JOINT EFFORT OF THE AMERICAS IN THE
STRUGGLE AGAINST CORRUPTION AND IMPUNITY

(presented by Doctor Ana Elizabeth Villalta Vizcarra)

I. RESOLUTION BY THE INTER-AMERICAN JURIDICAL COMMITTEE CJI/RES.77 (LXV-O/04)

During its 65th Ordinary Session (August 2 to 27, 2004), The Inter-American Juridical Committee approved Resolution CJI/RES.77 (LXV-O/04) denominated Joint efforts of the Americas in the struggle against corruption and impunity, which took into account the Quito Declaration on social development and democracy, and the impact of corruption which declares the commitment to “deny safe haven to corrupt officials... as well as to cooperate in their extradition.”

Considering that through Resolution AG/RES 2022 (XXXIV-O/04), Joint efforts of the Americas in the struggle against corruption and impunity in its Article 4, the General Assembly asked the Inter-American Juridical Committee to prepare a study on: a) the legal effects of granting safe haven in regional or extra-regional countries to public officials and persons charged with crimes of corruption after having held political power; and b) the cases in which fraud against the law or abuse of the law is considered in relation to the principle of dual nationality.

The Inter-American Juridical Committee, through the resolution, resolved among other issues, to designate Doctor Ana Elizabeth Villalta Vizcarra to present the study requested by the General Assembly in its Resolution AG/RES.2022 (XXXIV-O/04), bearing in mind the following elements: a) the Inter-American Convention Against Corruption, especially concerning legal aid and cooperation, and bearing in mind that corruption is an extraditable offense; b) the provisions relating to the United Nations Convention against Corruption, in particular concerning international cooperation; c) the content and scope of the provisions of several resolutions of the General Assembly regarding the existing obligation to deny safe haven to corrupt officials who have held political power, and to cooperate towards placing them at the disposal of the pertinent authorities of the countries where the crimes were committed in order to be tried by their national courts; d) existing international jurisprudence on the matter of "effective nationality or genuine link", especially the rulings of the International Court of Justice in the Nottebohm Case (Liechtenstein v. Guatemala) and sentence of the Permanent Court of Arbitration in The Hague in the Caneparo Case (Italy v. Peru); e) treatment to be given to requests for asylum in those cases involving individuals accused of crimes of corruption, in order to prevent impunity.

In compliance with this Resolution, the undersigned presents the report during the 66th Ordinary Session of the Inter-American Juridical Committee (from February 28th to March 11th of 2005), and organized as follows to approach the theme: A) The Inter-American
INTRODUCTION

Currently, corruption constitutes one of the new threats or a non-traditional threat in the Americas because corruption is no longer a local matter but has become a transnational phenomenon that affects all societies and economies, creating a need for International Instruments to regulate it in order to prevent, detect, fight and punish it.

Corruption weakens democracy and undermines the legitimacy of its institutions, it erodes the Constitutional State and jeopardizes government capacity to respond to other security threats; it endangers society, justice and society’s moral fiber, as well as the comprehensive development of the peoples.

Corruption constitutes a new threat, concern and challenge to hemispheric security, among others, which are of a diverse nature and have a multi-dimensional approach and scope, including political, economic, social, health and environmental aspects.

Corruption constitutes a non-traditional threat to the Inter-American System as well as to the Universal and Sub-regional Systems and for this reason, reference has also been made to International Instruments within the Framework of the United Nations Organization (UN), the Organization of American States (OAS), and the Central American Authority of Integration (SICA).

A) The Inter-American System

1) Background

Resolution AG/RES.1159 (XII-O/92) dated May 22, 1992, by the General Assembly of the Organization of American States (OAS) refers to “Corrupt Practices in International Trade”, and establishes that these are a phenomena severely affecting transparent relations between the States and are undermining stable institutional democracy. These corrupt practices can thwart the process of comprehensive development by diverting resources needed to improve the peoples’ economic and social conditions, and at the same time have adverse repercussions on International Trade and Investment movements, constituting one of the economic and social challenges for the nineteen nineties decade.

Resolution AG/RES.1294 (XXIV-O/94) denominated Probit and Public Ethics, refers that the Charter of the Organization of American States recognizes representative democracy as an indispensable condition for the region’s stability, peace and development; that corruption is one of the obstacles to the observance of human rights; that the Member States of the Organization should study measures consistent with each country’s legal system while improving public administration and promoting transparency and integrity in managing public resources. That the problem of corruption is now an issue of serious concern affecting both industrialized and developing countries throughout the world and the phenomenon is not restricted to our hemisphere.

