried out in exercise of its competencies. Single document units or general archives or fonds are not appraised.

3. Administrative documents and their production contexts are subject to appraisal because the aim is to discern not only administrative uselessness, but their permanence as a record and memory.

4. Physical and electronic documents are equally subject to appraisal.

5. Appraisal identifies the series that contain essential information for the institution, thus ensuring that it is properly protected, retained, and preserved; it also identifies documents that underpin rights and duties, not only of the institution, but also of third parties.

6. Destruction is not an end but a means in the appraisal process; the aim is not to eliminate simply to reduce the volume of documents, but to get rid of what is pointless to preserve for posterity.

7. It is necessary to ensure the long-term retention of documents that will help in the future to explain how a society or an entity involved from various standpoints (social, political, economic, technological, etc.).

8. An appraisal procedure must be established that determines the point in a document's lifespan at which it may be consulted by persons, and in what circumstances and conditions, always in accordance with the law, particularly the provisions that deal specifically with access to public information.

9. All appraisal systems should rest on three pillars: first, it must be governed by regulatory standards; second, it must be under the direction of an authority with vested powers and responsibilities; third, it must produce and apply decisions, which are normally reflected in what are generally known as retention calendars or document retention tables.

10. Once responsibility for elimination has been created, specific bodies or entities—e.g., an institutional appraisal committee—should be established in the institution to sanction, control, and quantify appraisal. To that end, criteria and procedures must be established for exercising that responsibility in the institution.

11. Responsibility for the document appraisal process should be shared by administrative managers, document managers, archivists, lawyers, and users.

12. It is essential to document all operations deriving from appraisal. Thus, the appraisal and elimination process will be situated within a transparent and reliable framework, be aligned with the quality assurance systems, and integrate the archive in the institution's management systems.

13. The document series appraisal form is intended to provide the body or committee that sanctions and controls appraisal with as much information as possible, so that they can weigh the value of the documents in the document series under appraisal.

14. At a minimum, the retention calendar should include the following elements:

- a. The document series data. They are filled out by the Archive and include the following information:
 - Series denomination, producing unit, purpose of administrative management
 - series length in years
 - type of medium
 - series volume
 - documents in the series
 - organization
 - legislation and regulation
 - administrative procedure
 - series location
 - antecedent or related series
 - Summary documents and duplicates
 - Proposed appraisal
 - Proposed user access
 - Proposed decision and comments

- b. Information to be filled out by the appraisal committee after its meeting to adopt the appraisal decision. It includes the following:
 - Appraisal decision
 - Decision on access
 - Decision on standardization of administrative procedure, as appropriate
 - Comments
- c. Data for the document series appraisal file or certificate. It includes:
 - Decision number
 - Approval meeting
 - Date of decision
 - Signatures of those responsible

15. The appraisal should not wait for the documents to enter the archive but should be done in advance, even before the documents are produced. By streamlining their production and use, procedures can be standardized and the production of useless documents avoided, while decisions can also be taken on control and regulation of access.

16. Incorporating the appraisal criteria in the electronic document design, redesign, or production phase is essential. Therefore, it is vital to involve the information providers or document producers.

3.2. Document transfer

Definition of document transfer

Document transfer is the usual procedure for entering material in an archive by transferring fractions of documents series once they have reached the time limit set by the rules established in the appraisal for each stage of the lifespan of documents.

Description of the good practice

It is considered good practice for institutions to design and implement a transfer procedure for archive documents based on the results of the appraisal phase, taking into account the main activities of the process, regardless of the document format.

Recommendations

1. Once the time limit set for retention in document-producing units has been reached, documents must be transferred to the archive in order to reduce the space that offices use for document retention and to improve effectiveness in the management of infrequently used documents, even if they still retain their administrative value.
2. The transfer calendar is the management instrument that governs the physical transfer of documents to the storage areas managed by the archive. Under that calendar, each unit is assigned a deadline for transferring documents.
3. The document retention period in producing units is set by the appraisal committee or another competent body, based on an analysis of each document series and the relevant standards.
4. Usually, the annual transfer date is established by mutual agreement between the person with that responsibility in each unit and the person in charge of the archive, so that the transfer operation interferes as little as possible with the normal activities of the office producing the documents.
5. All document transfers are to be accompanied by a delivery list or form which should provide the necessary information about the documents being transferred.
6. The delivery list should describe the contents of the documents in an identifiable, thorough, and relevant way, otherwise it will not be possible to monitor whether or not a specific file has been transferred or allow efficient retrieval of documents.
7. The receiving archive will compare or check the data contained in the delivery list in order to verify that the information shown matches the documents being received, since from that point forward the archive becomes responsible for them. Once verified, the data to be filled out by

the archive is included and the list is signed, which is understood as approval by the person in charge of the archive.

8. The delivery list or transfer form is drawn up in triplicate, with one of the copies returned to the unit or sending archive and the receiving archive keeping the other two: one in the general admissions register and the other in the sending units register.

9. Transfers are also made in electronic management systems (though no physical document transfers occur) and involve a series of fundamental changes:

a. The entry of documents in the archive entails a change of responsibility, which transfers from the manager to the archivist.

b. Following the moment of transfer, the policies on access, migration, and retention and destruction will apply in accordance with the instructions of the competent appraisal committee.

10. When electronic documents are transferred from one document management system to another, provision must be made for the following:

a. Format compatibility

b. Medium compatibility

11. Electronic document metadata must be transferred along with the document in order to enable its identification, authenticity, and any retention procedures that may be necessary in the future.

12. Electronic documents are entered in the archive together with their metadata and the appropriate signatures. The archive may add a stamp or signature as a guarantee of the integrity and authenticity of the document throughout its lifetime, which could do away with the task of maintaining the signature verification system.

13. Aside from metadata and the appropriate signatures, the documents should be accompanied by other supplementary documents, such as:

a. Indications as to procedures for use and access privileges

b. Indications as to procedures for prevention, correction, and discovery of information losses or changes thereto

c. Indications as to retention procedures in relation to media deterioration and technological obsolescence.

3.3. Document elimination

Definition of document elimination

Document elimination is the process by which documents are destroyed or computer systems are decommissioned or wiped, once their value (administrative, legal, informational, historic, testimonial) has been analyzed and found to be worthless for all intents and purposes.

Description of the good practice

It is considered good practice for institutions to design and implement a process for elimination of document series and units as part of the archival procedure that identifies documents that are to be destroyed in accordance with the time frames established in the appraisal phase. Document series or units are always physically destroyed when they cease to have value in an administrative or probative sense or in terms of establishing or extinguishing rights, and have neither developed significant historical or testimonial value nor are expected to do so.

Recommendations

1. Document series or units should only be physically destroyed once they have completely lost their value and administrative utility and have no historical worth that might warrant their permanent conservation; it should only be done on the basis of a regulated and authorized elimination process.

2. Physical destruction should be done by the body responsible at the archive or public office where they are located, using any method that ensures the impossibility of their reconstruction and subsequent use, or recovery of any of the information they contain.

3. Documents that contain private or secret information must be eliminated according to a procedure that guarantees the preservation of their information and the impossibility of recomposition.

4. Strip-cut or cross-cut shredding is the most appropriate method for eliminating paper documents. The paper is turned into strips or particles, whose size is chosen according to the level of protection required for the information contained in the documents to be destroyed.

5. Electronic documents have specific characteristics that must be taken into account when eliminating them:

- a. They are stored in storage media with a specific format
- b. The information contents are independent of the medium and format
- c. The media can usually be reused
- d. Their lifespan is short compared with a paper medium
- e. The destruction procedures should take account of the characteristics of the media best suited for the conservation of electronic documents
- f. There may be multiple copies of documents that are not always tracked

6. Bearing in mind the characteristics of electronic documents, it is recommendable to use wiping (understood as the procedure for eliminating data or files from a medium or set of media, allowing its reuse) and destruction (understood as the physical destruction of a storage medium containing electronic documents).

7. Suitable wiping techniques must be identified for each medium (optical, magnetic, external memories, etc.) and type of information, and a record kept of the wiping procedures carried out.

8. Documents marked for destruction should be protected against any possible external intrusion until they are destroyed.

9. All document handling and transportation operations during the transfer and up to the moment of destruction must be done by authorized and identifiable personnel. The transportation should be used exclusively for documents to be eliminated and travel directly to the place where they will be destroyed.

10. Hiring a company specializing in document destruction services may be an advisable option, depending on the volume of documents and the technical means required. In such cases, particular care should be taken with the destruction process:

- a. A representative of the person responsible for the documents should be required to witness their destruction and verify the conditions in which it is done as well as the results.
- b. It must be guaranteed that the documents are destroyed at their facilities using their own means, without any subcontracting that would entail the documents being handled by other companies without the knowledge of the person responsible for the documents.
- c. A certificate of destruction of the documents should be required that formally states that the information no longer exists, as well as where, when, and how it was destroyed.

11. The place or containers used to store documents to be eliminated require effective security measures against possible external intrusion. They should not be left exposed outside buildings. They should also not be piled up in places where people walk by or on open premises.

12. The elimination process should always be documented in a record of elimination.

13. Once the authorization obtained becomes enforceable, the body responsible for the custody of documents will open an elimination file for the documents or document series concerned.

CHAPTER 4. INFORMATION ACCESS AND SECURITY

4.1. Access to public documents

4.2. Analysis of legal access to documents

4.3. Management of document access requests

4.4. Access restrictions and control

4.5. Minimum security measures for documents containing personal data

4.6. Exercise of the rights of access, rectification, cancellation, and objection of personal data

4.7. Information security

4.8. Reuse of public information

Definition of access to public information

Access to public information is the fundamental right of persons to consult information in the possession, custody, or control of any obligated entity, having been produced or received by public authorities in the exercise of their functions and that is not subject to the exceptions regime. Where that information is recorded in document form, the right of access to public documents is also recognized and applies to all archived information in any format or medium.

This section looks at good practices in relation to access, one of the most important archival functions. The subject is examined from three perspectives: policy on access to public documents, reuse of information in the public sphere, and active citizen participation. Implementing these good practices will ensure transparency and access to public information.

Description of the good practice

Access to public documents is one of the main challenges facing public institutions in general, and archival institutions in particular. That is because it involves the realization of a human right that is recognized in international treaties as well as in many of our countries' constitutions and laws. Consequently, guaranteeing that right is an obligation for public administrations, as one of the main instruments for ensuring transparency, accountability and, therefore, open government. Accordingly, it is generally considered that document and archive management policies should, in turn, include a policy on access to public documents.

Recommendations

1. International best practice recommends the adoption at the highest decision-making level of a policy on access to public documents and an implementation guide to that end that is consistent with the legal framework in force.
2. At a minimum, the document setting out that policy should contain:
 - a. A declaration of principles by the institution on access to public documents and a list of commitments to that end. The declaration of principles and commitments should clearly recognize people's right of access to public documents in the broadest possible terms, on an equal and impartial footing, including the possibility of challenging denials of access.
 - b. Clear information about existing restrictions, their reasons, and their basis (legal and regulatory standards, judicial decisions, internal policies and rules of procedure, agreements with document donors or depositors)
 - c. Clear information on the necessary administrative procedure, as applicable, for requesting access: competent authority, time limits on decisions, established challenges regime, application form.
 - d. Definition of a series of indicators on exercise of the right of access for periodic evaluation of compliance with the policy.

3. It is recommended that compliance with the policy be periodically evaluated (at least annually), that mechanisms be introduced for correcting shortcomings or making improvements to the policy, and that a series of indicators be used for that evaluation.

4. The document containing the access policy should be disseminated as broadly as possible, periodically updated, and available on the institution's website.

5. The access policy implementation guide should set out the necessary technical and administrative processes for performance of the legal obligations and commitments specified in the policy and describe how responsibilities and duties with regard to access are distributed.

6. It is recommended that the institution's declaration of principles on access to public documents endorse or be based on the Principles of Access to Archives adopted by the International Council on Archives at its General Assembly on August 24, 2012; on international standards and good practice; and on the ethical principles relating to access contained in the professional code of ethics.

7. As one of those principles, victims of serious crimes under international law should be guaranteed access to archives and documents containing the evidence they need to uphold their rights and document violations of those rights, including when the documents or archives concerned are not accessible for the general public.

8. The ICA Technical Guidance on Managing Archives with Restrictions (2014) contains a number of recommendations based on internationally recognized practices for implementing the necessary restrictions on access in order to safeguard other rights and legal interests that warrant protection under legal and regulatory standards.

4.2. Analysis of legal access to documents

Definition of legal access

Legally accessible documents are archive documents that may be consulted under laws in force.

Description of the good practice

The analysis of legal and regulatory access is the technical process concerned with identifying categories of content in each documentary series that may be subject to restriction on the basis of a provision of law, as well as with determining statutory time limits on access that might be applicable, as appropriate, under those provisions; appropriate security measures for guaranteeing secrecy where the law so requires; and possible means for facilitating full or partial access to documents when necessary to comply with a legal provision. The findings of the analysis, contained in various system instruments (in particular, the access and security table) inform, together with the appropriate user permissions, the relevant access controls and decision-making processes in relation to access.

Recommendations

1. It is considered good practice for this process to be based on a prior analysis of the institution's legal framework (centering on general principles with regard to rights, conditions and restrictions on access under the legal framework in which the institution operates, as well as provisions contained in specific laws on privacy, information security, the right of access, and archives); an analysis of the institution's activities; and an assessment of the risks arising from access and use of documents and systems.

2. The process may be carried out as a standalone review or as part of the analysis and appraisal processes, whether in advance, during the creation phase, or on accumulated funds.

3. It is recommended that structured forms be used, so that the data to be analyzed are gathered in a standardized way.

4. If possible, the contents of the analysis on legal and regulatory access to document series should be disseminated for the information of the professional community and potential users.

5. It is also considered good practice for those communities to establish communication and participation mechanisms, either during the execution or validation of this process, or after the fact, for review. Such mechanisms can be either formal (e.g., through appraisal committees) or informal (web-based public forums).

6. It is considered good practice to develop access and security charts or tables. An access and security table is a formal instrument for identifying rights of access and the restrictions regime that applies to documents. The table amounts to a classification of document categories according to their access restrictions and security conditions.

7. The results of the analysis may also be included in other system instruments, such as series analysis and appraisal studies (especially when the accessibility analysis is done in tandem with that process), retention calendars (which would, thus, be understood as retention and access calendars), and archival description systems. In that connection, international archival description standards contemplate elements designed for reporting on the accessibility of archived documents and their groupings.

8. Both the list of different protection categories and the measures associated with them are dynamic elements that vary as factors of how they are regarded socially, legal and regulatory changes, advances in their definition by legal doctrine, administrative precedents, and case law. Through continuous monitoring of those aspects, the various instruments containing the results of the analysis of legal access and the attendant controls can be updated, thereby ensuring the archive's optimal compliance with statutory obligations and ethical commitments.

9. In certain legal contexts, the analysis will facilitate decisions in administrative proceedings on access to public information by providing the competent authority with necessary decision-making criteria to that end.

10. It is considered good practice to use this analysis to identify and propose improvements in the design of documents, so that they do not incorporate more protection-prone data than is necessary to adequately document the activity or process that they record.

4.3. Management of document access requests

Description of the good practice

The rules governing access to public information and archives will be implemented through regulated procedures. The good practices that we gathered refer to the technical process of managing requests, rather than to the administrative procedure.

Recommendations

1. The institution should provide reference information on its documents—including those subject to any type of restriction—and the procedure for requesting access to them. The document access policy should be publicly disseminated, available to users at all times, and compatible with the laws in force.

2. Direct access, without the need for any kind of procedural formalities, should be provided to documents in series classified as unrestricted on the basis of the accessibility analysis process; it should also be provided to internal users or those legally authorized to access restricted documents. The foregoing is without prejudice to appropriate access and security controls.

3. It is good practice to make standard access request forms available to the public.

4. Users should also be afforded the necessary assistance for filling out requests, in accordance with the contents and formalities required by the applicable rules.

5. When the request concerns documents that are not in the possession of the institution, it should be forwarded to the relevant institution. The obligated entity that received the request should notify the applicant that their request has been forwarded to another obligated entity to handle [Model Law, Art. 25 (2)]. When that is not possible, the user will be offered the necessary guidance to enable them to satisfy their need for information.

6. All requests shall be answered in writing at the earliest opportunity and within legally established time limits, even those that are refused under the laws in force. Responses granting access shall describe the manner and conditions in which said access will be provided. Responses

denying access must be supported by the exceptions regime, clearly inform the applicant of the reasons why the volume of material is considered reserved, provide a specific description of the provisions of the Law establishing that reservation, advise them of their right to appeal, and provide them with such other information as that Law may require.

7. It is recommended that a requests log or system, preferably automated, be used to control the necessary workflow for access to public documents, document the processes conducted in handling requests, including the decisions adopted, and offer quantitative data on request management. Such an obligation is consistent with the provisions contained in the Model Law.

8. It is considered good practice to involve document and archive management professionals in decision-making on access. Particularly, in order to advise the authority in charge of making decisions on access about the contents of requested documents and possible grounds for restriction.

9. Where possible, technical reports issued on the accessibility of requested documents should be based on the accessibility analyses of the document series concerned. At a minimum, the report should contain the following:

- a. A mention of the data contained in the document or documents that may be subject to protection under current law.
- b. Specific conditions for access to those data when they are covered by a statute and objective criteria that might qualify the decision of the competent authority. In particular, attention should be drawn to those cases in which the information subject to protection is manifestly public (because it is legally subject to active disclosure or has become general knowledge by other means) or no longer requires such protection (because the statutory time limits have run or the protected interest has ceased to exist).
- c. The possibility of, and proposals for, dissociating information, depersonalizing it, or providing partial access to it without distorting it or rendering it meaningless.

10. Following the dissociation of private data or of data that are otherwise subject to protection, responses to access requests should be published, in particular those that offer criteria for interpreting future requests concerning documents with similar or equivalent contents.

11. Statistics on access to public documents should be published periodically (at least annually). In particular, the following should be disseminated for each specific period:

- a. Number of access requests received.
- b. Number of access requests answered in a timely/tardy manner.
- c. Number of requests with a response pending.
- d. Number of requests denied; principal reasons for denial; specific sections of the law invoked for denying information (in whole or in part), frequency of invocation.
- e. Appeals lodged against refusals to release information.
- f. Application fees charged.
- g. Any other information required by law.

4.4. Access restrictions and control

Definition of access restriction

Access restriction is the exclusion of certain information from the general regime on unrestricted access, based on a clear and precise regime of legally established exceptions to protect public and private interests (national security, privacy, etc.) Under such laws, access to documents containing information subject to restriction is limited—usually for a specific period of time—to certain authorized persons, except where partial access may be offered.

Description of the good practice

It is considered good practice, in relation to document and archive management systems, for public institutions to implement the necessary security measures and access controls to prevent, in accordance with the rights and legal restrictions in force, unauthorized access to confidential

information. That includes the necessary measures to provide, where possible, partial access to documents or to conceal certain data, and to inform users of that circumstance when the law so requires.

Recommendations

1. The security measures and controls on document access should be established in accordance with the law, applicable technology, and, in particular, the institution's information security policy.

2. One of the main access control instruments recommended is a user permissions register: The register categorizes users according to their access rights: Its development consists of:

- a. Identifying the access needs of the institution's various operational areas.
- b. Identifying different user profiles.
- c. Identifying users with access to specific document groups.
- d. Assigning user profiles to both internal and external users

3. Controlling access to documents consists of applying to each document the access conditions appropriate to their class, as defined in the access and security table. It also consists of allowing each user to access and use documents according to those conditions and the permissions assigned to them in the user permissions register.

4. All document and archive management system users must show some kind of identification and provide certain minimum personal and contact data in order to access documents. Where access relates to restricted documents, other types of credential sufficient to demonstrate access clearance may be required.

5. The necessary measures should be established to control physical access to premises where documents—particularly restricted ones—or the equipment and systems used to store them are located, in order to prevent unauthorized entry.

- a. In the case of documents on traditional media, the above may entail placing restricted documents in locations separate from the rest of the storage area or even in special security furniture.
- b. Electronic documents may require the installation of security firewalls and separate physical storage devices or spaces.

6. The implementation of document tracing mechanisms is recommended; i.e., a system to monitor their access, use, or handling through the creation, incorporation, and conservation of information on such processes.

- a. The institution should keep a document access log, especially for restricted documents.
- b. In electronic information systems, that entails introducing audit trails to record users' activities in connection with documents and/or the management system itself.

7. The necessary mechanisms should be set up to allow partial access to documents or conceal certain data, with users advised in advance of that fact. The following procedures may be used:

- a. Data masking: This consists of generating a copy of a document on which confidential or restricted data have been concealed.
- b. Depersonalization or anonymization: This consists of producing of a new version of a document in which data that would allow certain persons to be identified have been concealed.
- c. Partial access to files: The withdrawal or temporary concealment of certain restricted documents in order to permit access to the rest, with the user informed of the documents that have been excluded; the specific reasons for their exclusion; a reasonable estimate of the volume of material that is confidential; the specific legal provisions supporting that confidentiality, and any other information required by law.

4.5. Minimum security measures for documents containing personal data

Definition of personal data

Personal data means any numeric, alphabetic, graphic, photographic, acoustic or any kind of data or information relating to an identified or identifiable natural person, whose identity can be determined by an identification number or one or more factors specific to the physical, physiological, mental, economic, cultural, or social identity of that natural person.

Description of the good practice

It is considered good practice for public institutions to implement measures to prevent disclosure of sensitive personal data, as well as to take steps to avert security risks. In that connection, public authorities should adopt measures to protect the security of personal data and prevent their unauthorized alteration, loss, transmission, or access.

Recommendations

1. The archiving of media or documents should be done in such a way as to ensure the correct conservation of documents, the location and consultation of information, and the exercise of the right of access.
2. Obligated entities should assign one or more security officers responsibility for coordinating and controlling the application of security measures.
3. Concerning personnel duties and obligations:
 - a. The duties and obligations of each user or user profile with access to such files is clearly defined and documented by the institution, with reasoned cause provided for their need to access those documents.
 - b. The security officer should adopt the necessary measures so that staff can easily familiarize themselves with the security rules that apply to the performance of their duties, as well as the consequences to which they could be liable in the event of a breach.
4. Concerning the copying or reproduction of documents containing personal data:
 - a. The copying or reproduction of documents containing personal data should only be done under the supervision of personnel authorized by the security officer.
 - b. All discarded copies or reproductions should be securely destroyed to prevent access to the information they contain or its subsequent recovery.
 - c. In the case of documents containing personal data on electronic media, a backup copy of the data and the procedures for their recovery should be kept at a different location to that of the computers used to process them, and in all cases the security measures guaranteeing the integrity and recovery of the information should be complied with.
5. Concerning access to documentation:
 - a. Access to documentation should be limited to exclusively to authorized personnel.
 - b. Each authorized person who requests access to documentation containing personal data should be correctly identified.
 - c. A user register should be established that logs their access and identifies which authorized person has accessed documentation containing personal data, and on what date.
 - d. If the loan of documentation is requested, the date set for the documentation's return should be logged. Once the return date is reached, the officer designated for that purpose should require the user to return it and make a record of any incident in the access log.
 - e. Only duly authorized personnel should be able to grant, alter, or void authorized access to resources, and should do so in accordance with the criteria established by the institution.

- f. Personnel from outside the institution who access resources should be subject to the same security conditions and obligations as the institution's personnel.
6. Procedures should be implemented to ensure the integrity of documentation by means of a document index or sequential numbering of its pages.
7. A security document should be drawn up that sets out measures, standards, and procedures of conduct
8. Concerning management of the security document:
 - a. The security officer should draw up a security document that sets out mandatory technical and organizational measures for all personnel with access to information containing personal data.
 - b. At a minimum, the document should contain the following:
 - Scope of application, specifying in detail the protected resources
 - Measures, standards, and procedures of conduct, as well as rules for ensuring security
 - Staff duties and obligations in relation to document access
 - Description of the information access procedure
 - Description of information systems, as appropriate
 - Incident notification, management, and response procedure
 - Identification of the security officer
 - Periodic controls to verify compliance with the document's provisions
 - c. When data are processed on behalf of third parties, the security document should identify the processing carried out and include an express reference to the contract or document governing the conditions of the commission, the identity of the person responsible, and the duration of the commission.
 - d. The security document should be kept current at all times and be revised whenever there are significant changes in the processing system used. In all cases, a change should be considered significant when it could potentially impact compliance with the security measures in place.
 - e. The contents of the security document should be kept consistent at all times with the provisions in force on security of personal data security.
 - f. The various user profiles authorized to access documents containing personal data should be informed, at a minimum, with the security measures that they should apply and with the duties and obligations to which they are subject.
9. In managing **electronic documents containing personal data** and matters relating to computer security, plans should be adopted for dealing with threats and technology changes.
10. Concerning user identification and authentication in relation to electronic documents:
 - a. The institution, person in charge of information systems containing personal data should adopt appropriate measures to ensure correct user identification and authentication.
 - b. The institution should establish a mechanism that unequivocally and individually identifies all users who attempt to access the information system and verifies their clearance.
 - c. For password-based authentication mechanisms, there should be an assignment, distribution, and storage procedure that ensures password confidentiality and integrity. Passwords should be changed at regular, set intervals and, while valid, should be stored in an unintelligible form.
 - d. The institution should establish a mechanism that limits the number of repeated unsuccessful attempts to access the information system.

11. Data transmission involving documentation containing personal data over public or wireless electronic communication networks should be done using encryption or another mechanism that ensures that the information is not intelligible and cannot be manipulated by third parties.

4.6. Exercise of the rights of access, rectification, cancellation, and objection of personal data

Definition of ARCO rights

The so-called ARCO rights (access, rectification, cancellation, objection) are the measures that physical persons can take to exercise control over their personal data.

Description of the good practice

Given the existence of documents containing people's sensitive personal data and the right to have one's confidentiality respected, institutions are responsible for adopting suitable procedures for receiving and responding to requests for access, rectification, and cancellation of personal data, as well as for seeking to ensure that such data are accurate and up-to-date.

In such situations, the owners of personal data or their accredited representatives are entitled to request institutions for the information contained in documents about them, be informed about the purpose for which that information has been gathered, directly consult the documents containing their data, and demand the rectification, update, nondisclosure, or cancellation of the information that concerns them.

Recommendations

1. Concerning management of the right to information:
 - a. Users from whom personal data are requested for inclusion in their files should be expressly advised in advance of the following in a precise and unambiguous way:
 - The existence of processing of personal data, the purpose for gathering those data, and the recipients of the information.
 - If their responses to the questions they are asked are compulsory or optional.
 - The consequences of obtaining the data or of the refusal to supply them.
 - The possibility of exercising the rights of access, rectification, and cancellation.⁶¹
 - The identity and address of the person responsible for processing the data, or of their representative, as applicable.
 - b. The information referred to in the section above should be included in a clearly legible way in questionnaires and other forms used to gather personal data.
2. Concerning management of the right of access to one's own files:
 - a. In this context, the right of access means the right of users to obtain information about whether their personal data are being processed, which entitles the applicant to directly consult the documents contained in their files or to be given a copy of the totality of such files or part thereof.
 - b. The cost of reproduction and copying the requested documents shall be borne by the applicant, in accordance with the law.
 - c. If magnetic or electronic copies can be made available and the interested party provides a storage medium for the information, reproduction should be free of charge.
 - d. Under the right of access, the user is entitled to obtain from the person responsible for processing information about specific data or about the entirety of their data submitted for processing.
3. Concerning the right to rectification of personal data:

⁶¹ It was considered appropriate in the context of this draft model law not to mention the right of objection, as it does not arise in the context of public administrations.

- a. The right to rectification entitles the user to have any inaccurate or incomplete data in their files changed.
- b. The rectification request should state which data is to be rectified and how it is to be corrected, and should be accompanied by documentation justifying the request.
4. Concerning the right to cancellation of personal data:
 - a. The right to cancellation is the right to erasure of any inappropriate or excessive data.
 - b. The cancellation request should state which data is to be canceled and be accompanied by documentation justifying the request, as appropriate.
 - c. Decisions on data cancellation requests are taken by the staff who enter the data in the files.
5. The rights of access, rectification, and cancellation are personal and exercised by the bearers of those rights or their representatives; in the case of the latter, their status as such must be accredited.
6. If, when invoking the right with the institution, the user receives no reply, they may resort to the internal and external appeal procedures provided by law.

4.7. Information security

Definition of information security

Information security is the preservation of the confidentiality, integrity, and availability of information, which may also involve other properties, such as authenticity, traceability, non-repudiation, and reliability.

Description of the good practice

It is considered good practice in the context of electronic administration to create the necessary conditions for confidence in the use of electronic media by means of measures to ensure the security of systems, data, communications, and electronic services, so that persons and public administrations can exercise rights and fulfill duties through those media.

In this context, network and information security means the capacity of networks or information systems to withstand, with a degree of confidence, any accidents or illicit or ill-intentioned acts that might compromise the availability, authenticity, integrity, and confidentiality of stored or transmitted data and of the services that those networks and systems offer or provide access to.

Security measures should be proportional to the importance and category of the information system to be protected.

Security measures can be divided into three groups:

- Organizational framework: The array of measures relating to the security structure overall.
- Operational framework: The measures that protect the operation of the system as an integral group of components with a specific purpose.
- Protection measures: The protections for specific assets, consistent with their nature and the quality required of the level of security of the aspects concerned.

Recommendations

1. Legal and technical standards should be adopted so that people and public administrations can feel security and confidence in their electronic interactions.
2. Confidence should be based on the fact that information systems will provide services and protect information in accordance with their functional specifications, without uncontrolled modifications or interruptions, or information falling into the hands of unauthorized persons.
3. Information security should be managed within the administration, and the security of externally accessible resources and information assets should be maintained.
4. All staff accessing assets should:

- a. Know and accept their responsibility with respect to security.
 - b. Have the proper training in relation to matters of security and responsibility.
 - c. Maintain professional secrecy, not divulge restricted information, and respect confidentiality.
 - d. Promptly report any weakness in the system through formal channels.
5. Assets must be protected, as must infrastructure, by means of access control mechanisms and protection against external contingencies.
 6. Information should be protected against unwanted modifications by means of mechanisms to ensure its integrity.
 7. A plan of action should be developed to minimize the effects of a catastrophe, in order to protect the integrity, availability, and preservation of information.
 8. The risks and impacts associated with the absence of continuity of information systems should be evaluated, regulations on security standards adhered to, and audits performed.
 9. Infrastructure should be used in a secure manner, with its status monitored and any incidents reported; routines should be established for monitoring registration of incidents and failures.
 10. Any system should consider the security requirements of documents for their entire lifespan.
 11. A continuous improvement process should be established for incident management.

4.8. Reuse of information

Definition of reuse of public information

Reuse of public information means the use by third parties (natural or legal persons) of public information for commercial ends or otherwise, where such use is not an administrative activity.

Description of the good practice

The reuse of public information is the use by natural or legal persons of information generated by public-sector agencies or in their custody for purposes other than those originally intended, whether for profit or not.

The reuse of such information offers significant economic potential and added value, as it facilitates the development and creation of new products, services, and markets. The reuse of public information can be done by administrations other than the ones that generated the information or by individuals and enterprises. Furthermore, by making public information available, public administrations increase administrative transparency, strengthen democratic values and the right to information, and enable citizen participation in public policies.

Recommendations

1. Create a consistent legal framework with an objective and subjective sphere of application, as well as all the rules of development that may be necessary to enable public information to be reused and made available to any natural or legal person, whether private or public.
2. Harmonize the provisions of public administrations on the reuse of information with the general regulatory framework on access to information.
3. Limit the sphere of application by listing those public documents or categories of documents that are not subject to reuse (e.g., documents and information that affect the security of the State, documents protected by copyright or industrial property rights, etc.) in accordance with the exceptions regime in force.
4. Where documents subject to intellectual property rights are authorized for reuse, verify that the necessary license has been granted and that sufficient exploitation rights are assigned by the rights holders.

5. Design a reuse regime that guarantees full observance of the principles that enshrine protection of personal data as a fundamental human right. Where possible, consider the dissociation or removal of personal data that could affect the rights of third parties, provided that that is technically and economically feasible.

6. The conditions for reuse must be clear, just, transparent, and nondiscriminatory, as well as consistent with the principles of free competition and public service.

7. It would be advisable to include in the conditions for reuse such aspects as the guarantee that documents will not be altered or their information falsified or distorted, that the source be stated, etc.

8. Conform to standards and good practice on competition by limiting exclusive agreements as much as possible, reserving them for very specific cases and exceptions.

9. Consider and design specific reuse strategies for documents and information kept in archives, libraries, museums, and other cultural centers.

10. Encourage documents to be made available electronically, such as on websites, thereby stimulating the growth of the information and knowledge society.

11. Promote the use of data, open formats and pertinent metadata associated with documents, and harmonize the provisions on reuse of public information with electronic administration processes.

CHAPTER 5. CONSERVATION AND CONTINGENCY MANAGEMENT

5.1. Preparation of an integrated document conservation plan

5.2. Custody and control of facilities

5.3. Environmental control

5.4. Preparation of a contingency management plan

5.5. Risk assessment

This section examines good practice relating to the processes included in an institutional conservation and contingency management plan.

5.1. Preparation of an integrated document conservation plan

Definition of plan

A plan is a systematic model of action prepared in advance for directing or steering an institution's policy.

Definition of conservation

Conservation is the array of processes and measures designed, on one hand, to preserve documents or prevent their possible physical alteration, and on the other, to restore those that have been altered.

Description of the good practice

The integrated conservation plan covers three closely related aspects: document safekeeping and control programming, authorization and inspection of storage areas, and their location and construction.

Document preservation should be a part of every integral objective of any institution and, therefore, of its overall strategy.

Recommendations

1. The institution should have in place a conservation plan that offers continuity and coherence over time.

2. All preventive conservation decisions adopted by the organization as part of its document management should be documented, duly reasoned, and subsequently disseminated.

3. The institution should evaluate its needs by conducting studies on the state of conservation of its fonds and on the environmental situation of the facilities that will underpin the conservation plan.

4. In general, the institution should give priority to implementing preventive measures as a safeguard against the need for repairs.

5. Studies on the state of conservation of the institution conducted by expert staff should cover the environment, storage, security, access, maintenance, conservation treatments, and conservation practices and policies.

6. The institution should establish priorities with regard to preventive actions to be implemented based on criteria as to impact, feasibility, and urgency. To that end, it will be necessary to have an officer in charge of implementing the conservation plan, who should appear in the organization chart and be known throughout the institution.

7. Implementing preventive conservation is something that concerns everyone and every activity in the institution. The active engagement of all the institution's staff through their awareness of the duties that they are required to perform in line with their training and functions is vital.

8. With respect to management and safekeeping of electronic documents, the institution's conservation plan should include the necessary measures to ensure the integrity, accessibility, confidentiality, authenticity, reliability, and identity of documents. Those measures should be designed in partnership with an interdisciplinary team composed of information technology specialists, document managers, and archivists.

5.2. Custody and control of facilities

Definition of custody

Custody is the legal responsibility that requires the archival institution to control and adequately conserve fonds, regardless of their ownership.

Description of the good practice

It is considered good practice in the area of document management for the institution to take responsibility for seeing to the conservation of its document fonds, as an indispensable requirement both for preserving the institutional memory and for the availability of useful instruments for decision-making on its business.

Recommendations

1. The institution should give close attention to the necessary technical and environmental conditions for housing its document fonds as a prerequisite for the choice or construction of the building where it will reside. Accordingly, it should be aware about aspects such as pollution, particularly in urban environments, given the high concentration of combustion particulates and pollutant gases. Other factors to consider when evaluating the risks to which the material might be exposed will be the proximity of water or gas conduits, as well as fuel storage facilities.

2. The institution should ensure that the architects or engineers involved in the construction of the building that will be used as an archive for its fonds have precise technical knowledge of the needs involved.

3. The section on the center's services and installations should examine the characteristics and state of water, gas, and electricity conduits, artificial lighting, ventilation system, heating, alarms, and fire detection and extinguishing systems. Identification, age, and compliance with technical norms are essential. Particular attention should be given to the following:

- a. Water and electricity conduits that pass through archive storage areas.
- b. The existence of filters in ventilation systems.
- c. Regulation of the relative humidity and temperature system.
- d. Renewal or recycling of contaminated air.
- e. Detection of possible points of entry of contaminated air.