Resolution AG/RES.1346 (XXV-O/95) refers to “The Summit of the Americas” held in Miami between December 9th and 11th, 1994, wherein the Heads of State and Government expressed that all aspects relating to public administration should be transparent and open to public scrutiny in a democracy. That the Organization of American States (OAS) constitutes an appropriate forum to analyze challenges faced by the region’s countries and to evaluate the mechanisms for juridical cooperation in order to prevent and punish any corruption that
may affect the Member States, this requiring a hemispheric approach to acts of corruption in both public and private sectors that would include extradition and prosecution of individuals accused of corruption, through negotiations for a new hemispheric agreement or new arrangements within the framework of existing international cooperation agreements. The convenience that a Work Group on Probity and Public Ethics draft a Project for the Inter-American Convention against Corruption with support from the General Secretariat, based on the proposal presented by the Government of Venezuela, and refers the Inter-American Juridical Committee to formulate observations to the Draft for the Inter-American Convention against Corruption.

Resolution AG/DEC.8 (XXV-O/95) held on June 7, 1995 and titled Declaration of Montrouis: a new vision of the OAS, expressed: "Their decision to fight public and private corruption in all its forms. To this end, and taking into account the work under way in the Organization, they support cooperation and the exchange of experiences to promote state modernization, transparency in government administration, and the strengthening of internal mechanisms for investigating and punishing acts of corruption as well as the holding of a specialized conference in Caracas to consider and if appropriate, adopt an Inter-American Convention against corruption."

On March 29, 1996, the Specialized Conference convened through the OAS General Assembly Resolution AG/RES.1346 (XXV-O/95) to adopt the Inter-American Convention against Corruption, which constitutes a unique international legal instrument on the subject and gathers the commitment by the States to carry out actions both in the internal and international spheres to fight corruption, also expressing in its preamble, that they are "Convinced that corruption undermines the legitimacy of public institutions, it endangers society, justice and moral order, as well as comprehensive development of the peoples." The Convention entered into effect on March 6, 1997.

Resolution AG/RES.1395 (XXVI-O/96) denominated Annual Report of the Inter-American Juridical Committee especially thanked the Committee for major contribution it made to the successful adoption of the Inter-American Convention against Corruption. In this sense, as follow-up, it refers the Committee to prepare model legislation regarding illicit enrichment and transnational bribery.

The General Assembly determined that the OAS constitutes a n a ppropriate forum to exchange information on the challenges faced by countries of the region in matters regarding the fight against corruption, as well as to achieve more effective international cooperation to fight it, by adopting the Inter-American Program for Cooperation in the Fight Against Corruption through Resolution AG/RES.1477 (XXVII-O/97).

Resolution AG/DEC. 16 (XXVIII-O/98) denominated Reaffirmation of Caracas, ratifies the commitment by the Heads of State and Government in the Declaration of Santiago, adopted within the framework of the Second Summit of the Americas, to review the institutional framework of the Inter-American System, particularly the Organization of American States, in order to strengthen its capacity to respond to the challenges of the new century.

Resolution AG/DEC.35 (XXXII-O/03) denominated Support for Ecuador in its Fight against Corruption, approved on June 10, 2003, the General Assembly took into account that the Declaration of Santiago on Democracy and Public Trust: A New Commitment to Good Governance for the Americas, affirms that "corruption and impunity weaken our public and private institutions, distort our economies, and undermine the social values of our peoples". Likewise, it points out that "cooperation and reciprocal assistance against corruption, in
accordance with applicable treaties and law, are fundamental factors in the promotion of democratic governance.”

In this sense, they reaffirmed their support for Ecuador in its fight against corruption and impunity in accordance with the applicable international instruments and national legislation.

Resolution AG/DEC.33 (XXXIII-O/03) denominated Support for Peru in its Fight Against Corruption and Impunity, approved on June 10, 2003, the General Assembly ratified that the fight against corruption is fundamental to the exercise of democracy, institution building, and strengthening of the rule of law. Likewise, it declares its support for the Peruvian State in the effort being made by her people and the State to fight corruption and impunity, in the framework of full respect for human rights, and reiterates the will of the governments of the Member States to extend the widest possible cooperation and assistance to the Government of Peru, in accordance with applicable treaties and law, by processing requests from that country’s competent authorities under its domestic law, to investigate and bring to trial cases of corruption and other serious crimes, in order to fight impunity.

Resolution AG/DEC.36 (XXXV-O/04) denominated Declaration of Quito on Social Development and Democracy, and the Impact of Corruption, approved in a plenary session on June 8, 2004, recalls in said Declaration “that the Inter-American Democratic Charter declares that the peoples of the Americas have a right to democracy and their governments have an obligation to promote and defend it and, at the same time, it establishes that transparency in government activities, probity, and responsible public administration on the part of governments are essential components of the exercise of democracy.” Throughout the processes for Summits of the Americas, the Heads of State and Government have been concerned with the fight against corruption.