- f. The state and functioning of burglar alarms.
- 4. The archive document storage areas should:
 - a. Be equipped with security systems.
 - b. Be at a safe distance from the building's mechanical rooms and from any electrical installations or water pipes that pass through them.
 - c. Have protected windows to protect against the harmful effects of sunlight on documents.
 - d. Be fitted with a fire detection and alarm system and other protective equipment.
 - e. Be permanently ventilated to reduce relative humidity and temperature fluctuations.
- 5. The institution should contribute to the better preservation of the fonds in its keeping by ensuring that it selects adequate archive furnishings. To that end:
 - a. Wooden bookcases and shelves that can support less weight, are more combustible, and are more vulnerable to biological hazards. Noncombustible aluminum or steel fittings without backs and with smooth, non-abrasive surfaces and rounded edges to avoid damage to documents are preferable.
 - b. Shelves should be installed away from walls, short of the ceiling, and have the bottom shelf away from the floor. This will allow air to circulate, limit the effects of humidity, and facilitate cleaning.
 - c. Passageways between shelves should have sufficient separation between units to permit easy access and work.
- 6. Poor quality storage boxes and folders can adversely impact the security of the objects that they are supposed to protect. Therefore, the institution should ensure that the chemical composition of those elements is appropriate, thereby contributing to the longevity of the fonds in its keeping.
- 7. The institution should have an adequate solution for the problem of preserving photographic, audiovisual, and large-format documents by using appropriate furniture (horizontal or special) and containers (special boxes, cases, or encapsulation).
- 8. Institutions that have electronic documents in that keeping should design an electronic document management policy that is applied from the moment the document enters the system and extends throughout its life span by:
 - a. Creating electronic repositories.
 - b. Analyzing the risks that affect the correct conservation of electronic documents: obsolescence, system failures, lack of backup copies, data corruption, or unauthorized access.
 - c. Drawing up contingency plans to ensure the integrity, accessibility, confidentiality, authenticity, reliability, and identity of documents. Where appropriate, corrective measures should also be planned, such as making authentic electronic copies with a change of format.
 - d. Implementing conservation mechanisms with applications that contemplate issues relating to backup copies, replication systems, and information protection systems.

5.3. Environmental control

Definition of environmental control

In the area of document management, environmental control means inspection, monitoring, and implementation of the necessary measures to reduce or prevent the deterioration of document fonds.

Description of the good practice

Evaluating environmental parameters by means of measurement and analysis tools followed by their comparison with the recommended appropriate values will determine whether or not measures are needed.

Recommendations

1. Regularly recording temperature and relative humidity should ensure the absence of fluctuations in readings. Accordingly, installing adequate climate control systems capable of maintaining standard conservation norms will considerably retard the deterioration of fonds.
2. The institution must protect its fonds against possible damage resulting from improper exposure to light intensity, in accordance with standard conservation norms.
3. The institution must protect its fonds against possible adverse effects by contaminants in the form of gases or particles; therefore, it should ensure air quality control in its archive storage areas.
4. The institution should consider comprehensive pest control, which consists of using non-chemical means (climate control, food sources, and building entry points) as an overall strategy against infestation.
5. Chemical treatments should only be used in crisis situations that threaten rapid damage or when insects cannot be eradicated by more conservative methods.
6. The institution should consider that a proper archive and appropriate handling is a practical and economic way of extending the life of the fonds in its keeping.
7. Cleaning procedures should be consistent with conservation standards and appropriate handling techniques, which the institution should disseminate among its cleaning staff.
8. Cleaning should be done regularly and at a frequency determined by how quickly dust and grime build up in storage areas.

5.4. Preparation of a contingency management plan

Definition of a contingency plan

A contingency plan is an instrument whose purpose is to correct deficiencies, take effective action in preventing disasters, and define goals, risks, and those with responsibilities.

Description of the good practice

Designing a plan for managing contingencies at archives is a priority recommendation for the adequate preservation and protection of repositories. Although losses are often unavoidable, their consequences can be reduced by having in place a plan that attenuates risks and the damage caused to documents.

Recommendations

1. A contingency management plan can be divided into three parts:
 - a. Planning: Defining objectives, needs, and resources in order to establish protocols that are set down in a document.
 - b. Protection: Using all available resources to prevent or minimize the impact.
 - c. Response and recovery: Protocols designed to save the fonds from the disaster.
2. Setting responsibilities and their adoption by the organization are essential for establishing a contingency management plan. The distribution of responsibilities establishes who is responsible for planning and who is supposed to do the work of salvage and evacuation.
3. Appointing a contingency committee serves to bring together specialists from different disciplines (building maintenance, safety experts, insurance adjusters, etc.). It performs an advisory role and is responsible for implementing the plan, corrective and priority measures, and action protocols.
4. The contingency team is the one that acts, reports, and evaluates situations in the event of risks.

5. The salvage brigade intervenes to evacuate document fonds affected by a loss, but always after the safety experts have ensured the environmental stability of the building affected.

6. Everyone involved in the plan should attend training courses on document handling and rescue.

7. The contingency management plan should contain the following information:

- a. The building plans, with information about essential documents, extinguishers, and evacuation routes.
- b. Chains of communication to be activated in emergencies, which should be kept current (companies, experts, etc.).
- c. Staff instructions, with basic actions to carry out specific protocols for the coordinator and teams, and fonds evacuation and relocation procedures.
- d. Damage assessment and response review forms.
- e. Insurance policy and information about institutional networks (experts, transportation companies, and suppliers).

5.5. Risk assessment

Definition of risk assessment

A risk assessment is the process of comparing the estimated risk with a preset criterion for determining its magnitude. The risk is expressed in terms that combine the probability with the consequences of an unwanted event.

Description of the good practice

A risk assessment should be done before action protocols are developed, since it provides information about the institution's real needs. Studying those needs will yield knowledge about protection strengths and weaknesses, thus enabling actual risks to be evaluated.

Recommendations

1. Compare the different risk values obtained in order to have an instrument that enables the institution to determine which risks are a priority and, therefore, warrant most attention.

2. Evaluate the institution's risks by studying the following variables:

- a. Analysis of the region's climate and geological factors.
- b. The building's location.
- c. Update the building plans, showing evacuation routes, the electrical system, and water conduits.
- d. Location of toxic products.
- e. A review of the state of the building, installations, and fonds.

3. That information should be materialized in a risk map that shows the probability and seriousness of threats, thereby serving as a guide for establishing and monitoring inspection routines. The risk map must be kept current and enable action priorities to be established.

4. For the purposes of emergency recovery, the institution should be equipped with a prompt initial response, a detailed disaster plan, trained personnel, a committed administration, effective communication, and swift and informed decisions.

CHAPTER 6. AWARENESS RAISING AND USER ASSISTANCE SERVICES

6.1. Awareness-raising

6.2. Assistance to the administration by archive services

6.3. Public assistance

This section deals with good practices relating to the services that the Archive provides, which should be aligned with the institution's established information policy.

6.1. Awareness-raising

Definition of awareness-raising

Awareness-raising is the process that seeks to promote the use of documents produced or received by institutions, enabling closer relations with users and enhancing their recognition, presence, and credibility as administrative and cultural management units.

Description of the good practice

It is considered good practice for an archive service to raise awareness about its contents: its document fonds, document-producing institutions and, in general, the information contained in the documents.

The purpose of awareness-raising is to inform people and society at large about the transcendental importance of archives, their usefulness, and the services that they provide for the benefit of the community.

Recommendations

1. Involve other professionals, such as educators, graphic designers, teachers, communicators, artists, and IT experts, among others.

2. The educational potential of archives should be leveraged, given the social and cultural benefits.

3. It is essential to have an area and personnel that specialize in awareness-raising.

4. Develop an awareness campaign, the goals and mission of which are defined in line with the institution's established information policy.

5. Identify the types of users that the campaign will mainly target. An awareness campaign can target any kind of user; however, awareness-raising can be directed at specific spheres, such as schools or universities.

6. Select and prepare the collections, exhibits, or documents, as appropriate, that will be used in the awareness campaign.

7. Awareness-raising can take various forms, from broad-spectrum activities that require significant spending and resources, to low-cost, simple actions. Some of those activities are:

a. Exhibits—either virtual or physical

- Virtual exhibits are designed to be accessed over the Internet (on the archive's website) or via digital media (CD or DVD).

- Physical exhibits can be permanent, temporary, or touring.

b. Guided tours, both on-site and virtual (on the archive's website).

c. Publications: Archive guide, inventories, catalogs, classification charts, studies, campaigns, thematic guides, etc.

d. Creation of a profile or page on a social media platform.

e. Creation of a graphic documentation account: graphic content on Flickr, Photobucket, and the like.

f. Creation of a video channel: uploads of self-produced videos or selections of third-party videos to sites like YouTube or Vimeo.

g. Other awareness measures include educational services, videos, open-days, pamphlets, newsletters, competitions, and historic tourism, among others.

8. Gather statistics on numbers of visits and user satisfaction, as well as other data that could provide important information for the campaign's validation and adaptation (number of followers on social media, media impact, number of posts, etc.).

6.2. Assistance to the administration by archive services

Definition of assistance to the administration

Assistance to the administration means the service that an institution provides to internal users in order to meet their needs through the activities that it performs.

Description of the good practice

It is considered good practice for an archive to provide comprehensive assistance to the line offices of its institution as a basic part of its regular functions.

The assistance provided to a line organization may be regarded as one of the basic processes connected with the services that an archive offers its internal users, in which internal users are defined as the various units that make up the institution to which the archive belongs, as the area in charge of the safekeeping of its documents.

Recommendations

1. The archive should keep permanently available for the administration the documents that the latter has generated and transferred to it; it should also answer any queries on background that the administration may pose.

2. If possible, the archive should provide various types of services to the document-producing institution:

- a. Design and follow-up of document management plans.
 - b. Document management training for the institution's staff.
 - c. Assistance to the institution in daily document management.
 - d. Document transfers to the archive from various administrative units.
 - e. Management of administrative loans of documents in the archive's keeping.
3. Consultation and loan processes by the document producing administration should be regulated procedures.

4. To avoid any serious incidents or problems with administrative loans and the attendant responsibility changes, it is advisable that the following recommendations be implemented:

- a. Every administrative loan should be accompanied by a specific delivery list indicating the documents that are on temporary loan and who the person responsible for their safekeeping will be outside of the archive.
- b. Administrative loans should be the direct responsibility of a person in the administrative unit that requests the loan. The name of that person should be recorded on the delivery list for the loan and they will be the point of contact in the event of any incident.
- c. To avoid the bad practice of incorporating loaned documents in new administrative processes, consideration should be given to the volume of administrative loans at the time of appraisal and planning of the calendars for transfers from administrative units to the archive. The fewer the administrative loans, the more effective transfers can be.
- d. Mechanisms for effective control of access and security levels should be applied to administrative units in order to distinguish which administrative units may access the various documents in safekeeping, in accordance with their level of access.

6.4. Public assistance

Definition of public assistance

Public assistance means the service that an institution provides to external users in order to meet their needs through the activities that it performs.

Description

It is considered good practice for the archives of public institutions to have in place an assistance area to act as intermediary between, on one hand, users and, on the other, documents and archival information, whether on-site or, in particular, virtual.

Among the main functions of archives are to inform society about the documentary heritage held on their premises and facilitate access to them by persons outside the institution, in line with the criteria in place for access to such documents.

Hence the need for any archive, whatever type it may be, to have a public assistance area that can coordinate the activities that the archive needs to carry out for:

- Addressing requests for archival information
- Providing access to documents

- Document reproduction

Recommendations

1. The range of public assistance services offered by the archive, as well as the rules and conditions for their access and use should be available in writing and disseminated as widely as possible, in particular via the institution's website.

2. The array of services should be presented in menu form and include a series of commitments to quality of service provision, indicators for evaluating their fulfillment, and a mechanism for users to register complaints and suggestions. The services menu should also be available in writing and disseminated as widely as possible, in particular via the institution's website and at the archive consulting room.

3. It is appropriate to establish a multichannel service for attending to archival information requests: in person, by telephone, by mail (postal or electronic), or via web-based services (instant messaging, CRM system forms, etc.).

- a. Deferred assistance to requests (by mail or online forms) will be subject to appropriate lead times clearly indicated on the services menu.
- b. Queries submitted in person, by telephone, or via instant messaging services should be answered immediately, where feasible, with as long a schedule as possible for that purpose, the times for which should be publicly advertised.
- c. If possible, archival information requests should be centrally managed and the following types of data recorded: requester's personal and contact details; query data (date and manner, archivist responsible, response date); data about the subject (topic or matter, document groupings referenced); and the content of the response to the request.

4. Other forms of interaction with users should be established, particularly through institutional profiles on social media platforms.

5. As much access as possible should be provided, both via computer and directly, to copies or electronically distributed versions of documents not subject to any legal or regulatory restrictions, in the form of digital objects available on the institution's website, where possible, through archival description systems or any other systems that allow information to be retrieved via search functions; in addition, the information should be provided in context.

6. On-site access to documents should occur on suitable premises, by the appropriate means, and with sufficient technical and administrative staff, following registration of the user and notification to them of the rules in force.

7. The archive should have a reading room with enough places for potential on-site users. It is recommended that the reading room be equipped with the following elements, in particular:

- a. Tables and adequate lighting for reading.
- b. Devices for consulting original documents or copies (book rests, microfilm readers, computers, etc.).
- c. Points of access to archival description systems (inventories and traditional description instruments in hard copy, computers with access to electronic information systems).
- d. A reference library: encyclopedias and reference works, legislation catalogues.
- e. Sufficient electrical outlets at reading places to power electronic devices (laptop computers, tablets, smart phones, etc.).
- f. Shelves to store archival units, with separate spaces for those that have not yet been consulted or that have been reserved for an agreed space of time, and for those that have already been consulted and can be returned to the storage area by archive staff.

8. Access to the reading room and the documents themselves should be in accordance with a set of written rules disseminated as widely as possible and notified to users. Printed copies of the rules should be visibly available at strategic places in the room.

9. Users should have access at all times to assistance from technical staff, who, in particular, will:

- a. Provide information about the services offered by the archive, the rules and conditions governing correct access and use of documents, the use of description instruments and systems, copy requests, and other services provided by the archive.
 - b. Conduct reference interviews so that the technician can interpret the user's information needs and offer them the necessary resources to satisfy them.
 - c. Manage document access requests.
 - d. Participate in instruction activities for users.
 - e. Receive and process complaints and suggestions in relation to the service.
10. The archive should have the necessary staff and means to provide a document reproduction service in accordance with a set of written rules disseminated as widely as possible.

CHAPTER 7. ELECTRONIC ADMINISTRATION

7.1. Interoperability

7.2. Metadata

7.3. Document digitization

This section examines good practice relating to the processes required to ensure adequate management in the context of electronic administration.

7.1. Interoperability

Definition of interoperability

The capacity of ITC systems and of the business processes they support to exchange data and enable the exchange of information and knowledge.

Description of the good practice

It is considered good practice in the context of electronic administration to incorporate the concept of interoperability as a requirement to enable information systems and supported processes to share data and allow exchange of information and knowledge among them. This encompasses:

- **Technical interoperability**, which has to do with the interconnection of computers through the agreement on standards in order to present, gather, exchange, process, and transport data;
- **Semantic interoperability**, which seeks to ensure that the data being transported mean the same to connected systems;
- **Organizational interoperability**, which seeks to organize the business processes and the institution's internal structure for better data exchange.

Recommendations

1. The institution should have an interoperability policy that registers the following basic principles: overall quality, multidimensional nature, and a multilateral solutions approach.
2. Interoperability is defined as multilateral because of the need to share, reuse, and collaborate. The degree of cooperation will determine the success of initiatives.
3. Interoperability should have a threefold dimension: organizational, semantic, and technical. There is also a fourth dimension, the temporal, which requires the institution to guarantee access to information throughout the lifespan of electronic documents.
4. Organizational interoperability encourages institutions to:
 - a. Establish and publicize the conditions of access and use for the services provided in their electronic administration.
 - b. Simplify their organizational complexity.
 - c. Publicly update their administrative processes and services.
 - d. Publicize and update their organizational structure, in particular indicating their registry and points of public assistance.

5. Semantic interoperability requires the development and implementation of a data exchange model to be used for exchanging information.
6. Technical interoperability requires institutions to:
 - a. Use open standards and make complementary use of standards that are in general public use.
 - b. Be technologically neutral, ensuring a free choice of alternatives for people and avoiding any kind of technological discrimination.
 - c. Publish a list of the open and complementary standards accepted to facilitate interoperability.
 - d. Seek to link their infrastructure with that of other institutions, in order to facilitate service and information interoperability.

7.2. Metadata

Definition of metadata

In the area of document management, metadata means the data that describe the context, content, and structure of documents and their management over time.

Description of the good practice

It is considered good practice in the context of electronic administration to have adequate metadata implementation as necessary contextual information of electronic documents and files.

Recommendations

1. Institutions should ensure the availability and integrity of the metadata of their electronic documents.
2. Metadata implementation in electrical documents and files should:
 - a. Ensure the registration of documents' correct contextual information.
 - b. Help with the location and retrieval of documents through the use of controlled vocabularies, value systems, and other standardized descriptive systems.
 - c. Improve dissemination of information.
 - d. Control access to documents.
 - e. Enable document access or transfer between institutions.
 - f. Enable execution of instructed actions on documents.
 - g. Ensure conservation of key documents.
 - h. Ensure preservation of information over time.
 - i. Standardize descriptions.
 - j. Help with data migration planning and other conservation needs.
 - k. Provide a benchmark for assessing document management quality.
 - l. Effectively integrate information about electronic documents in intellectual control systems.
 - m. Ultimately, ensure interoperability.
3. Electronic document management metadata should be articulated in metadata schemes that match the particular characteristics and management needs of each institution. It is advisable to adapt an existing metadata schema so that each institution creates its application profile.
4. The metadata schema and profile should include three categories: mandatory, complementary, and optional metadata.
5. The metadata schema should include precise descriptions of all its elements and sub-elements.

6. The complementary metadata that the institution identifies as necessary for its document management processes should be incorporated in document management software.

7.3. Document digitization

Definition of digitization

Digitization is the technical process that involves the generation and subsequent processing of a digital image from an original document in a non-digital format. The concept of digitization excludes documents originally generated in a digital format.

Description of the good practice

It is considered good practice in the framework of document management to establish minimum requirements for electronic images resulting from digitization by standardizing basic parameters for those processes, ensuring the necessary flexibility for their application by different public administrations, while adhering to the premise of obtaining complete and true electronic images of the original document.

Recommendations

1. The digitization process should be set down in a formal procedure and imparted to the institution staff involved in document production.
2. The digitization process should cover format standardization, quality levels, technical conditions, and the associated metadata.
3. It should be understood that the digital components of an electronic document resulting from a digitization process are the electronic image, the metadata, and the electronic signature, as appropriate.
4. The electronic image obtained through digitization should be true to the original content, ensure its integrity, guarantee the legibility of the electronic image obtained, adhere to the proportions of the source document, and not add any characters that do not appear in the original.
5. Outsourcing the digitization service does not exempt the institution from the responsibility to guarantee the integrity of the result of that process.
6. Metadata registration in a digitization process should include not only the mandatory minimums, but also the necessary complementary metadata that reflect aspects of the digitization process itself.
7. If possible, the effort should be made to automate metadata capture, assuming that the digitization mechanisms allow that to be configured.
8. A necessary part of the digitization process is preventive maintenance and routine checks to ensure the quality of the image and its metadata by developing a continuous quality control program to verify output consistency.

CHAPTER 8. STAFF PROFILES AND DOCUMENT MANAGEMENT TRAINING

8.1.Senior management

8.2.Middle management

8.3.Archive technicians

8.4.Communication plan

8.5.Work team awareness

8.6.Continuing education plan

Definition of job profile

A job profile is a means of compiling the necessary personnel requirements and qualifications that an employee must have to enable them to perform their duties satisfactorily in an institution: level of education, experience, job functions, instruction and knowledge requirements, as well as the necessary aptitudes and personality characteristics.

Description of the good practice

Institutions should define the responsibilities and competencies of all staff involved in the document management policy. The purpose of defining responsibilities, competencies, and their interactions is to establish and maintain an adequate document management regime that meets the needs of all interested parties, both internal and external. Responsibilities and competencies should be defined based on the institution's standardized practices or rules.

The institution should introduce a continuing education and awareness program in relation to document management. Training in the requirements of document management and its practical application should include all personnel, whether internal or external, who are in charge of all or part of an activity, or involved in the creation, maintenance, and control of documents incorporated in document management systems.

Recommendations

1. Different categories should be established for defining the competencies, responsibilities, duties of all staff involved in document management.

2. The institution's executive management should assume the highest level of responsibility in order to ensure the success of the document management action plan by resourcing the low levels, promoting compliance with document management procedures at all levels of the institution, and consolidating an adequate regulatory framework.

3. It is advisable for the heads of management units or intermediate organizational groupings to be responsible for ensuring that the personnel under their supervision generate and maintain the documents for which they are responsible as an integral part of their work and in accordance with established policies, procedures, and norms.

4. Highly qualified managers, IT technicians, and archive professionals should assume responsibility for planning and implementing at the practical and technical level the necessary procedures and processes for correct document management and for establishing the necessary technical norms for correct administration of the document management policy.

5. Set up multidisciplinary work teams of qualified technicians to plan the document management policy, which will require involving different institution personnel:

- a. With specific obligations in the areas of security, design, and systems relating to information and communication technologies.
- b. With obligations to verify and sanction fulfillment of norms.
- c. To create, receive, and maintain documents as part of their daily work, so that it is done in accordance with established policies, procedures, and norms.

6. If the institution's document management plan is implemented by external contractors, it is important to ensure that they comply with the standards set down in the institution's policies and the law.

8.4. Communication plan

8.5. Work team awareness

Definition of a communication plan

A communication plan is an instrument that sets out the communication policies, strategies, resources, objectives, and actions, whether internal or external, proposed by an institution.

Description of the good practice

A communication plan should ensure that the procedures and benefits of document and archive management are understood throughout the institution. It should clearly explain the document management guidelines and situate the procedures and processes in a context that enables all the personnel to understand the reasons why document management is necessary.

The communication plan should articulate procedures to ensure that the basic documents associated with the institution's document and archive management policy are accessible to and reach all its members and that they are aware of their importance and significance.

Recommendations

1. The communication plan should be proactive and develop the necessary instruments to make all the personnel aware and engaged in fulfilling document and archive management rules; guidelines, recommendations, good practice guides, etc. are useful to that end.
2. The communication plan may be articulated in synergy with certain aspects of the continuing training plan and use surveys in areas of the institution where fulfillment of established procedures is identified as weak.
3. Specific codes of ethics or of conduct may be developed or adopted for archive and document management technicians, given the importance of their competencies with regard to management and archival processing of documents in the institution.
4. The communication plan could include mechanisms for all members of the work team to provide feedback on the management policy and its implementation, which is especially useful for planning a review and assessment of that policy.
5. Stimulate mindfulness in the institution's employees at all times and encourage them to support and achieve the objectives of the document management policy.

8.6. Continuing education plan

Description of the good practice

It is considered good practice for public institutions to provide training to all staff that take on any kind of responsibility in the area of document management, and to educate both internal and external users about archive services.

Recommendations

1. The institution should determine the level of training needed for its staff to perform the document and archive management processes, and should introduce the necessary education activities to provide that training.
2. It is recommended that a staff education plan be implemented to provide training and refresher courses in knowledge and skills relating to document and archive management.
 - a. The education plan should be approved and managed at the institution's senior management levels and suitably resourced.
 - b. It should clearly explain the document management policies and situate the procedures and processes in a context that enables staff personnel to understand why document management is necessary.
3. Application of the staff education plan should encompass all personnel that take on any kind of responsibility in the area of document management. Having said that, the activities it envisages should be differentiated in order to be appropriate to specific groups or, in certain cases, individual members of staff. In particular, the activities should target:
 - a. Managers.
 - b. Archive and document management specialists.
 - c. General staff responsible for creating or using documents.
 - d. External services companies, fellowship recipients, and volunteers.
4. It is also recommended to have an education plan for archive users, both internal and external.
 - a. It will be up to the archive's assistance service to provide users with a basic initial education about the correct access and use of documents, the use of description instruments and systems, copy requests, and other services provided by the archive.
 - b. The archive's dissemination activities should include awareness and education about archives.
5. Staff and user education activities should cover awareness of the importance and significance of public archives and document management processes, the responsibilities of the actors involved, and the rights of the public in that regard.

6. Public institutions should promote information literacy campaigns to enhance the abilities of the public with respect to access to archives and public documents. Particularly, in relation to:

- a. Discovery and use of archival information systems.
- b. Document access application procedure.
- c. Information use.

7. If possible, appropriate educational materials for each type of user should be made publicly available on the institution's website.

8. Give consideration to an internal and/or external education methodology and the instruments that it should include.

9. Provide education programs on document management rules and practices to the institution's staff at all levels and, where appropriate, to contractors and/or staff of other institutions involved in such processes.

10. Use assessment procedures to contrast staff competency levels with the objectives of the education program.

11. Periodically review the efficiency and effectiveness of training programs through outcome reporting to encourage the necessary changes and achieve continuous improvement.

12. Through surveys or interviews, evaluate the level of satisfaction of persons who have participated in education activities.

13. Design mechanisms for staff that have already received training to benefit from the enhancements made to educational activities.

BIBLIOGRAPHY AND RESOURCES

CHAPTER 1. DOCUMENT MANAGEMENT POLICY

Bibliography

- CRUZ MUNDET, J. R. 2006. *La gestión de documentos en las organizaciones*. Madrid: Ediciones Pirámide.
- INTERNATIONAL STANDARD ORGANIZATION. 2011a. *ISO 30300:2011. Information and documentation. Management system for records. Fundamentals and vocabulary*.
- INTERNATIONAL STANDARD ORGANIZATION. 2011b. *ISO 30301:2011. Information and documentation. Management system for records. Requirements*.
- INTERNATIONAL STANDARD ORGANIZATION. 2016. *ISO 15489-1:2016. Information and documentation. Records management. Part I: Concepts and principles*.
- INTERNATIONAL STANDARD ORGANIZATION. 2008. *ISO/TR. 2008 26122:2008. Information and documentation. Work process analysis for records*.
- INTERNATIONAL STANDARD ORGANIZATION. 2009. *ISO 23081-2:2009. Information and documentation. Managing metadata for records: Part II: Conceptual and implementation issues*.
- INTERNATIONAL STANDARD ORGANIZATION. 2011a. *ISO 30300:2011. Information and documentation. Management system for records. Fundamentals and vocabulary*.
- INTERNATIONAL STANDARD ORGANIZATION. 2011b. *ISO 30301:2011. Information and documentation. Management system for records. Requirements*.
- INTERNATIONAL STANDARD ORGANIZATION. 2011c. *ISO/TR 23081-3:2011. Information and documentation. Managing metadata for records: Part III: Self-assessment method*.
- INTERNATIONAL STANDARD ORGANIZATION. 2017. *ISO 23081-1:2017. Information and documentation. Records Management processes. Metadata for records: Part I: Principles*.

Resources

- COLOMBIA. ARCHIVO GENERAL DE LA NACIÓN. Programa de Gestión Documental. Disponible en: <http://www.archivogeneral.gov.co/transparencia/gestion-informacion-publica/Programa-de-Gestion-Documental-PGD>.
- COLOMBIA. CONTADURÍA GENERAL DE LA NACIÓN. 2013. *Programa de gestión documental de la UAE Contaduría General de la Nación*. Disponible en: <http://www.contaduria.gov.co/wps/wcm/connect/65155c34-4a85-4096-a06a-47b53b6b42e0/GESTION+DOCUMENTAL+VERSI%C3%93N+2.pdf?MOD=AJPERES>
- ECUADOR. PERERO GONZÁLEZ, Ginna Isabel. 2012. *Modelo de un sistema de gestión documental para el manejo de archivos administrativos, dirigido al Gobierno Autónomo Descentralizado Parroquial de José Luis Tamayo, provincia de Santa Elena, año 2013*. La Libertad.

CHAPTER 2. DOCUMENT ANALYSIS, CLASSIFICATION, AND DESCRIPTION

Bibliography

- BARBADILLO ALONSO, J. Clasificaciones y relaciones funcionales en los documentos de archivos. *Tábula: revista de archivos de Castilla y León*, 13, pp. 95-104.
- BARBADILLO ALONSO, J. 2011. *Las normas de descripción archivística. Qué son y cómo se aplican*. Gijón: Trea.
- BONAL ZAZO, J. L. 2001. *La descripción archivística normalizada. Origen, fundamentos, principios y técnicas*. Gijón: Trea.
- BONAL ZAZO, J. L.; GENERELO LANASPA, J. J.; TRAVESÍ DE DIEGO, C. 2006. *Manual de Descripción Multinivel. Propuesta de adaptación de las normas internacionales de descripción archivística* [en línea]. 2ª ed. Valladolid: Junta de Castilla y León. Disponible en: http://www.aefp.org.es/NS/Documentos/NormasDescriptivas/MDM2_2006.pdf
- COMISIÓN DE NORMAS ESPAÑOLAS DE DESCRIPCIÓN ARCHIVÍSTICA, *NEDA-MC. Modelo conceptual de descripción archivística: entidades, relaciones y atributos*, Madrid, 2017. Disponible en: <https://sede.educacion.gob.es/publiventa/d/20886C/19/0>
- COMISIÓN SUPERIOR CALIFICADORA DE DOCUMENTOS ADMINISTRATIVOS, *Cuadro de Clasificación de Funciones Comunes de la Administración General del Estado*, Madrid, 2018. Disponible en: <https://www.mecd.gob.es/dam/jcr:4889f307-13b0-460a-88c4-5f930c4ac204/ultima-version-ccf-20180110.pdf>
- CRUZ MUNDET, J. R. 2005. *Manual de Archivística*. Edición corregida y actualizada. Madrid: Fundación Germán Sánchez Ruipérez.
- CRUZ MUNDET, J. R. 2006. *La Gestión de documentos en las organizaciones*. Madrid: Ediciones Pirámide.
- DELGADO GÓMEZ, Alejandro, “Sistemas de clasificación en múltiples dimensiones: la experiencia del Archivo Municipal de Cartagena”, *Innovar o morir. En torno a la clasificación*, Revista Tábula: Revista de Archivos de Castilla y León, 13, 2010, pp. 125-136.
- DELGADO GÓMEZ, A. 2004. *Normalización de la descripción archivística: Introducción a Encoded Archival Description (EAD)* [en línea]. Cartagena: Archivo Municipal; Archivo 3000. Disponible en: http://iibi.unam.mx/archivistica/alejandro_delgado-ead_espanol.pdf
- DÍAZ RODRÍGUEZ, A. La clasificación como proceso de gestión de documentos. En *Tábula: revista de archivos de Castilla y León*, 13, pp. 79-94.
- FOSCARINI, F. 2010. La clasificación de documentos basada en funciones. *Revista Tábula: revista de archivos de Castilla y León*, 13, pp. 41-58.
- FRANCO ESPINO, Beatriz; PÉREZ ALCÁZAR, Ricard (coords.). *Modelo de Gestión de Documentos y Administración de Archivos para la Red de Transparencia y Acceso a la Información* [en línea]. RTA, 2014. Disponible en: <http://mgd.redrta.org/>. Con especial atención a G04/O. *Guía de Implementación Operacional: Control intelectual y representación*.

G04/D01/O. *Directrices: Identificación y Clasificación*. G04/D02/O. *Directrices: Descripción archivística*.

- GÓMEZ, R.; BRIGAS, R. 2005. Normalización y requisitos funcionales de la descripción archivística: una propuesta metodológica. *Scire*, 11, (1), pp. 103-112.
- HEREDIA HERRERA, A. 1991. *Archivística General: Teoría y práctica*. Sevilla: Diputación Provincial de Sevilla.
- HEREDIA HERRERA, A. 2010. Clasificación, Cuadros de Clasificación y e-gestión documental. *Tábula: revista de archivos de Castilla y León*, 13, pp. 139-152.
- HEREDIA HERRERA, A. 2011. *Lenguaje y vocabulario archivísticos. Algo más que un diccionario*. Sevilla: Junta de Andalucía.
- HERNÁNDEZ OLIVERA, L. (ed.). 2008. Ahogados en un mar de siglas. Estándares para la gestión, descripción y acceso a los recursos archivísticos. *Tábula*, 11. [Actas del V Congreso de Archivos de Castilla y León, León, 1-3 de octubre de 2008].
- INTERNATIONAL STANDARD ORGANIZATION. 2016. *ISO 15489-1:2016. Information and documentation. Records management. Part I: Concepts and principles*.
- LA TORRE, J. L.; MARTÍN-PALOMINO, M. 2000. *Metodología para la identificación y valoración de fondos documentales (Escuela Iberoamericana de Archivos: Experiencias y materiales)*. Madrid: Ministerio de Educación, Cultura y Deporte de España.
- LERESCHE, F. 2008. *Las bibliotecas y los archivos: compartir normas para facilitar el acceso al patrimonio* [en línea]. Traducción de Elena Escolano. En: *Conferencia 74 Congreso General de IFLA: Quebec, 10-14 agosto 2008*. Disponible en: <http://archive.ifla.org/IV/ifla74/papers/156-Leresche-trans-es.pdf>
- PITTI, D. V. 2004. Creator Description. Encoded Archival Context [en línea]. En: TAYLOR, A. G.; TILLET, B. B. (eds.). *Authority Control in Organizing and Accessing Information: Definition and International Experience*. Nueva York: The Haworth Information Press, pp. 201-226. Disponible en: http://eprints.rclis.org/4181/1/pitti_eng.pdf
- RAMÍREZ DELEÓN, J. A. 2011. *Descripción archivística: diseño de instrumentos de descripción*. [en línea]. México: Instituto Federal de Acceso a la Información y Protección de Datos; Archivo General de la Nación. Gestión de Documentos y Administración de Archivos: Colección Cuadernos Metodológicos. Cuaderno 4. Disponible en: <http://inicio.ifai.org.mx/Publicaciones/cuaderno4.pdf>
- VILLASECA REYES, O. 2012a. *Directrices para la organización documental*. Santiago de Chile: Archivo Nacional de Chile. Serie Directrices y Normas Técnicas para la gestión de archivos.
- VILLASECA REYES, O. 2012b. *Directrices para la identificación de fondo documental*. Santiago de Chile: Archivo Nacional de Chile. Serie Directrices y Normas Técnicas para la gestión de archivos.
- VV.AA. 1992. *Actas de las Primeras Jornadas sobre metodología para la identificación y valoración de fondos documentales de las Administraciones Públicas (20-22 de marzo de 1991)*. Madrid: Ministerio de Cultura.

CHAPTER 3. DOCUMENT APPRAISAL, TRANSFER, AND ELIMINATION

Bibliography

- AENOR. UNE-EN 15713: 2010. *Destrucción segura del material confidencial. Código de buenas prácticas*.
- AUSTRALIA. NORTHERN TERRITORY GOVERNMENT. 2010. *Guidelines for the destruction of a public sector organisation's temporary value records (Issued November 2010)*. Disponible en:

http://www.nt.gov.au/dcis/info_tech/records_policy_standards/tempo_value_records_disposal.shtml

- AUSTRALIA. STATE RECORDS AUTHORITY OF NEW SOUTH WALES. 2010a. *Guideline 3: Destruction*. Disponible en: <https://www.prov.vic.gov.au/sites/default/files/2016-05/1013g3%20v1.1%20ST%2020130717.pdf>
- AUSTRALIA. STATE RECORDS AUTHORITY OF NEW SOUTH WALES. 2010b. *Destruction of Records*. Sydney. Disponible en: <https://www.records.nsw.gov.au/recordkeeping/advice/retention-and-disposal/destruction-of-records>
- CANADÁ. UNIVERSITY OF BRITISH COLUMBIA. InterPARES 2 Project. 2010. *Creator Guidelines - Making and Maintaining Digital Materials: Guidelines for Individuals - Guía del Preservador - Preservación de Documentos de Archivos Digitales: Lineamientos Para los Organizaciones*. Traducción al español: Juan Voutssás. Disponible en: [http://www.interpares.org/ip2/display_file.cfm?doc=ip2\(pub\)guia_del_preservador.pdf](http://www.interpares.org/ip2/display_file.cfm?doc=ip2(pub)guia_del_preservador.pdf)
- CASELLAS I SERRA, L. E. 2010. *La valoración de documentos electrónicos*. Disponible en: http://iibi.unam.mx/archivistica/valoracion_casellas-barnard.pdf Con resultados del Subgrupo de documentos electrónicos que forma parte del Foro Iberoamericano de Evaluación Documental (FIED).
- CERMENO, L.; RIVAS, E. 2011. Valoración, selección y eliminación. En CRUZ MUNDET, J.R. (Dir.) *Administración de documentos y archivos. Textos documentales*. Madrid: Coordinadora de Asociaciones de Archivos. Disponible en: <http://www.archiveros.net/LIBRO.ARCHIVOS.IBEROAMERICANOS.pdf>
- CHILE. ARCHIVO NACIONAL DE CHILE. 2012. *Instructivo para transferencias de documentos tradicionales al Archivo Nacional de Chile*. Santiago de Chile. Serie Protocolos de Trabajo y Mejores Prácticas para la gestión de archivos
- DORANTES CACIQUE, M.T. 2011. *La valoración documental en el siglo XXI. El principio pro homine en la archivística: valoración documental, valoración de la información y derechos*. México. Disponible en: <http://www.te.gob.mx/documentacion/3seminario/files/t9/dorantes.pdf>
- ESPAÑA. COMISIÓN SUPERIOR CALIFICADORA DE DOCUMENTOS ADMINISTRATIVOS, Recomendaciones para el borrado lógico de documentación electrónica y destrucción física de soportes informáticos de la Administración General del Estado, Madrid, 2017. Disponible en: <http://www.mecd.gob.es/dam/jcr:8a4186d5-73cc-4eb8-b5de-c1272ab8da7c/recomendaciones-destruccion.pdf>
- ESPAÑA. GENERALITAT DE CATALUNYA. 2012. *Metodologia per a l'elaboració de propostes d'avaluació i accés documental*. Aprobado en la reunión de 18 de diciembre de 2012. Disponible en: http://cultura.gencat.cat/web/.content/dgpc/arxiu_i_gestio_documental/03_cnaatd/03_Avaluacio_disposicio/avaluacio_i_acces/metodol_dipleg_04.pdf
- ESPAÑA. MINISTERIO DE EDUCACIÓN, CULTURA Y DEPORTE. 2003. *Criterios generales para la valoración de los documentos de la Administración General del Estado*. (Documento aprobado por la Comisión Superior Calificadora de Documentos Administrativos, en sesión de 27 de noviembre de 2003.) Disponible en: <http://www.mcu.es/archivos/docs/MetodologiaComSup.pdf>
- ESPAÑA. MINISTERIO DE INDUSTRIA, COMERCIO Y TURISMO. INTECO. 2011. *Guía sobre almacenamiento y borrado seguro de información*. Disponible en: http://www.inteco.es/guias_estudios/guias/guia_borrado_seguro
- FENOGLIO, N. C. 2010. *Proyecto: Evaluación de documentos en Iberoamérica. Antecedentes y perspectiva*. Disponible en: <http://blogs.ffyh.unc.edu.ar/evaluaciondedocumentos/files/2012/06/Norma-C.-Fenoglio1.pdf>