They underscore the Declaration on Security in the Americas, through which a multi-dimensional approach recognizes corruption as a new threat to the security of the States that undermines public and private institutions as well as public trust, generates great economic damages, affects stability, distorts the rule of law and harms government capacity to respond to other threats to the security" and that cooperation among Sovereign States plays an important role in supporting national efforts to consolidate democracy, to promote social development and to fight against corruption.

In that sense, the Inter-American Convention against Corruption is the most important legal instrument within the Inter-American scope for fighting corruption, as it establishes essential means of cooperation in the struggle against this scourge and thus promotes international actions to prevent, detect and penalize it.

In this same sense, they declared: "That development, democracy and the fight against corruption are deeply related and therefore, should be treated in a balanced and comprehensive manner.”

They reaffirmed their commitment in the fight against corruption, which endangers democracy and democratic governance, weakens institutions, jeopardizes economic and social development and the struggle against poverty, undermining public trust and political stability.

“That within the framework of national legislation and applicable international regulations, they are committed to denying safe haven to corrupt officials, to those that corrupt them, and to assets or goods resulting from corruption, as well as to cooperate in their extradition, recovery and restitution of assets originated by corruption to their legitimate owners, and they commit themselves to perfect the regional mechanisms for mutual juridical assistance in criminal matters.”
"The international community must carry out a far-reaching concerted effort by the Hemispheric States in the fight against corruption and impunity by providing the widest cooperation within the existing framework of treaties and applicable laws, in order to prosecute persons that commit corruption acts against the State through political power, to be judged by their national courts and to respond before them", and that “International Cooperation against corruption should be respectful of the sovereignty and territorial integrity of the States and the principle of non-intervention in internal affairs.”

That in the exertion of power, governance is the shared responsibility of the government, political parties and civil society in general, and contemplates authorities’ obligation to render accounts for optimum transparency.

It was established that corruption is a phenomenon that threatens the effectiveness of democratic institutions and affects the economic and social development of nations.

That the fight against corruption is a priority in the Americas because it is the essence of the Inter-American System, preservation and strengthening of democracy, and the Inter-American Democratic Charter establishes it by expressing that: the fundamental components in the exertion of democracy are transparency in government activities, probity (integrity), responsibility in public administration by governments, and the freedom of expression and the press; because by fighting corruption we will achieve better social justice as well as better investment and economic growth.

2) Summit of the Americas

The “First Summit of the Americas” held in Miami, Florida on December 9th to 11th of 1994 in the Declaration denominated First Summit and Corruption, the Heads of State and Government expressed:

“Effective democracy requires a comprehensive attack on corruption as a factor of social disintegration and distortion of the economic system that undermines the legitimacy of political institutions.”

The Heads of State and Government confirmed their commitment presented in the Declaration of Principles in the “Action Plan and Corruption”, in its point 5, The Fight against Corruption, expressed:

“The problem of corruption is an issue of primary interest now a-days, not only for this hemisphere, but also for all the regions of the world. Corruption in public and private sectors weakens democracy and undermines the legitimacy of governments and institutions. The modernization of the State, which includes deregulation, privatization and simplification of governmental procedures, reduces the opportunities for corruption.

In a democracy, all the aspects relating to public administration must be transparent and open to public scrutiny.”

In this sense, among other actions, they agreed to develop in the Organization of American States with due consideration of Treaties and the pertinent national laws, a hemispheric approach to acts of corruption in the public and private sectors in include extradition and prosecution of individuals accused of corruption, through the negotiation of a new hemispheric agreement or new arrangements within the existing framework for international cooperation.

In the “Second Summit of the Americas”, held in Santiago de Chile, on April 18 and 19 of 1998, in its Declaration denominated “Second Summit and Corruption”, the Heads of State and Government expressed:
"We will lend new impetus to the struggle against corruption, money laundering, terrorism, weapons trafficking, and the drug problem, including illicit use, and work together to ensure that criminals do not find safe haven anywhere in the Hemisphere. We are determined to persevere in this direction."

The Action Plan of the Second Summit and Corruption expressed unfaltering support for the “Inter-American Program to Fight Corruption”, implement actions therein, particularly the adoption of a strategy to achieve prompt ratification of the “Inter-American Convention against Corruption” approved in 1996, elaboration of the Codes of Conduct for public officials, in conformity with the respective legal frameworks, study on the problem of goods and product laundering coming from corruption, and to promote dissemination campaigns on the ethical values that support the democratic system.

In the “Third Summit of the Americas and Corruption”, celebrated in Quebec, Canada on April 20 and 22 of 2001, in its Declaration Third Summit and Corruption, the Heads of State and Government expressed: “Recognizing that corruption undermines basic democratic values, it represents a challenge to political stability and to economic growth, and therefore, threatens vital interests of our hemisphere, we will reinforce our struggle against corruption. Likewise, we recognize the need to improve human security conditions in the hemisphere.”