- FRANCO ESPINO, Beatriz; PÉREZ ALCÁZAR, Ricard (coords.), *Modelo de Gestión de Documentos y Administración de Archivos para la Red de Transparencia y Acceso a la Información* [en línea]. RTA, 2014. Disponible en: <http://mgd.redrta.org/>. Con especial atención a G05/O. *Guía de Implementación Operacional: Valoración; G05/D01/O. Directrices: Instrumentos para la valoración; G05/D02/O. Directrices: Transferencia de documentos; G05/D03/O. Directrices: Eliminación de documentos.*
- INTERNATIONAL COUNCIL ON ARCHIVES. *Parliamentary institutions: the criteria for appraising and selecting documents. Las instituciones parlamentarias: criterios para la evaluación y selección de documentos.* Trabajos de la Sección de archivos y archivistas de parlamentos y partidos políticos.
- INTERNATIONAL COUNCIL ON ARCHIVES. 2005. *Manual on appraisal (Draft)*. Committee on Appraisal. Disponible en: <https://www.ica.org/en/draft-manual-appraisal>
- INTERNATIONAL COUNCIL ON ARCHIVES. 2013. *Guidelines on Appraisal and Disposition of Student Records*. Section on University and Research Institutions Archives. Disponible en: https://www.ica.org/sites/default/files/SUV_Appraisal_disposition_student_records_EN.pdf
- INTERNATIONAL COUNCIL ON ARCHIVES / INTERNATIONAL RECORDS MANAGEMENT TRUST. *Managing public sector records: a study programme. Building Records Appraisal Systems*. Disponible en: http://www.irmt.org/documents/educ_training/public_sector_rec/IRMT_build_rec_appraisal.pdf
- INTERNATIONAL STANDARD ORGANIZATION. 2016. *ISO 15489-1:2016. Information and documentation. Records management. Part 1: Concepts and principles.*
- LA TORRE, J. L.; MARTÍN-PALOMINO, M. 2003. *Metodología para la identificación y valoración de fondos documentales*. Madrid: State Archives Office
- MILLARUELO, A.; PÉREZ DE LEMA, A. 2014. *Destrucción o eliminación segura de documentación electrónica y soportes informáticos*. En MINISTERIO DE HACIENDA Y ADMINISTRACIONES PÚBLICAS, 2016. *Política de gestión de documentos electrónicos*. 2ª edición. Madrid: 2016. Disponible en: <http://www.minhfp.gob.es/Documentacion/Publico/SGT/POLITICA%20DE%20GESTION%20DE%20DOCUMENTOS%20MINHAP/politica%20de%20gestion%20de%20documentos%20electronicos%20MINHAP-ponencias%20complementarias%20a%20documento.pdf>
- PARADIGM PROJECT: *Appraisal and disposal Workbook on Digital Private Papers*. Disponible en: http://www.paradigm.ac.uk/workbook/pdfs/04_appraisal_disposal.pdf
- TÁBULA: REVISTA DE ARCHIVOS DE CASTILLA Y LEÓN. 2003. 6. *El Refinado arte de la destrucción: la selección de documentos*.
- TORREBLANCA, A.; CONDE, M. L. 2003. *Sistemas de eliminación de documentos administrativos*. Murcia: Dirección General de Cultura.

Resources

- COLOMBIA. ARCHIVO GENERAL DE LA NACIÓN. Tablas de retención documental. Disponible en: <http://www.archivogeneral.gov.co/transparencia/gestion-informacion-publica/Tablas-de-Retencion-Documental-TRD>
- ESPAÑA. MINISTERIO DE EDUCACIÓN, CULTURA Y DEPORTE. Comisión Superior Calificadora de Documentos Administrativos. Grupo de Trabajo de Series y Funciones Comunes. Estudios de identificación y valoración. Disponible en: <http://www.mcu.es/archivos/MC/CSCDA/EstudiosIdentificacion.html>
- ESPAÑA. MINISTERIO DE EDUCACIÓN, CULTURA Y DEPORTE. Comisión Superior Calificadora de Documentos Administrativos. Formularios. Disponible en: <http://www.mcu.es/archivos/MC/CSCDA/Formularios.html>

CHAPTER 4. INFORMATION ACCESS AND SECURITY

Bibliography

- ALBERCH I FUGUERAS, R. 2008. *Archivos y derechos humanos*. Gijón: Trea.
- BETHAULT, D. 2012. El modelo francés de reutilización de la información del sector público. En: *II Jornada sobre la reutilización de la información del sector público: acceso y uso de la información: Madrid, 15 y 16 de febrero de 2012*. Madrid: Universidad Complutense de Madrid.
- CANCIO, J. 2012. Marco legal en España: Real decreto 1495/2011. En: *II Jornada sobre la reutilización de la información del sector público: acceso y uso de la información: Madrid, 15 y 16 de febrero de 2012*. Madrid: Universidad Complutense de Madrid.
- CENTRO DE ARCHIVOS Y ACCESO A LA INFORMACIÓN PÚBLICA (CAinfo). 2012. *Seguridad nacional y acceso a la información en América Latina: estado de situación y desafíos* [en línea]. Documento preparado por Centro de Archivos y Acceso a la Información Pública (CAinfo) con la asistencia técnica del Centro de Estudios para la Libertad de Expresión y Acceso a la información (CELE) de la Facultad de Derecho de la Universidad de Palermo, Argentina. Montevideo: CAinfo. Disponible en: <http://www.palermo.edu/cele/pdf/NS-AI.pdf>
- CLAPTON, G.; HAMMOND, M.; POOLE, N. 2011. *PSI re-use in the cultural sector. Final report*. Londres: Curtis+Cartwright Consulting. Disponible en: http://ec.europa.eu/information_society/newsroom/cf/itemdetail.cfm?item_id=9020
- COLLADO, L. 2012. "Usos potenciales de los mapas, directorios y otros productos informativos de la información pública". En: *II Jornada sobre la reutilización de la información del sector público: acceso y uso de la información: Madrid, 15 y 16 de febrero de 2012*. Madrid: Universidad Complutense de Madrid.
- COMISIÓN EUROPEA. 2001. Decisión 2001/264/CE del Consejo, de 19 de marzo de 2001, por la que se adoptan las normas de seguridad del Consejo. Disponible en: <http://eur-lex.europa.eu/legal-content/ES/TXT/PDF/?uri=CELEX:32001D0264&qid=1401793082125&from=EN>
- COMISIÓN EUROPEA. 2003. Directiva Europea 2003/98/CE, de 17 de noviembre de 2003, del Parlamento Europeo y del Consejo, relativa a la reutilización de la información del sector público. Disponible en: <http://eur-lex.europa.eu/legal-content/ES/TXT/PDF/?uri=CELEX:02003L0098-20130717&qid=1401779418320&from=EN>
- COMISIÓN EUROPEA. 2013. *Opinion 06/2013 on open data and public sector information (PSI) reuse*. Disponible en: http://ec.europa.eu/justice/data-protection/article-29/documentation/opinion-recommendation/files/2013/wp207_en.pdf
- CHILE. CONTRALORÍA GENERAL DE LA REPÚBLICA. 2012. *Manual de Buenas Prácticas para la Tramitación de Solicitudes de Acceso a la Información. Ley 20.285 sobre Acceso a la Información Pública* [en línea]. Santiago de Chile: Contraloría General de la República. Disponible en: http://www.oas.org/juridico/PDFs/mesicic4_chl_bue_acc.pdf
- DAVARA FERNÁNDEZ DE MARCOS, I. 2011. *Hacia la estandarización de la protección de datos personales. Propuesta sobre una «tercera vía o tertium genus» internacional*. Madrid: La Ley.
- DUCHEIN, M. 1983. *Los obstáculos que se oponen al acceso, a la utilización y a la transferencia de la información conservada en los archivos: Un estudio del RAMP* [en línea]. Programa General de Información y Unisist. París: UNESCO. Disponible en: <http://unesdoc.unesco.org/images/0005/000576/057672so.pdf>
- ESPAÑA. GOBIERNO VASCO. 2010. Manual de seguridad. Disponible en: https://euskadi.net/contenidos/informacion/bp_segurtasuna/es_dit/adjuntos/MSPLATEA_c.pdf

- ESPAÑA. MINISTERIO DE HACIENDA Y ADMINISTRACIONES PÚBLICAS. 2013. *Guía de aplicación de la Norma Técnica de Interoperabilidad de Reutilización de Recursos de Información*. Disponible en: http://administracionelectronica.gob.es/pae/Home/pae_Estrategias/pae_Interoperabilidad_Inicio/pae_Normas_tecnicas_de_interoperabilidad.html#REUTILIZACIONRECURSOS
- FERNÁNDEZ CUESTA, F. 2012. Al servicio de la transparencia. El papel de los archiveros y la gestión documental en el acceso a la información pública. *Métodos de información* [en línea], 3 (5), pp. 153-166. Disponible en: <http://www.metodosdeinformacion.es/mei/index.php/mei/article/view/IIMEI3-N5-153166/768>
- FERNÁNDEZ CUESTA, F. 2011. *Protección de datos en archivos públicos: introducción a su estudio* [en línea]. HERNÁNDEZ OLIVERA, L. (dir.). Trabajo Grado de Salamanca, Universidad de Salamanca. Disponible en: <http://hdl.handle.net/10366/111529>
- FRANCO ESPINO, Beatriz; PÉREZ ALCÁZAR, Ricard (coords.), *Modelo de Gestión de Documentos y Administración de Archivos para la Red de Transparencia y Acceso a la Información* [en línea]. RTA, 2014. Disponible en: <http://mgd.redrta.org/>. Con especial atención a G02/G. *Guía de Implementación Gerencial: Gobierno Abierto y Transparencia. G02/D01/G. Directrices: Acceso a los documentos públicos. G02/D03/G. Directrices: Reutilización de la información. G06/O. Guía de Implementación Operacional: Control de acceso y G06/D01/O. Directrices: Requisitos de seguridad y acceso. G06/D02/O. Directrices: Gestión de solicitudes de acceso. G06/D03/O. Directrices: Restricciones y control de acceso.*
- FUMEGA, S. 2014. *El uso de las tecnologías de información y comunicación para la implementación de leyes de acceso a la información pública* [en línea]. Santiago de Chile: Consejo para la Transparencia. Disponible en: http://redrta.cplt.cl/_public/public/folder_attachment/55/1a/1a3b_6f48.pdf
- GLOVER, M. et al. 2006. *Freedom of information: history, experience and records and information management implications in the USA, Canada and the United Kingdom*. Pittsburgh: ARMA International Educational Foundation. Disponible en: http://armaedfoundation.org/wp-content/uploads/2016/12/Freedom_of_Information_in_US_UK_and_Canada.pdf
- GÓMEZ, R. [et. al.]. 2010. Metodología y gobierno de la gestión de riesgos de tecnologías de la información. *Revista de Ingeniería* [en línea], 31, pp. 109-118. Disponible en: <http://www.redalyc.org/articulo.oa?id=121015012006>
- GÓMEZ FERNÁNDEZ, L.; ANDRÉS ÁLVAREZ, A. 2012. *Guía de aplicación de la Norma UNE-ISO/IEC 27001 sobre seguridad de sistemas de información para PYMES*. 2ª ed. Madrid: AENOR.
- GONZÁLEZ QUINTANA, A. 2010. Archivos y derechos humanos. Recomendaciones desde el Consejo Internacional de Archivos. En: BABIANO MORA, J. (coord.). *Represión, derechos humanos, memoria y archivos. Una perspectiva latinoamericana*. Madrid: Fundación 1º de mayo, pp. 189-199.
- INTERNATIONAL COUNCIL ON ARCHIVES. 2012. *Principios de acceso a los archivos*. Trad. de Esther Cruces Blanco. París: ICA. Disponible en: https://www.ica.org/sites/default/files/ICA_Access-principles_SP.pdf
- INTERNATIONAL COUNCIL ON ARCHIVES. 2014. *Principios de acceso a los archivos. Guía técnica para la gestión de archivos de uso restringido*. París: ICA. Disponible en: https://www.ica.org/sites/default/files/Technical%20Guidance%20on%20Managing%20Archives%20with%20restrictions_SP.pdf
- INTERNATIONAL COUNCIL ON ARCHIVES (ICA). 2014. *Guía técnica para la gestión de archivos de uso restringido* [en línea]. París: ICA. Disponible en: https://www.ica.org/sites/default/files/Technical%20Guidance%20on%20Managing%20Archives%20with%20restrictions_SP.pdf

NOTA: La traducción al español de este documento cuenta con algunos errores, por lo que recomendamos, en la medida de lo posible, acudir a la versión original en inglés:

- INTERNATIONAL COUNCIL ON ARCHIVES (ICA). 2014. *Technical Guidance on Managing Archives with Restrictions* [en línea]. París: ICA. Disponible en: <https://www.ica.org/en/technical-guidance-managing-archives-restrictions-0>
- INTERNATIONAL ORGANIZATION FOR STANDARDIZATION (ISO). 2010. *ISO 16175-3:2010: Information and documentation - Principles and functional requirements for records in electronic office environments - Part 3: Guidelines and functional requirements for records in business systems*. Ginebra: ISO.
 - INTERNATIONAL ORGANIZATION FOR STANDARDIZATION (ISO). 2011. *ISO 16175-2:2011: Information and documentation - Principles and functional requirements for records in electronic office environments - Part 2: Guidelines and functional requirements for digital records management systems*. Ginebra: ISO.
 - INTERNATIONAL ORGANIZATION FOR STANDARDIZATION (ISO). 2016. *ISO 15489-1:2016: Information and documentation - Records management - Part 1: Concepts and principles*. Ginebra: ISO.
 - INTERNATIONAL ORGANIZATION FOR STANDARDIZATION (ISO). 2013. *ISO/IEC 27001:2013. Information technology -- Security techniques -- Information security management systems*. Ginebra: ISO.
 - JOYANES AGUILAR, L. 2012. Ciberespacio y libre acceso a la información. En: *II Jornada sobre la reutilización de la información del sector público: acceso y uso de la información: Madrid, 15 y 16 de febrero de 2012*. Madrid: Universidad Complutense de Madrid.
 - ORENGA, L.; SOLER, J. 2010. *Com es fa un Quadre de Seguretat i Accés?* [presentación en línea]. Material docente del curso homónimo celebrado los días 10 y 17 de noviembre de 2010 en Tarragona y Barcelona, para la Associació d'Arxivers de Catalunya. Disponible en: <http://www.slideshare.net/JoanSolerJimnez/com-es-fa-un-quadre-de-seguretat-i-acces>
 - ORGANIZACIÓN DE ESTADOS AMERICANOS (OEA). 2010a. *Ley Modelo Interamericana sobre Acceso a la Información Pública* [en línea]. AG/RES. 2607 (XL-O/10). Disponible en: http://www.oas.org/dil/esp/AG-RES_2607-2010.pdf
 - ORGANIZACIÓN DE ESTADOS AMERICANOS (OEA). 2010b. *Comentarios y guía de implementación para la Ley modelo interamericana sobre acceso a la información* [en línea]. CP/CAJP-2841/10. Disponible en: http://www.oas.org/es/sla/ddi/docs/AG-RES_2841_XL-O-10_esp.pdf
 - PARLAMENTO EUROPEO. 2013. Directiva 2013/37/UE del Parlamento Europeo y del Consejo de 26 de junio de 2013, por la que se modifica la Directiva 2003/98/CE relativa a la reutilización de la información del sector público. Disponible en: <http://eur-lex.europa.eu/legal-content/ES/TXT/PDF/?uri=CELEX:32013L0037&qid=1401780323623&from=EN>
 - PELEGRÍN, J. 2012. La revisión de la Directiva europea 2003/98 sobre reutilización de la Información del Sector Público. En: *II Jornada sobre la reutilización de la información del sector público: acceso y uso de la información: Madrid, 15 y 16 de febrero de 2012*. Madrid: Universidad Complutense de Madrid.
 - RAMÍREZ DELEÓN, J. A. 2007. *Archivos gubernamentales: Un dilema de la transparencia*. México: INFODF. Disponible en: http://www.cevat.org.mx/retaip/documentos/material_apoyo/ensayo/Ensayo2.pdf
 - RAMOS SIMÓN, L. F.; MENDO CARMONA, C.; ARQUERO AVILÉS, R. 2009. La producción informativa y documental del Estado: hacia un inventario de los recursos públicos. En: *Revista española de documentación científica*, (32), 1, pp. 40–59.
 - SCARENSI, M. J. 2014. La legislación archivística y el acceso a la información en América Latina. En: TORRES, N. (comp.). *Hacia una política integral de gestión de la información pública. Todo lo que siempre quisimos saber sobre archivos (y nunca nos animamos a preguntarle al acceso a la información)* [en línea]. Buenos Aires: Centro de Estudios en

Libertad de Expresión y Acceso a la Información (CELE); Universidad de Palermo, pp. 109-154. Disponible en: http://www.palermo.edu/cele/pdf/Hacia_una_politica_integral-kk.pdf

- SERRA SERRA, J. 2013. Una interpretación metodológica de la norma ISO 15489 para la implantación de un sistema de gestión de documentos. En: *Jornadas Ibéricas de Arquivos Municipais: Políticas, Sistemas e Instrumentos nos Arquivos Municipais, 04 e 05 de Junho 2013* [en línea]. Lisboa: Arquivo Municipal. Disponible en: http://arquivomunicipal.cm-lisboa.pt/fotos/editor2/j_serra.pdf
- TORRES, N. (comp.). [2013]. *Acceso a la información y datos personales: una vieja tensión, nuevos desafíos* [en línea]. Buenos Aires: Centro de Estudios en Libertad de Expresión y Acceso a la Información (CELE). Disponible en: http://www.palermo.edu/cele/pdf/DatosPersonales_Final.pdf
- TRONCOSO RAIGADA, A. 2009. Reutilización de información pública y protección de datos personales. En: *Revista general de información y documentación*, 19, pp. 243–264.
- VALENTÍN RUIZ, F. J.; BUENESTADO DEL PESO, R. 2012. Aproximación al panorama actual de la reutilización de la información del sector público. En *Textos universitaris de Biblioteconomia i Documentació*, 29.
- VRIES, M. 2012. El proyecto ePSIplatform en sus últimos desarrollos. En: *II Jornada sobre la reutilización de la información del sector público: acceso y uso de la información: Madrid, 15 y 16 de febrero de 2012*. Madrid: Universidad Complutense de Madrid.