In its Action Plan Third Summit and Corruption, in its point “Fight against Corruption”, they expressed: “that corruption severely affects public and private democratic political institutions, weakens economic growth and affects the needs and basic interests of the least favored groups in all countries, and that the responsibility of preventing and controlling this problems depends both on governments as well as legislative bodies and judicial powers.

In this sense, they considered to: sign and ratify or adhere to the Inter-American Convention against Corruption, as soon as possible and as the case may be; promote and ratify its effective application through the Inter-American Cooperation Program to Fight Corruption; to establish a follow-up mechanism for implementation of the Inter-American Convention against Corruption, to strengthen the Inter-American Cooperation Network against Corruption; to promote whenever pertinent, participation by Civil Society in its struggle against corruption.

In the “Extraordinary Summit of the Americas”: the Heads of State and Government met during the Extraordinary Summit held in the City of Monterrey, Mexico, on January 13th of 2004, and with the purpose of moving forward on the instrumentation of measures to combat poverty, promote social development with a renewed and strengthened vision of cooperation, solidarity and integration, confront the continuous and increasing challenges in the hemisphere, such as new security threats. In that sense, the issued the Declaration of Nuevo Leon and in relation to “Democratic Governance”, they reaffirmed their decision to coordinate immediate actions whenever democracy is endangered in any of our countries; strengthen and respect the rule of law; defend human rights and fundamental freedoms, economic progress, social justice and well-being, transparency and the rendering of accounts in public affairs, promote diverse forms of citizen participation and generate opportunities for everyone, all of which are essential to promote and consolidate representative democracy.

They recognized that corruption and impunity weaken public and private institutions, erode social values, undermine the rule of law, and distort economies and the allocation of resources for development. Therefore, they pledged to intensify their efforts to combat corruption and other unethical practices in the public and/or private sectors, strengthening a culture of transparency and ensuring more efficient public management.
They refer to the "Inter-American Democratic Charter", which points out that the peoples of the Americas have the right to democracy and that their governments have the obligation to promote and defend it, and it establishes that transparency in government activities, probity and responsibility in public management are key components of democracy.

In this sense, in the framework of applicable national and international law, they committed themselves to deny safe haven to corrupt officials, to those who corrupt them, and their assets; and to cooperate in their extradition as well as in the recovery and return of the proceeds of corruption to their legitimate owners. They also committed to enhance regional mechanisms for mutual legal assistance in criminal matters and their implementation. Likewise, they expressed that the “United Nations Convention against Corruption” is a valuable instrument to confront this scourge, and therefore we commit to consider signing and promoting its ratification.

3) Inter-American Convention against Corruption

It was subscribed in Caracas, Venezuela on March 29, 1996 and in its preamble establishes that: corruption is often a tool used by organized crime for the accomplishment of its purposes; that, in some cases, corruption has international dimensions, which requires coordinated action by States to fight it effectively; that to combat corruption, the States have the responsibility of eradicating impunity, and to cooperate with one another for their efforts in this area to be effective, reason for which they are convinced of the need for prompt adoption of an international instrument to promote and facilitate international cooperation in fighting corruption and, especially, in taking appropriate action against persons who commit acts of corruption in the performance of public functions, or acts specifically related to such performance, as well as appropriate measures with respect to the proceeds of such acts.”

The main purpose of the Convention is to promote and strengthen development of the necessary mechanisms by each of the State Parties to prevent, detect, sanction and eradicate corruption.

Said Convention regulates in its Article XIII, matters relating to Extradition by establishing that this Convention may be considered as the legal basis for extradition with respect to any offense to which this article applies, and extradition shall be subject to the conditions provided for by the law of the State Party or by applicable extradition treaties, after verifying that circumstances justify it and are of an urgent nature, and upon request of the Requested State Party, proceed to detain the person requested for extradition in its territory, or adopt other measures to ensure appearance in extradition procedures.

Article XIV regulates matters referring to Assistance and Cooperation by establishing that the State Parties shall afford one another the widest measure of mutual assistance by processing requests from authorities that, in conformity with their domestic laws, have the power to investigate or prosecute the acts of corruption described in this Convention, to obtain evidence and take other necessary action to facilitate legal proceedings and measures regarding the investigation or prosecution of acts of corruption described in the present Convention, and shall also provide each other with the widest measure of mutual technical cooperation on the most effective ways and means of preventing, detecting, investigating and punishing acts of corruption.

4) Inter-American Democratic Charter

It was subscribed on September 11th, 2001, in Lima, Peru and marked the beginning of a new era in the Inter-American System, having as a starting point, the Declaration that
status: “The Peoples of America have the right to democracy and their governments have the obligation of promoting and defending it.”