Resources

- COMISIÓN EUROPEA. Digital Agenda for Europe. A Europe 2020 Initiative. Revision of the PSI Directive. Disponible en: <http://ec.europa.eu/digital-agenda/news/revision-psi-directive>
- COMISIÓN EUROPEA. Digital Agenda for Europe: key initiatives. Disponible en: http://europa.eu/rapid/press-release_MEMO-10-200_en.htm
- COMISIÓN EUROPEA. Legal Aspects of Public Sector Information (LAPSI) thematic network outputs. Disponible en: <https://ec.europa.eu/digital-single-market/en/news/legal-aspects-public-sector-information-lapsi-thematic-network-outputs>
- ESPAÑA. GOBIERNO DE ESPAÑA. datos.gob.es. Disponible en: <http://datos.gob.es/es>
- ESPAÑA. GOBIERNO VASCO. Open Data Euskadi. Disponible en: <http://opendata.euskadi.eus/inicio/>
- ESPAÑA. MINISTERIO DE ENERGÍA, TURISMO Y AGENDA DIGITAL. Plan Avanza. Disponible en: <http://www.agendadigital.gob.es/agenda-digital/planes-anteriores/Paginas/plan-avanza.aspx>
- ORGANIZACIÓN DE LOS ESTADOS AMERICANOS. Acceso a la información. Disponible en: http://www.oas.org/es/sla/ddi/acceso_informacion_ley_modelo.asp

CHAPTER 5. DOCUMENT CONSERVATION AND CONTINGENCY MANAGEMENT

Bibliography

- BELLO, C.; BORRELL, À. 2008. *Los documentos de archivo: cómo se conservan*. Gijón: Trea.
- CALDERÓN DELGADO, Marco. *Conservación Preventiva de documentos*. Archivo Nacional. Costa Rica. Disponible en: http://www.archivonacional.go.cr/pdf/conservacion_preventiva_documentos.pdf
- COLOMBIA. PRESIDENCIA DE LA REPÚBLICA. 2016. *Guía para la conservación de documentos*. Bogotá. Disponible en: <http://es.presidencia.gov.co/dapre/DocumentosSIGEPRE/G-GD-01-conservacion-documentos.pdf>

- FRANCO ESPINO, Beatriz; PÉREZ ALCÁZAR, Ricard (coords.), *Modelo de Gestión de Documentos y Administración de Archivos para la Red de Transparencia y Acceso a la Información* [en línea]. RTA, 2014. Disponible en: <http://mgd.redrta.org/>. Con especial atención a G07/O. *Guía de Implementación Operacional: Control físico y conservación y G07/D01/O. Directrices: Plan integrado de conservación. G07/D02/O. Directrices: Custodia y control de las instalaciones.*
- HAEBERLEN, T.; LIVERI, D.; LAKKA, M. 2013. *Good Practice Guide for securely deploying Governmental Clouds*. European Union Agency for Network and Information Security. Disponible en: <http://www.enisa.europa.eu/activities/Resilience-and-CIIP/cloud-computing/good-practice-guide-for-securely-deploying-governmental-clouds>
- MARTÍNEZ REDONDO, Piedad, *Plan de conservación documental. Estrategias y procesos de conservación para asegurar el adecuado mantenimiento de los documentos en soporte papel*. UPRA. Colombia. Disponible en: <http://www.upra.gov.co/documents/10184/18526/Plan+de+Conservaci%C3%B3n+Documental+-+UPRA+-+version+1.0+Final.pdf/c1821ed8-5c0e-400f-b4c1-31b79d31c471>
- MILLARUELO, A. 2014. Estrategia de conservación de documentos en repositorio, conforme al calendario de conservación. Ponencia nº 5. En MINISTERIO DE HACIENDA Y ADMINISTRACIONES PÚBLICAS, 2016. *Política de gestión de documentos electrónicos*. 2ª edición. Madrid: 2016. Disponible en: <http://www.minhafp.gob.es/Documentacion/Publico/SGT/POLITICA%20DE%20GESTION%20DE%20DOCUMENTOS%20MINHAP/politica%20de%20gestion%20de%20documentos%20electronicos%20MINHAP-ponencias%20complementarias%20al%20documento.pdf>
- OGDEN, S. 1998. *El manual de preservación de bibliotecas y archivos del Northeast Document Conservation Center*. Santiago de Chile: DIBAM. Disponible en: <http://www.dibam.cl/Recursos/Publicaciones/Centro%20de%20Conservaci%C3%B3n/archivos/OGDEN.PDF>
- ROTAECHÉ GONZÁLEZ DE UBIETA, M. 2007. *Transporte, depósito y manipulación de obras de arte*. Madrid: Editorial Síntesis.
- SÁNCHEZ HERNANPÉREZ, A. 1999. *Políticas de Conservación en Bibliotecas. Instrumenta Bibliológica*. Madrid: Arco Libros.
- TACÓN CLAVAÍN, J. 2008. *La conservación en archivos y bibliotecas: prevención y protección*. Madrid: Ollero y Ramos.
- TACÓN CLAVAÍN, J. 2011. *Soportes y técnicas documentales: causas de su deterioro*. Madrid: Ollero y Ramos.
- SASTRE NATIVIDAD, Garazi. *Preservación y conservación de documentos digitales* [en línea]. En: ArchivPost. Salamanca: Asociación de Archiveros de Castilla y León, 2015. Disponible en: <http://www.acal.es/index.php/archivpost-a-fondo>

CHAPTER 6. AWARENESS RAISING AND USER ASSISTANCE SERVICES

Bibliography

- ALBERCH I FUGUERAS, R. 2003. La dinamización cultural en el archivo, un reto futuro. En: *VII Jornadas Archivísticas. Aprender y enseñar con el archivo*. Huelva, pp. 127-135.
- ALBERCH, R.; BOIX, L.; NAVARRO, N.; VELA, S. 2001. *Archivos y cultura: manual de dinamización*. Gijón: Trea.
- CAMPOS, J. 2009. *La difusión en los archivos: importante herramienta de proyección ante la sociedad* Disponible en: <http://eprints.rclis.org/20236/1/La%20difusi%C3%B3n%20en%20los%20archivos%20importante%20herramienta%20de%20proyecci%C3%B3n%20ante%20la%20sociedad.pdf>
- CERDÁ DÍAZ, J. 2008. Las exposiciones documentales. Técnicas y tendencias. En: *Tábula: Revista de Archivos de Castilla y León*, 11, pp. 359-384.

- CERDÁ DÍAZ, J. 2010. Los archivos, un lugar para descubrir. Experiencias de dinamización cultural. En: GONZÁLEZ CACHAFEIRO, J. (Coord.). *3ª Jornadas Archivando. La difusión en los archivos. Actas de las Jornadas. León 11 y 12 noviembre de 2010*. Disponible en: http://archivosferrapambley.files.wordpress.com/2011/01/actas_jornadas_2010.pdf
- COX, R.J. Machines in the archives: Technology and the coming transformation of archival reference. *First Monday*.
- CRYMBLE, A. 2010. An Analysis of Twitter and Facebook Use by the Archival Community. En *Archivaria*, 70 Disponible en: <http://journals.sfu.ca/archivar/index.php/archivaria/article/view/13298>]
- DUFF, W.; FOX, A. 2006. 'You're a guide rather than an expert': Archival reference from an archivist's point of view. *Journal of the Society of Archivists*.
- ESPAÑA. JUNTA DE CASTILLA Y LEÓN. 2006. *Manual de archivo de oficina*. Valladolid: Junta de Castilla y León.
- ESPAÑA. MINISTERIO DE EDUCACIÓN CULTURA Y DEPORTE. 2003. *Archivo de oficina*. Madrid: Ministerio de Educación, Cultura y Deporte. Disponible en: <https://www.mecd.gob.es/cultura-mecd/dms/mecd/cultura-mecd/areas-cultura/archivos/recursos-profesionales/documentos-tecnicos/archivo-de-oficina.pdf>
- FERNÁNDEZ CUESTA, F. 2008. *Archiblogs: el blog como nueva herramienta de difusión del archivo*. En: *Jornadas Archivando. Un nuevo paradigma en la gestión de archivos*. Disponible en: <http://www.slideshare.net/pacofernandez/jornadas-archivamos-presentation>
- FERNÁNDEZ GIL, Paloma. 1996. Archivos de Oficina: la Teoría Archivística y la Práctica. En: *La organización de documentos en los archivos de oficina: XI Jornadas de Archivos Municipales (Aranjuez, 23-24 Mayo 1996)*. Madrid: Dirección General del Patrimonio Cultural: Ayuntamiento del Real Sitio y Villa de Aranjuez, Archivo Municipal: Grupo de Archiveros Municipales de Madrid, pp. 155-160.
- FRANCO ESPINO, Beatriz; PÉREZ ALCÁZAR, Ricard (coords.), *Modelo de Gestión de Documentos y Administración de Archivos para la Red de Transparencia y Acceso a la Información* [en línea]. RTA, 2014. Disponible en: <http://mgd.redrta.org/>. Con especial atención a G08/O. *Guía de Implementación Operacional: Servicios de Archivo y G08/D03/O. Directrices: Difusión. G08/D01/O. Directrices: Atención a la Administración. G08/D02/O. Directrices: Atención al público.*
- JAÉN, L. F. 2006. *La Difusión de Archivos: estrategias para su proyección*. Convención Internacional de Archivistas. Mar del Plata, Argentina.
- NAVARRO BONILLA, D. 2001. El servicio de referencia archivística: retos y oportunidades. *Revista española de Documentación Científica*, 24 (2), pp. 178-197. Disponible en: <http://redc.revistas.csic.es/index.php/redc/article/viewFile/49/109>
- SIERRA, L. F. 2011. Difusión en archivos: una visión integradora. En: *Códices* (7), 2. Universidad Lasalle, Colombia. Disponible en: http://eprints.rclis.org/20000/1/Difusi%C3%B3n%20en%20archivos_una%20visi%C3%B3n%20integradora.pdf
- YAKEL, E. 2000. Thinking inside and outside the boxes: archival reference services at the turn of the Century. *Archivaria*, 49, pp. 140-160. Disponible en: <http://journals.sfu.ca/archivar/index.php/archivaria/article/viewFile/12742/13927>

Resources

- CHILE. ARCHIVO NACIONAL DE CHILE. Material educativo. Disponible en: http://www.archivonacional.cl/616/w3-propertyvalue-38641.html?_noredirect=1
- COLOMBIA. ARCHIVO NACIONAL DE LA NACIÓN. AGN para niños, niñas y adolescentes. Disponible en: <http://www.archivogeneral.gov.co/Conozcanos/agn-para-ninos>

- ESPAÑA. MINISTERIO DE EDUCACIÓN, CULTURA Y DEPORTE. Exposiciones y visitas virtuales de los Archivos. Disponible en: <http://www.mecd.gob.es/cultura-mecd/areas-cultura/archivos/exposiciones-y-visitas-virtuales.html>
- MÉXICO. ARCHIVO GENERAL DE LA NACIÓN. Actividades de difusión. Disponible en: <http://www.agn.gob.mx/menuprincipal/difusion/difusion.html>

CHAPTER 7. ELECTRONIC ADMINISTRATION

Bibliography

- AUSTRALIA. NATIONAL ARCHIVES OF AUSTRALIA. 2010. *Australian Government Recordkeeping Metadata Standard Implementation Guidelines: Exposure Draft*.
- AUSTRALIA. NATIONAL ARCHIVES OF AUSTRALIA. 2011. *Australian Government Recordkeeping Metadata Standard Implementation Guidelines. Version 2.0*.
- AUSTRALIA. DEPARTMENT OF FINANCE AND ADMINISTRATION. 2006. Australian Government Information Interoperability Framework. Disponible en: https://www.finance.gov.au/publications/agimo/docs/Information_Interoperability_Framework.pdf
- BROWN, A. 2008. *Digital Preservation Guidance Note 2: Selecting Storage Media for Long-Term Preservation*. Londres: The National Archives <http://www.nationalarchives.gov.uk/documents/selecting-storage-media.pdf>
- COMISIÓN EUROPEA. 2008. *MoReq2 Specification. Model Requirements for the Management of Electronic Records*.
- COMISIÓN EUROPEA. 2008. *Semantic Interoperability Centre Europe. A Study on Good Practices in Existing Repositories*.
- ESPAÑA. MINISTERIO DE HACIENDA Y ADMINISTRACIONES PÚBLICAS, 2016c. *Esquema de Metadatos para la Gestión del Documento Electrónico (e-EMGDE). Versión 2.0. Documentación complementaria a la Norma Técnica de Política de gestión de documentos electrónicos*. Madrid: 2016. Disponible en: https://www.administracionelectronica.gob.es/pae/Home/pae_Estrategias/Archivo_electronico/pae_Metadatos.html
- FRANCO ESPINO, Beatriz; PÉREZ ALCÁZAR, Ricard (coords.), *Modelo de Gestión de Documentos y Administración de Archivos para la Red de Transparencia y Acceso a la Información* [en línea]. RTA, 2014. Disponible en: <http://mgd.redrta.org/>. Con especial atención a G03/G. *Guía de Implementación Gerencial: Administración electrónica y G03/D01/G. Directrices: Interoperabilidad. G03/D02/G. Directrices: Administración de documentos electrónicos*.
- INTERNATIONAL FEDERATION OF LIBRARY ASSOCIATIONS AND INSTITUTIONS. 2005. Directrices para proyectos de digitalización de colecciones y fondos de dominio público, en particular para aquellos custodiados en bibliotecas y archivos, marzo de 2002. Madrid: Ministerio de Cultura. Disponible en: <https://www.ifla.org/files/assets/preservation-and-conservation/publications/digitization-projects-guidelines-es.pdf>
- INTERNATIONAL STANDARD ORGANIZATION. 2009. *ISO 23081-2:2009. Information and documentation. Records Management process Metadata for records: Part II: Conceptual and implementation issues*.
- INTERNATIONAL STANDARDS ORGANIZATION. *ISO/TR 18492:2005. Long-Term Preservation of Electronic Document-Based Information*.
- INTERNATIONAL STANDARDS ORGANIZATION. 2009. *ISO/TR 15801:2009. Document management -- Information stored electronically -- Recommendations for trustworthiness and reliability*.

- INTERNATIONAL STANDARDS ORGANIZATION. 2010a. *ISO 16175-1:2010. Principles and functional requirements for records in electronic office environments. Part 1: Overview and statement of principles.*
- INTERNATIONAL STANDARDS ORGANIZATION. 2010b. *ISO 16175-2:2010. Principles and functional requirements for records in electronic office environments. Part 2: Guidelines and functional requirements for digital records management systems.*
- INTERNATIONAL STANDARDS ORGANIZATION. 2010c. *ISO 16175-3:2010. Principles and functional requirements for records in electronic office environments. Part 3: Guidelines and functional requirements for records in business systems.*
- INTERNATIONAL STANDARD ORGANIZATION. 2011a. *ISO 30300:2011. Information and Documentation. Management system for records. Fundamentals and vocabulary.*
- INTERNATIONAL STANDARD ORGANIZATION. 2011b. *ISO 30301:2011. Information and Documentation. Management system for records. Requirements.*
- INTERNATIONAL STANDARD ORGANIZATION. 2011c. *ISO 23081-3:2011. Information and documentation. Records Management process Metadata for records: Part III: Self-assessment method.*
- INTERNATIONAL STANDARD ORGANIZATION. 2016. *ISO 15489-1:2016. Information and documentation. Records management. Part I: Concepts and principles.*
- INTERNATIONAL STANDARD ORGANIZATION. 2017. *ISO 23081-1:2017. Information and documentation. Records Management processes. Metadata for records: Part I: Principles.*
- JIMÉNEZ GÓMEZ, C. E. 2012. *Elementos relevantes en la transposición e implantación de los marcos nacionales de interoperabilidad.* XVII Congreso Internacional del CLAD sobre la Reforma del Estado y de la Administración Pública, Cartagena, Colombia, 30 oct. - 2 nov. 2012. Disponible en:
http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2311879

Resources

- AUSTRALIA. DEPARTMENT OF FINANCE. Australian Government Information Interoperability Framework. Disponible en:
<http://www.finance.gov.au/policy-guides-procurement/interoperability-frameworks/information-interoperability-framework/>
- AUSTRALIA. The Australian Government Information Management Office Archive. Digitisation of Records: Better Practice Checklist. Disponible en:
<http://www.finance.gov.au/agimo-archive/better-practice-checklists/digitisation.html>
- BRASIL. CONSELHO SUPERIOR DA JUSTIÇA DO TRABALHO. 2012. Sustentabilidade. Justicia de trabajo. Disponible en:
http://www.tst.jus.br/documents/1692526/0/Cat%C3%A1logo_Ingl%C3%AAs_Espanhol_web.pdf
- CANADÁ. THE UNIVERSITY OF BRITISH COLUMBIA. InterPARES Project. International Research on Permanent Authentic Records in Electronic Systems. Disponible en:
<http://www.interpares.org/welcome.cfm>
- COMISIÓN EUROPEA. ISA. Interoperability Solutions for European Administrations. Disponible en: https://ec.europa.eu/isa2/home_en
- COMISIÓN EUROPEA. CEF Building Blocks for a Digital Connected Europe. Disponible en:
<https://ec.europa.eu/cefdigital/wiki/display/CEFDIGITAL/About+CEF+building+blocks>
- COMISIÓN EUROPEA. General Model of Electronic Archiving. Disponible en:
<http://kc.dlmforum.eu/gm3>
- NUEVA ZELANDA. ARCHIVES NEW ZEALAND. Digitisation guidance - what's current and what's happening?. Disponible en: <https://records.archives.govt.nz/toolkit-blog/digitisation-guidance-whats-happening/>

- PREMIS. Preservation Metadata Maintenance Activity. Disponible en: <http://www.loc.gov/standards/premis/>
- REINO UNIDO. Digital Preservation Coalition. Disponible en: <https://dpconline.org/>
- UNIÓN EUROPEA. ePractice.eu. Observatorio Europeo de la Administración Electrónica. Disponible en: <http://www.epractice.eu/en/home/>
- UNIÓN EUROPEA. Portal Europeo de Justicia. Disponible en: <https://e-justice.europa.eu/home.do?action=home&plang=es>

CHAPTER 8. STAFF PROFILES AND DOCUMENT MANAGEMENT TRAINING

Bibliography

- ALBERCH, R.; COROMINAS, C.; MARTÍNEZ, M. C. 1997. El personal de los Archivos. Función archivística y su plantilla. *Lligall. Revista catalana d'arxivística*, 11, pp. 221-252
Disponible en: <https://www.um.es/adegap/docsinfo/archivistica.pdf>
- ESPAÑA. MINISTERIO DE HACIENDA Y FUNCIÓN PÚBLICA, 2016a. *Política de gestión de documentos electrónicos. Guía de aplicación de la Norma Técnica de Interoperabilidad*. 2ª edición. Madrid: 2016. Disponible en: http://www.administracionelectronica.gob.es/pae/Home/pae_Estrategias/pae_Interoperabilidad_Inicio/pae_Normas_tecnicas_de_interoperabilidad.html#POLITICAGESTION
- INTERNATIONAL ORGANIZATION FOR STANDARDIZATION. 2010. *ISO/TC46/SC11, Preservación de documentos digitales. Guía "Cómo empezar"*. Disponible en: <https://committee.iso.org/sites/tc46sc11/home/projects/published/digital-records-processes-and-se.html>
- INTERNATIONAL STANDARD ORGANIZATION. 2011a. *ISO 30300:2011. Information and Documentation. Management system for records. Fundamentals and vocabulary*.
- INTERNATIONAL STANDARD ORGANIZATION. 2011b. *ISO 30301:2011. Information and Documentation. Management system for records. Requirements*.
- INTERNATIONAL STANDARD ORGANIZATION. 2016. *ISO 15489-1:2016. Information and documentation. Records management. Part I: Concepts and principles*.
- LLANSÓ, J.; COSTANILLA, L.; GARCÍA, O.; ZABALZA, I. 2013. *Buenas prácticas en gestión de documentos y archivos. Manual de normas y procedimientos archivísticos de la Universidad Pública de Navarra*. Pamplona: Servicio de Publicaciones.
- MÉXICO. INSTITUTO NACIONAL DE TRANSPARENCIA, ACCESO A LA INFORMACIÓN Y PROTECCIÓN DE DATOS PERSONALES. Lineamientos generales para la organización y conservación de los archivos de la Administración Pública General. <http://cevfaiprivada.ifai.org.mx/swf/cursos/archivos/introduccion.html>

Prepared under the direction of the Department of International Law, Secretariat for Legal Affairs, OAS. Consultants:

Beatriz Franco Espiño, Chief, Document Appraisal and Processing Service State Archives Office
Ministry of Education, Culture, and Sport of Spain

Ricard Pérez Alcázar, Department Chief, Archive Programming and Coordination Area State Archives Office Ministry of Education, Culture, and Sport of Spain.

CHAPTER III

**ACTIVITIES CARRIED OUT BY THE INTER-AMERICAN JURIDICAL COMMITTEE
DURING 2020**

A. Participation of the Presidents of the Inter-American Juridical Committee

Documents

- | | |
|---------------------|--|
| CJI/doc. 612/20 | Report by Dr. Ruth Stella Correa Palacio, Chair of the Inter-American Juridical Committee, to the Committee on Juridical and Political Affairs – (CAJP) (May 2020) |
| CP/CAJP/INF. 774/20 | Presentation of the Annual Report of the Inter-American Juridical Committee by its Chair, Dr. Ruth Stella Correa Palacio, to the Political and Juridical Committee

(Document prepared by the Department of International Law) |
| CJI/doc. 626/20 | Annual Report of the Chair of the Inter-American Juridical Committee, to the General Assembly (virtual session, October 21, 2000)
(presented by Dr. Luis García-Corrochano Moyano) |

* * *

On May 14, 2020, the Chair of the Committee, Dr. Ruth Stella Correa Palacio, submitted the Committee's Annual Report - 2019 to the Committee on Juridical and Political Affairs (CAJP) of the Permanent Council of the OAS, which took place virtually on May 14, 2020 (document CJI/doc. 612/20), on the occasion she announced the adoption by the Committee of the Proposed Model Inter-American Law 2.0 on Access to Public Information. She also referred to the developments of the website of Committee's, that has integrated its recent reports, as well as all the courses on international law courses from 1974 to the present.

She explained that he had requested an increase in the Committee's budget in order to regain the position of a permanent secretary in the city of Rio de Janeiro. The exchange with the delegates of the Permanent Missions has been recorded in a document prepared by the International Law Department, (document CP/CAJP/INF. 774/20).

On October 21, 2020, the new Chair of the Committee, Dr. Luis Garcia-Corrochano Moyano, presented the Annual Report to the General Assembly which took place virtually. On that occasion, the Chair emphasized the instruments adopted by the Committee in the last two years, such as the "Guide on the Law Applicable to International Commercial Contracts in the Americas", the "Proposed Model Law 2.0 on Access to Public Information", which responds to a mandate of the OAS General Assembly; the "Guidelines for Binding and Non-Binding Agreements"; and the report on "International Law and State Cyber-operations".

All mentioned documents are included below:

CJI/doc. 612/20

**REPORT BY DR. RUTH STELLA CORREA PALACIO,
CHAIR OF THE INTER-AMERICAN JURIDICAL COMMITTEE,
TO THE COMMITTEE ON JURIDICAL AND POLITICAL AFFAIRS (CAJP)
(May 14, 2020)**

Your Excellency, Ambassador Carlos Alberto Játiva; members of the CAJP: on behalf of the Inter-American Juridical Committee (CJI), I would like to express our gratitude for this opportunity to present, from a distance, the annual report on the activities of the CJI in 2019. Those activities are also detailed in the annual report distributed by the Permanent Council as document CP/doc.5600/20, which can also be found on the Committee's website.

The CJI is one of the principal organs through which the OAS accomplishes its purposes; it advises the Organization on legal matters, promotes the progressive development and codification of international law, and studies juridical problems related to the integration and harmonization of countries' laws.

Mandates and sessions

The CJI held two regular sessions at its headquarters in Rio de Janeiro, Brazil in 2019: from February 18 to 22 and from July 31 to August 9.

In recent months, the CJI adopted two instruments of international significance: a Guide to the Law Applicable to International Commercial Contracts in the Americas and a draft Model Law 2.0 on Access to Public Information.

The *Guide to the Law Applicable to International Commercial Contracts in the Americas* seeks to contribute to the harmonization of the law applicable to international commercial contracts in the region. To that end, it proposes specific recommendations for different actors at the domestic level, lawmakers, courts, and contracting parties, which can be applied regardless of the prevailing legal regime in each of our countries. The CJI Guide takes up concepts contained in the Inter-American Convention on the Law Applicable to International Contracts (Mexico Convention of 1994), as well as subsequent developments in the field, mainly reflected in the Principles on Choice of Law in International Commercial Contracts adopted in 2015 by the Hague Conference on Private International Law.

Since its adoption, the Guide has been widely shared among experts, academics, and international organizations, who have expressly welcomed it and recognized the important contribution it could make, not only in the region, but also globally. This undoubtedly reinforces the relevance of the role of the OAS in the progressive development and codification of international law. Both Dr. José Moreno, who served as rapporteur for the topic, and the Department of International Law, in its capacity as Technical Secretariat of the CJI, have made efforts to disseminate the Guide through presentations to, for example, the Hague Conference on Private International Law, the American Association of Private International Law, and the permanent missions to the OAS at its headquarters. This last briefing took place in January this year.

I would like to take this opportunity to call on Member States, through you, to disseminate the Guide as widely as possible among their authorities and relevant actors, so that the work of the CJI can accomplish its purpose of contributing to the strengthening of economic development in the region, an area where clarity in the treatment of the rules applicable to international contracts is key.

Also during our March 2020 session, the CJI adopted the approved the *Proposed Inter-American Model Law 2.0 on Access to Public Information* in response to a mandate from the OAS General Assembly. This document is the result of a broad consultation carried out by the Department of International Law with the region's guarantor bodies in this area, as well as lawmakers, judiciaries, civil society, academics, and other social actors working on the issue. I am

not going to dwell on the details of this process, which Dr. Dante Negro, Director of the Department of International Law, already presented to this Commission on April 23, but I would like to highlight some substantive aspects.

The proposed Model Law 2.0 conceives of access to public information as a tool that increases transparency in public management; allows corruption to be combatted effectively; promotes open competition, investments and economic growth; empowers various sectors of the population, including those in vulnerable situations; and is a fundamental component for the exercise of democracy. It is also a tool that contributes, in its design, to gender mainstreaming.

We have already transmitted the proposed model law to the Permanent Council so that it can relay it to the General Assembly, as requested in the resolution adopted by that body last year. Its adoption would mark a new stage in the consolidation of access to public information in the Hemisphere, 10 years after the adoption of the first model law, which had a great impact in terms of reform and modernization in so many countries in the region. The Organization should be proud of this development, since several global forums have underscored the contribution of our Hemisphere in this area in terms of experiences and good practices that have been replicated elsewhere. The adoption of this proposed Model Law will not only keep the OAS at the forefront of this issue, but also meet the expectations of countless actors in the region who are awaiting this new soft-law instrument as a frame of reference for their work, in particular the various guarantor bodies in the Hemisphere.

In relation to the current agenda of the CJI, it is important to note that it contains 12 items. Three of them correspond to mandates received from the General Assembly: “Electronic warehouse receipts for agricultural products,” “Protection of personal data”, and “Use of fireworks, whether for personal use or in large-scale firework displays.” The CJI included four topics on its own initiative during 2019: “Guidelines for further development of regulations on diplomatic asylum,” “Electoral fraud as an international crime in the inter-American system,” “Private customary international law in the context of the Americas,” and “Legal aspects of foreign debt.” The Committee has also retained the following five topics on its agenda: “Guidelines for applying the conventionality principle,” “Binding and non-binding agreements,” “Validity of foreign judicial decisions in light of the Inter-American Convention on extraterritorial validity of foreign judgments and arbitral awards,” “Cybersecurity,” and “Foreign interference in a State’s electoral process: A threat to democracy and sovereignty of states. Responses under international law.”

It would also be timely to respectfully call on the States that have not yet responded to the consultations we have held on the issues of “binding and non-binding agreements” and “cybersecurity” to send us their contributions and input on both issues, which will allow the reports that the CJI makes on these important matters to reflect the greatest possible number of points of view in the region.

I take this opportunity to invite you to examine the progress of our work on the CJI website. With the support of the Department of International Law, the information has been reorganized to make it readily understandable and to allow consultation of reports that are part of the current agenda of the CJI as well as work it has recently completed. Likewise, all annual reports since 1994 can be accessed. In addition every Course on International Law since its inception is included on the website. In this way we hope to make the Committee's work better known, as it is constantly being consulted. In 2019 alone, 13,718 documents in Spanish and 3,378 documents in English were downloaded from the site.

Miscellaneous topics

As in previous years, the CJI held its traditional Course on International Law, with the support of the Department International Law, in Rio de Janeiro, Brazil from July 22 to August 9, 2019. There were 43 students from 14 countries in the Hemisphere who paid for their own their participation, since once again the Course lacked the funds to offer scholarships. It should be noted that the event was held at the Law School of the Federal University of Rio de Janeiro thanks to the support of the *Núcleo Interamericano de Derechos Humanos* (NIDH) of that University.

During 2019 the CJI received representatives from various institutions who requested meetings with us. This shows the enormous interest that the work of the CJI has aroused in such important bodies as the International Institute for the Unification of Private Law (UNIDROIT) and the African Union Commission on International Law. Both institutions proposed specific areas for joint work in the immediate future. The CJI also received a visit from the Secretary General of the Organization, Mr. Luis Almagro, who discussed the Organization's legal agenda with CJI members.

Mr. Chairman, I would like to reiterate the readiness of the CJI to continue responding to the mandates of the political bodies of the Organization in a serious, rigorous, and expeditious manner with juridical products of high relevance to the region. This requires, however, a number of minimum conditions, including maintaining the budget of the CJI at least at its current level to allow the body to continue meeting each year for at least one week in the first half of the year and ten days in the second half. We also need to strengthen our Technical Secretariat. I wish to place on record the tireless contribution of the Department of International Law to the work of the CJI, which it does in addition to and notwithstanding its many obligations at OAS headquarters. We have long called for the reinstatement of the position of Secretary of the CJI, which would not only stop the CJI being the only organ in the system that does not have such a position, but would also provide the Department of International Law with an additional lawyer to assist in its ongoing support for the work of the CJI.

Mr. Chairman, delegates, thank you for the opportunity to address you in my capacity as Chair of the CJI. As always, the work and efforts of this body and its Technical Secretariat are at the disposal of the OAS Member States.

Thank you very much.

* * *

CP/CAJP/INF. 774/20

**PRESENTATION OF THE ANNUAL REPORT OF THE INTER-AMERICAN
JURIDICAL COMMITTEE BY ITS CHAIR, DR. RUTH CORREA PALACIO,
TO THE POLITICAL AND JURIDICAL COMMITTEE**

(Document prepared by the Department of International Law)

I. Introduction

On Thursday, May 14, 2020, the Chair of the Inter-American Juridical Committee, Dr. Ruth Correa Palacio, gave a presentation, transmitted from Bogotá, Colombia, of the annual report on the activities of the Inter-American Juridical Committee in 2019 to the Committee on Juridical and Political Affairs, which held a virtual meeting due to the Coronavirus (COVID-19) pandemic.

Her oral presentation is a summary of the Annual Report published as document CP/doc.5600/20, available at: http://www.oas.org/es/sla/cji/informes_anuales.asp in Spanish, and at: http://www.oas.org/en/sla/iajc/annual_reports.asp in English.

The meeting was chaired by Ambassador Carlos Alberto Játiva, Permanent Ambassador of Ecuador to the OAS, and attended, via streaming, by representatives of the following 23 permanent missions to the OAS: Antigua and Barbuda, Argentina, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Guyana, Honduras, Mexico, Panama, Paraguay, Peru, Saint Lucia, Trinidad and Tobago, United States, Uruguay, and the Bolivarian Republic of Venezuela.

II. Presentation by Dr. Ruth Correa Palacio

The Chair of the CJI began by mentioning the two legal instruments adopted by the Committee in the past year: a Guide to the Law Applicable to International Commercial Contracts

in the Americas and a Proposed Model Law 2.0 on Access to Public Information drawn up pursuant to a General Assembly mandate.

She explained that the Guide, adopted in March 2019, puts forward recommendations designed to promote harmonization of laws governing commercial contracts based on progress made in this field since adoption of the Convention of Mexico in 1994 and is drafted in such a way as to be applicable in all OAS Member States, regardless of their legal regime. She also reported on the efforts undertaken by the Juridical Committee and its technical secretariat, the Department of International Law, to promote the Guide and the recognition accorded it by prestigious institutions specializing in international contracts.

She then went on to underscore the benefits of the "Proposed Model Law 2.0 on Access to Public Information," adopted in March of this year, which draws on the experience and best practices of States and is geared, *inter alia*, to providing better protection for the population as a whole, making public administration more transparent, promoting investment, serving as a guide for the bodies responsible for guaranteeing the right of access to information in our Hemisphere, and potentially contributing to efforts to combat corruption, while enhancing the exercise of democracy. The Chair of the CJI explained that the Proposal was the fruit of updates contributed by the Department of International Law and that it had been sent to the Permanent Council for consideration and adoption by the General Assembly.

Regarding the CJI's current agenda, Dr. Correa outlined the 12 items on it and pointed out that three of them had been prompted by the General Assembly: "Electronic Warehouse Receipts for Agricultural Products," "Protection of Personal Data," and "The Use of Fireworks, for either personal use or in mass firework displays." At that point, she respectfully invited the States to respond to the Committee's questionnaires and queries concerning "Binding and Non-Binding Agreements" and "Cyber-security," so as to take as many State's opinions as possible into account, in each case.

The Committee Chair then mentioned the efforts made, with the support of the Department of International Law, to promote the Committee's work via the website. As a result, the work of the Committee can now be accessed online, including its annual reports, progress with rapporteurships under way, which are now open to the public, as well as all the international law courses. She reported that over the past year almost 14,000 documents in Spanish had been downloaded from the website.

Concerning the annual International Law Course, she drew attention to the fact that, for the second year running, the Committee had not received the funding that, in the past, had provided grants for students to attend the course, who now had to finance their presence and participation themselves. The Course was conducted in the law faculty of the *Universidade Federal do Rio de Janeiro*, attended by 43 students from 14 countries in the Hemisphere.

With respect to the Committee's budget, the Chair voiced her concern regarding the lack of a Committee Secretary position and kindly requested that the budget agreed on be maintained this year, as it represented the minimum required to hold two sessions a year.

The Committee Chair ended her presentation by reiterating the CJI's intention to continue working in the best interest of States through contributions to the region in line with the legal agenda of the OAS. Encouraged by experts' appreciation of the two non-binding instruments that the Committee is making available to States and by the interest shown in the Committee's work by international organizations specializing in international law, Dr. Correa reaffirmed the readiness of the members of the Committee to continue contributing to the progressive development and codification of international law.

III. Consideration of the Annual Report of the Inter-American Juridical Committee in light of the presentation by Dr. Ruth Correa Palacio

The Chair of the CAJP thanked Dr. Ruth Correa for her presentation and the presence of the Department of International Law in its capacity as Technical Secretariat of the Committee. That acknowledgment of the Committee Chair's presentation was repeated by all those who took the floor during the virtual meeting.