Among the conditions considered essential for democracy and that nations are committed to defend are: respect for human rights and essential liberties, the possibility for the peoples to elect their governments and Express their will through free and fair elections, transparency and integrity in State institutions and among those appointed as heads of these; recognition and respect for social rights; the existence of public participation spaces and mechanisms so that citizens become directly involved in defining their own destiny; and lastly, strengthening of political parties and organizations as a means for expressing the peoples’ will.

This Charter is based on the principle established in the Charter of the Organization of American Status (OAS), which recognizes that representative democracy is indispensable for stability, peace and development in the region.

Key components in the exercise of democracy are “transparency in government activities, probity, and responsible public administration by governments, respect for social rights and the freedom of expression and of the press.”

5) Declaration on Security in the Americas

This Declaration was adopted on October 8 of 2003, within the framework of the Special Conference on Security held in Mexico City on October 27 and 28 of 2003, with the purpose of promoting and strengthening peace and security in the hemisphere, and takes into account the Santiago Commitment with democracy and the renovation of the inter-American system of 1991, which decided to begin a joint reflection process on hemispheric security from an updated and comprehensive perspective in light of new world and regional circumstances. In this sense, considering that the Declaration of Bridgetown recognizes that threats, concerns and other challenges to Security in the Hemisphere are of a diverse nature and multi-dimensional scope, and that the traditional approach and scope must be widened to encompass new and non-traditional threats that include political, economic, social, health and environmental aspects, reason for which complex characteristics have determined that security has a multi-dimensional character (which includes traditional threats and new threats, concerns and other challenges to the security of the States in the Hemisphere).

The hemispheric States will have to cooperate in shared values as well as common approaches to face traditional and new threats, concerns and other security challenges.

These new threats to hemispheric security are of an inter-sector nature that requires responses to multiple aspects on the part of national organizations and in some cases, association between governments, the private sector and civil society, all acting in an appropriate manner in conformity with democratic principles and regulations.

To face these new threats, it is necessary to have as basis shared values and common approaches well-recognized in the hemisphere, and in this sense, it must be enhanced that:

"a) Threats, concerns and other challenges to security in the hemisphere are of a diverse nature and multi-dimensional scope and concept, and that traditional approaches should be widened to encompass new and non-traditional threats that include political, economic, social, health and environmental aspects."

"M) Hemispheric State security is affected in many different forms by traditional and new threats, concerns and challenges of a diverse nature: terrorism, transnational organized crime, the global drug problem, corruption, asset laundering, illicit trafficking in weapons and the connections between them..."
The specialized OAS forums, Inter-American and international, must develop cooperation in order to face these new threats, concerns and other challenges based on applicable instruments and mechanisms.

In this order, meetings between the Ministers of Justice or General Prosecutors of the Americas (REMJA), and other meetings between authorities on matters of criminal justice are important and efficient forums to promote and strengthen mutual understanding, trust, dialogue and cooperation in the formulation of policies for criminal justice and respond to new threats to security.

Through this Declaration on Security in the Americas, the delegates condemned: transnational organized crime because it threatens State institutions and has harmful effects on our societies. They renewed the commitment to fight it by strengthening the internal juridical framework, the rule of law and multilateral cooperation with due respect for sovereignty in each State, in particular through the exchange of information, mutual legal assistance and extradition. To fight against transnational organized crime through full implementation of the obligations assumed by the State Parties to the United Nations Convention against Transnational Organized Crime and its three Protocols, so that asset laundering, kidnapping, illicit trafficking with people, corruption and other related crimes are typified as crimes in the hemisphere, and that proceeds from those crimes be identified, sought, frozen or seized, and ultimately, to confiscate and alienate them.

Likewise, improve coordination and technical cooperation to strengthen national institutions dedicated to preventing and punishing these transnational crimes, and identify and prosecute members of transnational criminal organizations."

In Numeral 31, they expressed: "We reaffirm our commitment in the fight against passive and active corruption, which constitute a threat to the security of our States and undermines public and private institutions as well as society’s trust, generating great economic damages, affects stability, erodes the rule of law and harms governmental capacity to respond to other security threats. Its effects propagate to different fields of activity in our States, reason for which cooperation, mutual legal assistance, extradition and concerted actions to fight it are a political and moral imperative. We commit ourselves to strengthen follow-up mechanisms to the Inter-American Convention against Corruption and support the United Nations Convention on the subject."

To deal with this struggle, the Delegates reaffirmed their "commitment to revitalize and strengthen the organs, institutions and mechanisms of the inter-American system related to the multiple aspects of security in the hemisphere, achieve major coordination and cooperation among them within their areas of competence in order to improve the capacity of the American States to face traditional and new threats, concerns and other challenges to security in the hemisphere."

Within the framework of the “Special Conference on Security”, the Third Plenary Session approved a Declaration on the Central American Model for Democratic Security on October 28th of 2003, which recognizes the contribution of the 1995 Framework Treaty on Democratic Security in Central America to the new vision on hemispheric security and its multi-dimensional approach, was well as great progress attained by the Central American Security Commission in executing the Central American Democratic Security Model.

Said Declaration enhances substantial contributions by the Central American Integration System to the hemispheric security design, as well as advances in comprehensive development of its democratic security model.
6) **Fight against Corruption and Impunity**

Resolution AG/RES.2022 (XXXIV-O/04) denominated *The Joint Effort of the Americas in the Struggle against Corruption and Impunity*, approved on June 8, 2004, considers: That the Charter of the Organization of American States recognizes that representative democracy is an indispensable condition for the stability, peace, and development of the region and that transparency in government activities, probity, and responsible public administration on the part of the government are essential components of the exercise of democracy, as stated in the Inter-American Democratic Charter.

That the Inter-American Convention against Corruption establishes that the fight against corruption strengthens democratic institutions and that the in this struggle it is the responsibility of the States to eradicate impunity; that their action in this area requires cooperation among them in order to be effective.

It recalls that the Declaration of Santiago on Democracy and Public Trust: a new commitment to good governance for the Americas, affirms that cooperation and reciprocal assistance against corruption, in accordance with the applicable treaties and law, are fundamental factors in the promotion of democratic governance, and that the Declaration on Security in the Americas, the States reaffirmed that cooperation, mutual legal assistance, extradition and concerted action to combat corruption constitute a political and moral imperative.

That in the Declaration of Nuevo Leon, adopted at the Special Summit of the Americas, the Heads of State and Government pledge, inter alia, to cooperate in the extradition of corrupt officials and to enhance regional mechanisms for mutual legal assistance in criminal matters and their implementation.

Likewise, the preamble of the United Nations Convention against Corruption emphasizes that corruption is no longer a local matter but a transnational phenomenon that affects all societies and economies, making international cooperation to prevent it and fight it essential.

That it is necessary, in accordance with the various documents we have adopted in the Hemisphere, to express, in a collective and unified manner, the political will of our peoples to insist that the international community fulfill its commitments to these values and ideals.

In this order of ideas, the General Assembly resolved to: reaffirm that the struggle against corruption and impunity is a fundamental commitment and a mutual duty of the States of the Americas, as a guarantee of the exercise of democracy and the consolidation of its institutions, governance, strengthening of the rule of law, and respect for human rights, because corruption, whether passive or active, is a menace to the security of States, undermines public and private institutions, and encumbers the development of peoples."

To express, in the context of strengthening democratic governance, their full support for the efforts being carried out by member states so that those who have committed acts of corruption against those states while in public office shall be prosecuted by national courts and answer before them."

Likewise, they call upon the international community, in accordance with applicable treaties and laws, to refrain, without accepting justifications based on fraud or abuse of the law and legal principles, from granting safe haven; and to provide broad cooperation to the states of the hemisphere for the purpose of guaranteeing that those public officials who have exercised political power and, in that capacity, have committed crimes of corruption, may be made available to the corresponding authorities of the countries in which these crimes were committed for prosecution by their national courts.
B) The Universal System

In the framework of the United Nations, concerned by the severity of the problems and threats from corruption against the stability and security of all societies by undermining institutions and democratic values, ethics and justice, as well as affecting sustainable development and the rule of law; and at the same time concerned by the links between corruption and other forms of crime, in particular organized crime and economic crime, including Money laundering, that in those cases of corruption that involve vast amounts of assets, which can constitute an important proportion of the resources of the States, and that they threaten political stability and sustainable development in those States.

That corruption is no longer a local problem and has become a transnational phenomenon that affects all societies and economies, and international cooperation to prevent it and fight is essential, requiring a broad and multi-disciplinary approach to prevent and fight corruption in an effective manner.

That it is necessary to prevent, detect and dissuade international transfers of assets illicitly acquired in a more efficient manner, and to strengthen international cooperation to recover assets because prevention and eradication of corruption are the responsibility of all the States who must cooperate among each other.

In this sense, the Member States of the Organization of the United Nations subscribed to The United Nations Convention against Corruption known as the Convention of Mérida, on December 10th of 2003 in Mérida, Yucatan, Mexican United States, which constitutes an effective and modern instrument in the struggle against corruption, since it establishes among others, the obligation of the State Parties to adopt preventive measures and to penalize a broad scope of corruption acts; to lend the widest cooperation for extradition and reciprocal legal assistance in conformity with national legislation and applicable international regulations.

The object of this Convention is to: promote and strengthen measures to prevent and fight corruption in a more efficient and effective manner; promote, facilitate and support international cooperation and technical assistance in the prevention and struggle against corruption, including recovery and repossession of assets; and promote integrity, the obligation to render accounts and due management of public affairs and assets.