The delegation of Ecuador stressed the importance of the items on the CJI agenda for both the region and Ecuador. The delegate explained that Ecuador had replied to both of the Committee's questionnaires (the one on "binding and nonbinding agreements" and the one on "cyber-security") and had, furthermore, submitted comments on four items addressed in the Committee's 2019 report: protection of personal data, access to public information, application of the principle of conventionality, and cyber-security (a subject for which a meeting with the rapporteur had been requested to facilitate the identification of rules and, possibly, the development of a "national concept"). With regard to Proposed Model Law 2.0 on access to public information, the delegation said it was awaiting a decision by the Permanent Council. Finally, the delegation expressed its appreciation of the contributions to the Committee by Dr. Salvador Crespo, a Committee member who is also currently Procurator-General (*Procurador General*) of the Republic of Ecuador.

The delegation of Mexico took note of the Committee's report and of the CJI's dynamic agenda, despite budgetary constraints. The Ambassador of Mexico to the OAS congratulated the CJI and its Chair on the latter's election as the first woman ever to chair the Committee. She said that her election echoed the feminist approach espoused by her country's Ministry of Foreign Affairs and urged States to foster substantive equality when it comes to submitting candidacies for the next elections in the Committee. She also called for boosting the Committee's budget as a matter of priority in keeping with the level of responsibility vested in the body charged with the progressive development and codification of the system. Regarding the Committee's agenda, she underscored its initiative of working on diplomatic asylum and the updating of its approach to application of the principle of conventionality. She applauded the practical dimension and contribution to the protection of citizen's freedoms made by the Proposed Model 2.0 on Access to Public Information, which deserved the Organization's support. Finally, she called for the full budgetary backing needed to guarantee the Committee's technical autonomy and impartiality.

The delegation of Chile paid its respects to the Committee Chair and thanked her for her dedication and commitment. The Chilean Ambassador to the OAS said that the report was a major contribution to States which not only identified areas to be examined but also came up with options for addressing current challenges in international law. As examples of its achievements, he singled out the fact that the Guide to the Law Applicable to International Commercial Contracts in the Americas fosters economic integration and itself helps harmonize rules, while the Proposed Model 2.0 on Access to Public Information is especially relevant today. He added that he would be remitting comments by his delegation regarding "binding and non-binding agreements" and the "protection of personal data." Finally, he mentioned the General Assembly mandate asking the Committee to draft a model law, which was originally a Chilean initiative, on the "Use of Fireworks, for either personal use or in mass firework displays," in view of the positive impact of regulations in his country, which ban the sale and use of fireworks and establish rules governing firework displays based on safety requirements. On this topic, mainly geared to protecting children, he suggested that the Committee conduct a comparative study and that it send out a questionnaire to get a better grasp of the situation in the OAS member states.

The delegation of the United States thanked the Chair for her leadership during the Committee's very productive past 12 months. It pointed out that the United States keeps close track of the Committee's work and will submit comments on each item on the Committee's agenda, as work progresses. It also congratulated the Committee on its report on international commercial contracts. As regards the Committee's work on binding and non-binding agreements, the delegation asked for an extension, over and beyond the two months proposed for submitting comments, to enable it to conduct a conscientious review of the rapporteur's work, given the scope of that work and due to the delays caused in ministries of foreign affairs by the Coronavirus, irrespective of the current rapporteur's mandate, which is due to expire. Regarding the subject of access to public information, the delegation said it would be remitting its comments and concerns, for instance with respect to practical aspects of the Model's implementation, which could overwhelm systems and end up being counterproductive to its goal of enhancing transparency. In that connection, the delegation of the United States announced its intention to request, in the Permanent Council, that said instrument be debated in the Committee on Juridical and Political Affairs, and that amendments be permitted to the document adopted by the Inter-American

Juridical Committee prior to its referral to the General Assembly. Concerning the cyber-security item, the delegation urged the CJI to stick to the original goal of ascertaining the stances of a larger number of States and providing an opportunity to those who have not yet replied to the questionnaire, with a view to promoting transparency and refraining from expanding this project outside the region or attempting to synthesize States' positions, before eliciting the responses of other Member States. Notably, the delegation appreciated the identification of challenges to legal and technical capacities. On another tack, the delegation recalled that three vacancies will occur this year on the Committee, one due to the departure of Professor Duncan Hollis of the United States, who, despite ongoing backing from his country, will step down when his term ends. The delegation accordingly announced that the United States would in due course present the candidacy of a qualified expert in the field. Finally, the United States delegation expressed its appreciation of the Committee's dialogue with legal consultants and said it trusted that such an (in-person or virtual) encounter could take place this year.

The delegation of Costa Rica stressed the issue of parity in the composition of OAS bodies and activities and applauded the presence of Dr. Correa, as the first-ever women Chair in the history of the Committee. The delegation also called upon States to respect parity in the nomination and election of future members of the Committee. Regarding the matters examined by the Committee, the delegate said that Costa Rica was interested in capacity-building vis-à-vis cyber operations and in initiatives involving the development of internal rules and regulations for tackling cyber threats. Under the current circumstances imposed by the Coronavirus (COVID-19) pandemic, the delegate urged the Committee to lend assistance based on the contributions made to humanity by public and private international law.

The delegation of Colombia transmitted its congratulations to the Committee and took note of the instruments adopted over the past year, such as the "Guide to the Law Applicable to International Commercial Contracts in the Americas" and the "Proposed Model Law 2.0 on Access to Public Information" and singled out the progress being made in the current agenda, for instance with respect to "binding and non-binding agreements" and "cyber-security." The delegation highlighted the work of the Committee Chair, Dr. Ruth Correa, and her career in her home country and in the international arena. It pointed to the historical contributions made by the Committee and the important role that the CJI and other institutions specializing in internal law can play to respond to the crisis afflicting the world today. Accordingly, it issued a call for ongoing political and financial support for the work of the CJI and for that work to focus on issues rooted in its historical contributions that strengthen the rule of law in the Hemisphere.

The delegation of Brazil congratulated the Committee on its work and said it was an honor to host the Inter-American Juridical Committee in Rio de Janeiro. It emphasized the historical importance of its work and underscored the adoption of the "Guide to the Law Applicable to International Commercial Contracts in the Americas." The delegation invited States to increase the Committee's budget in view of its major achievements.

The delegation of the Dominican Republic acknowledged the Committee's work and pointed out the importance of the "Guide to the Law Applicable to International Commercial Contracts in the Americas." With respect to the Committee's current work of particular interest to the delegation, the delegate applauded the progress made on "cyber-security" and "protection of personal data." Finally, the delegation congratulated the Committee on the usefulness of its inclusion of the agenda item "Electoral fraud as an international crime in the inter-American system."

In his capacity as Chair of the CAJP, Ambassador Carlos Alberto Játiva took note of the presentation of the 2019 Annual Report of the Inter-American Juridical Committee by its Chair and of the comments made by the delegations. He said they would be transmitted to the Permanent Council and then remitted for consideration by the General Assembly at its fiftieth regular session. He proposed ensuring ample dissemination of the two documents recently adopted by the Committee: the Guide to the Law Applicable to International Commercial Contracts in the Americas and the Proposed Model Law 2.0 on Access to Public Information. With regard to the latter, he suggested bringing it to the attention of the Permanent Council with a view to facilitating its adoption by the General Assembly at its next regular session. He encouraged States to reply to

the Committee's queries regarding "binding and non-binding agreements" and "cyber-security." Finally, he undertook to send the Committee on Administrative and Budgetary Affairs a note attached to the report of the Chair of the Inter-American Juridical Committee, to ensure that the CAJP gives due consideration to the CJI's request for the position of Secretary of the Inter-American Juridical Committee to be reinstated on a permanent basis.

* * *

CJI/doc. 626/20

**ANNUAL REPORT OF THE CHAIR OF THE INTER-AMERICAN JURIDICAL
COMMITTEE TO THE GENERAL ASSEMBLY
(Virtual session, October 21, 2020)**

(presented by Dr. Luis García-Corrochano Moyano)

Mr. President, Minister Darren A. Henfield, I would like to begin by expressing my gratitude for this opportunity to present, from a distance, the annual report on the activities of the Inter-American Juridical Committee (CJI) in 2019 and including some developments that have taken place this year as well.

During the course of 2019, the CJI held two regular sessions at its headquarters in the city of Rio de Janeiro, Brazil, in February and July-August.

The work of codification and progressive development of international law of the Committee

In 2019, the CJI adopted a relevant instrument in matter of international law, the *Guide to the Law Applicable to International Commercial Contracts in the Americas*. The Guide proposes specific recommendations for different actors at the domestic level, lawmakers, courts, and contracting parties aiming at harmonization of the issue in the region considering it can be applied regardless of the prevailing legal regime in each of our countries. The CJI Guide takes up concepts contained in the Inter-American Convention on the Law Applicable to International Contracts (Mexico Convention of 1994), as well as subsequent developments in the field, mainly reflected in the Principles on Choice of Law in International Commercial Contracts adopted in 2015 by The Hague Conference on Private International Law. Since its adoption, the Guide has been widely shared among experts, academics, and international organizations, who have expressly welcomed it and recognized the important contribution it could make, not only in the region, but also globally. The Guide is currently available on the Committee's website in English, Portuguese and Spanish.

Also during our March 2020 session, the CJI approved the *Proposed Inter-American Model Law 2.0 on Access to Public Information* in response to a mandate from the OAS General Assembly. This proposal conceives of access to public information as a tool that increases transparency in public management; fights corruption; promotes open competition, investments and economic growth; empowers various sectors of the population, including those in vulnerable situations; and is a fundamental component for the exercise of democracy. It is also one of the first international instruments that contributes, in its design, to gender mainstreaming.

I do not want to overlook the fact that the two instruments referred above are of paramount importance during the pandemic we are living through. The Guide to International Contracts can serve users in those situations where international contracting has been disrupted by COVID-19 and the economic implications that this represents. Whereas, the proposed Model Law on Access to Public Information includes important and updated parameters that will facilitate transparency and confidence with respect to emergency decisions adopted to combat this scourge.

I would also like to place on record two documents recently adopted at the August session. At that occasion, the CJI approved a "Guidelines on Binding and Non-Binding Agreements", which offer a concrete and detailed set of definitions, points of understanding, and best practices that OAS member states might consider using in the negotiation, adoption, or implementation of different types of international agreements, as well as in their interaction with the various actors

involved (States, government entities, and territorial units). Such Guidelines provide greater knowledge in these areas and lower the risk of future difficulties with other states in the region and around the world. In the field of cybersecurity, the Committee emphasized the need to provide OAS Member States with clear parameters on the application of international law to cyberspace—and thus limit the risks of unintended escalation or conflict. Thus, based on the proposals contained in the report entitled “International Law and State Cyber Operations” the CJI recommends that the OAS General Assembly support the applicability of international law to state operations in cyberspace through a declaration included in the text of a resolution adopted by the CJI.

I would like to take this opportunity to respectfully call on member states to consider disseminating all instruments referred to, as widely as possible among their authorities and relevant actors, and in the case of the Model Law 2.0 on Access to Public Information to adopt it.

In addition to the cited issues, the Committee’s agenda is composed of topics that correspond to mandates from the General Assembly, such as “electronic warehouse receipts for agricultural products”; “Protection of personal data” and “use of fireworks”. Other topics have been included on their own initiative such as diplomatic asylum, electoral fraud, international customary law, legal aspects of the external debt, foreign investment, business and human rights, principle of conventionality, extraterritorial validity of foreign judgments, foreign interference in democratic elections, and cyber-security.

I also take this opportunity to invite you to examine the progress of our work on the CJI website, which is constantly updated and reorganized with the support of the Department of International Law, the Technical Secretariat of the Inter-American Juridical Committee.

Promotion of International Law

As in previous years, the CJI held its traditional Course on International Law, with the support of the Department International Law, in Rio de Janeiro, Brazil in 2019. The Committee received representatives from various institutions which shows the enormous interest that the work of the CJI has aroused in such important bodies as the International Institute for the Unification of Private Law (UNIDROIT) and the African Union Commission on International Law. The CJI also received a visit from the Secretary General of the Organization, Mr. Luis Almagro, with whom we discussed the Organization's legal agenda. It must be noted that the Joint Meeting between the CJI and the legal advisors of ministries of foreign affairs of member states originally scheduled for August of this year was postponed to August 2021, at its headquarters in Rio de Janeiro, Brazil, due to the COVID-19 pandemic. These meetings are highly important to us and legal advisors, thus we encourage Member States to continue to facilitate such participation.

Budgetary issues

One last issue I want to address is the budget situation of the CJI. We thank all those delegations that constantly support the Committee so that its budget is not cut. Currently, the CJI has sufficient financial resources to carry out its work, but does not have the needed human resources at its Technical Secretariat, which is the Department of International Law. These human resources have been progressively cut in recent years. I urge Member States to consider this situation, which impacts the effective development of the CJI's function, despite the Department's ongoing support for our work. On the other hand, any further reduction, however minimal, would definitely jeopardize the possibility of the Committee continuing to comply with General Assembly mandates in an efficient and timely manner, as it has done thus far. These mandates are increasing year by year in response to the growing need of member states for this body's contributions to the codification and progressive development of international law.

Mr. Chairman, delegates, thank you for the opportunity to address you in my capacity as Chair of the Inter-American Juridical Committee. As always, the work and efforts of this body and its Technical Secretariat, the Department of International Law of the Secretariat for Legal Affairs, are at the disposal of the OAS Member States.

Thank you very much.

* * *

B. International Law Course

For the first time in 47 years, due to the COVID-19 pandemic, the Course on International Law, originally scheduled for July 20 through August 7 in Rio de Janeiro, Brazil, was not held and was postponed until next year.

Concerning the promotion of international law, the Secretary for Legal Affairs explained at the August session that since March 2020, his office had been holding virtual forums with senior guests from academia, including Chief Justices of Supreme Courts, members of the CJI, and jurists from the Caribbean. He invited the members to consider participating in future forums to report on the Committee's current agenda, beginning with those whose respective rapporteurships had ended this year. Information on the webinars can be found at: http://www.oas.org/en/sla/virtual_forum.asp

* * *

C. Relations and cooperation with other Inter-American bodies and with regional and global Organizations

Meetings sponsored by the Inter-American Juridical Committee during the 96th Regular Session, held in Rio de Janeiro, Brazil:

- 1) March 3, 2020: Videoconference with Marek Dubuvec, Executive Director of the National Law Center of the United States, as described in the section on electronic warehouse receipts for agricultural products
- 2) August 4, 2020: Videoconference with Ignacio Tirado – Secretary-General of UNIDROIT, Rome, Italy.

Dr. José Moreno invited Dr. Ignacio Tirado to describe recent developments in UNIDROIT in potential areas of interest to the Committee.

Dr. Ignacio Tirado stated first that the Principles of Transnational Civil Procedure, having brought together different legal perspectives from both civil and common law, could serve as a general framework for development at the regional level. The OAS proposal therefore offered an opportunity to do something in the Americas similar to what was done with the European Law Institute. Since the principles had been established, what was needed was to draft detailed rules that covered the Region of the Americas. This project had been accepted in UNIDROIT and, thus, the next step would be to decide on its content with OAS and IAJC staff, who would prepare something concrete indicating the viability and need for the project. He stated that while UNIDROIT did not have the financial resources to monitor this type of project, it would be useful to make first contact with the secretariats of each institution.

Next, Dr. Tirado spoke about a draft model law on electronic warehouse receipts, stating that UNCITRAL and UNIDROIT were awaiting confirmation by their respective executive bodies to determine the scope of work.

Finally, concerning the preparation of a guide to good practice in the enforcement of judgments decisions and real guarantees, Dr. Tirado stated that this project originated in the World Bank. Decisions in this area tended to conflict with other areas of the law in the enforcement stage. Thus, the intention was to study the current situation and identify weaknesses and best practices (something that should have a significant electronic component). He stated that the enforcement project was being examined by a working group and would lead to the preparation of a legislative guide to good practice (with recommendations) but not a model law for the moment, due to lack of consensus.

The Chair thanked Dr. Tirado for his clear and direct explanation of the possibilities of a joint report for the Committee's consideration.

* * *

INDEXES

ONOMASTIC INDEX

ARAÚJO, Nadia de	55
ARRIGHI, Jean-Michel	16, 19, 39, 171, 177
BAENA SOARES, João Clemente	27, 186, 191
BERTRAND-GALINDO ARRIAGADA, Milenko	16, 18
CEVALLOS ALCÍVAR, Juan	186
COLLOT, Gélín Imanès	27
CORREA PALACIO, Ruth Stella	16, 19, 22, 27, 41, 59, 429, 430, 432
DUBUVEC, Marek	110, 438
ESPECHE-GIL, Miguel Angel	16, 19, 177, 183, 190
FUJIMORI, Alberto	177
GALINDO, George Bandeira	16, 19, 58, 77, 117, 175, 193
GARCÍA-CORROCHANO MOYANO, Luis	12, 16, 18, 20, 39, 74, 173, 325, 429, 436
HERNÁNDEZ GARCÍA, Joel	32, 37, 54, 187
HOLLIS, Duncan B.	16, 18, 20, 112, 117, 120, 141, 171, 184, 193, 199, 261
MATA PRATES, Carlos Alberto	28, 73, 190
MORENO RODRÍGUEZ, José Antonio	16, 18, 20, 40, 52, 55, 109, 111, 182, 190, 438
MORENO-VALLE, Jaime	19
NEGRO, Dante M.	16, 19, 57, 110, 323
PARADA, Eduardo	19
PICHARDO OLIVIER, Miguel Aníbal	
RICHARD, Alix	16, 21, 58, 113, 171
RUDGE, Eric P.	16, 18, 58, 117, 195
SALAZAR ALBORNOZ, Mariana	16, 18, 39, 58, 73, 76, 119, 326
SALINAS BURGOS, Hernán	27, 177
SALVADOR CRESPO, Iñigo	16, 19, 20, 21
SOUZA GOMES, Maria Conceição de	16, 19
STEWART, David P.	27, 109
TIRADO, Ignacio	438
TORO UTILLANO, Luis	16, 19
TRAMHEL, Jeannette	57, 108, 109
VIEIRA, Maria Lúcia Iecker	16, 18
VILLALTA VIZCARRA, Ana Elizabeth	30, 185

* * *

SUBJECT INDEX

Agreements – contracts	184, 199, 260, 263
Azylum	173
International law	
Course, International law	438
Customary law	175
Cyber security	120, 141, 170
Democracy	171
Electoral process	171
Electronic receipts	108-112
Fireworks	180
Foreign debt	183
Foreign investments	183
Foreign judgments	51, 59
Fraud	177
Homages	18, 20, 21, 22
Human Rights	
Business	183
Principle of Conventionality	27, 41
Inter-American Juridical Committee	
activities	429
agenda	16, 19
cooperation	438
date and venue	17
observer	430, 432, 436
structure	15
Right to Information	
access to public information	323, 328
personal data	73, 79, 84

* * *