Chapter IV regulates all matters referring to International Cooperation and specifically, extradition; transference of sentenced persons; reciprocal legal assistance, among others. In the same sense, it also regulates international cooperation for recovery of assets.

Chapter IV establishes that the Parties will have wide-scope cooperation in criminal issues and that whenever appropriate and in accordance with the national legal system, the State Parties will consider the possibility of lending assistance in the investigation and corresponding procedures corresponding to civilian and administrative matters related to corruption.

With regard to extradition, the most ample cooperation is regulated since it establishes that it will apply to typified crimes according to the present Convention in those cases where the person object of a request for extradition in the territory of the Requesting State Party, as long as the crime for which the extradition is requested is punishable in accordance with the national law of the Requesting State Party and the Requested State Party. Despite the above, if allowed by the legislation of a State Party, it can grant extradition of a person for whatever crimes comprehended in this Convention that is not punishable according to its own national laws.
That when the national law of a State Party allows it, the Convention may serve as a basis for extradition and will not consider any crimes typified according to the Convention as being of a political nature, and if a State Party subordinates extradition to the existence of a treaty, receives a request for extradition from another State Party with which it has no associated extradition treaty, may consider the Convention as juridical basis for the extradition with respect to the crimes to which this Convention applies.

That the State Parties that do not subordinate extradition to the existence of a treaty, will recognize the crimes to which the present article applies as cause for extradition among them. That the State Parties, in conformity with their national laws, will speed up extradition procedures and streamline the corresponding probative requirements with respect to any crimes to which the Convention applies. If an alleged criminal is in the territory of a State Party and it does not extradite him with respect to a crime to which this Convention applies due to the fact that he is one of its nationals, previous request from the State Party that requests the extradition, it will be forced to submit the case without unjustified delay to its competent authorities for purposes of prosecution.

When the national law of a State Party only allows extradition or in some way surrender of one of its nationals under the condition that the person be returned to that State Party to comply with the imposed sentence as result of a judgment or prosecution for which the extradition was requested, and that State Party and the State Party that requested the extradition accept that option; if the request for extradition or handing over with the purpose of complying with the sentence is denied due to the fact that the person sought is a national of the required State Party, if its national law allows it and in conformity with the requirements of said law allow it, previous request from the Requesting State Party, will consider the possibility of imposing compliance of the imposed sentence or de remaining part of the sentence in accordance with the national law of the Requesting State Party. Before denying the extradition, the Requested State Party, when adequate, will consult with the Requesting State Party in order to provide ample opportunities to present its opinions and provide pertinent information to its allegations. The State Parties will try to celebrate agreements, or bilateral or multi-lateral arrangements to carry out the extradition or increase its efficiency.

With regard to reciprocal Legal Assistance, the State Parties will lend the most ample reciprocal legal assistance with respect to investigations, prosecutions and legal actions related to crimes included in the present Convention.

The Convention provides for the establishment of Conference of the State Parties in the Convention with the purpose of improving the capacity of the State Parties and cooperation between them to attain the objectives and promote and examine its application.

C) The Sub-Regional System

The Central American Authority for Integration (SICA) constitutes the Sub-Regional System in the Central American Region, which updates the Juridical Framework of the Organization of Central American States (ODECA), readapted to the current reality and needs through the Protocol of Tegucigalpa to the Charter of the Organization of Central American States (ODECA) subscribed by the Summit of Central American Heads of State and Government on December 13 of 1991, wherein SICA constitutes the institutional framework of Central American Regional Integration.

Article 3 in its incise b) of the Protocol of Tegucigalpa, among other regulated purposes, the following: "To establish a new Regional Security Model based on the reasonable balance of forces, strengthening of public power, overcoming extreme poverty,
promotion of sustainable development, environmental protection, eradication of violence, corruption, terrorism, drug and weapons trafficking."

This Regional Security Model was set forth with the subscription of the Framework Treaty on Democratic Security in Central America, on December 15 of 1995, in the Summit of Central American Presidents held in San Pedro Sula, Honduras.

This Central American Democratic Security model upholds the supremacy and strengthening of public power, the reasonable balance of forces, citizen security and their properties, overcoming poverty and extreme poverty, promotion of sustainable development, environmental protection, eradication of violence, corruption, impunity, terrorism, drug related activity, and illicit traffic of weapons. The adoption of a framework legal instrument becomes a need to facilitate integral development of all the aspects contained in the New Democratic Security Model, that is, the Framework Treaty on Democratic Security in Central America.

Public or private corruption constitutes a threat to democracy and citizen security and for the States of the Central American Region within this model, and therefore, the State Parties are committed to carry out all the efforts for eradicating it at all levels and manners.

In this sense, the Parties carry out all efforts to eradicate impunity by elaborating programs leading to harmonization and modernization of the Central American criminal justice systems.

The concept of Democratic Security is integral and inseparable and comprehends all the aspects for sustainable development in Central America, in its political, economic, social, cultural and ecological manifestations, constituting a multi-dimensional approach to Democratic Security.

With the purpose of contributing to the consolidation of Central America as a Region of peace, freedom, democracy and development, one of the objectives consists of: "Establishment or strengthening operational coordination mechanisms of the competent institutions for a more effective struggle against crime and all the threats to democratic security, such as terrorism, illicit traffic of arms, drug activity and organized crime."

In this manner, the 1995 Framework Treaty for Democratic Security in Central America has contributed a new vision to Hemispheric Security and its multi-dimensional approach, and Resolution AG/RES.2053 (XXXIV-O/04) denominated Central American Model for Democratic Security, approved on June 8, 2004 expresses it as such, and it also calls on the Central American States to continue working on the implementation of its initiatives, among others, public security for persons and their properties, overcoming poverty, particularly extreme poverty and corruption.

D) Nationality Conflicts

Nationality is conceived as the political-legal ties that unite a person with a determined State, which generate reciprocal rights and obligations.

Nationality conflicts arise due to diverse regulations on the positive rights in this aspect. There are two types of conflicts: negatives and positives. There are negative conflicts when a person lacks nationality, not being a citizen of any State (stateless person), and there is no legislation to apply. There are positive conflicts when a single person has two or more nationalities, reason for which two or more legislations can be applied.

The same person can have double or multiple nationalities as a consequence of a positive nationality conflict. This conflict may cause fraudulent naturalizations on some occasions when invoked by *mala fides*.

When double nationality exists, a claimant cannot be protected against its own State, and The Hague 1930 *Agreement on Codification of International Law* in its Article 4 establishes so by expressing that: “no State can exert diplomatic protection in benefit of one of its nationals, against another State to which it is also a national.”

**THE HAGUE CONVENTION OF 1930**

The *Hague Convention of 1930* codified the vast majority of the general principles in effect on matters of nationality, on issues relating to conflicting laws on nationality, thus Article 1 states: “each State must determine by its own law who are its nationals. This law will be recognized by other States as long as it is compatible with the conventions, common regulations and well-recognized general principles of international law.”

The same Convention in its Article 4 establishes that: “a State cannot give diplomatic protection to one of its nationals against a State of whom the person is also a national. Likewise, a person that has two or more nationalities cannot use the fact that he is a national of one of those States to begin legal procedures before a commission or international court against the other State of which he is also a national.”

In relation to “effective or dominant nationality”, Article 5 of the Convention expresses: “a person that has more than one nationality will be treated as if he had a single nationality within a third State.” Without prejudice of the application of the law on matters relating to the personal condition and of any convention in effect, the authorities of the third State will exclusively recognize any one of the nationalities that the person has; the nationality of the country in which he habitually and mainly resides, or the nationality of the country to which he is apparently more intimately connected by circumstances.”

**EFFECTIVE NATIONALITY**

The principle of effective nationality has been confirmed by jurisprudence and by development of conventional law, and it is understood as an effective and closer relationship with a determined State. An example of this is the 1912 Sentence by The Hague Permanent Court of Arbitration in the Canevaro Case.

Effective nationality takes into account all the factual circumstances of a person that determine his real connections to one State or another. Doctrine on effective nationality is also regulated in Article 3, Paragraph 2 of the By-Laws of the International Court of Justice by expressing: “any person to be elected as a member of the Court who could be considered as a national of more than one State, will be considered a national of the State where he ordinarily practices his civil and political rights.”

**The Canevaro Case**

This is a diplomatic protection case interposed by Italy on behalf of Rafael Canevaro against Peru, which considered whether Rafael Canevaro should be considered an Italian claimant and The Hague Permanent Court of Arbitration ruled against; that in reality, regardless of the condition that Canevaro has in Italy, Peru has the right to consider him a Peruvian citizen and to deny his character as an Italian claimant, since he behaved as a Peruvian when he presented his nomination for the Senate (where only Peruvian citizens can be elected), having carried out his office as Consul General of Peru in The Netherlands and effectively presenting himself as a Peruvian.
This case established that when double nationality exists since birth (by the combination of the principles of *jus soli* and *jus sanguinis*), in case of a conflict between the two, the "effective or dominant nationality" will prevail and it can be determined on the basis of the person's desires, intentions, actions and behavior.

In matters of double nationality, the international arbitrators have not given prevalence to *jus sanguinis* over *jus soli*, but rather to "effective nationality", that is, the extent and place to which an individual was established, and that is the place where Public Authority will be in charge of the individual and will determine his condition, (Sentence by The Hague Permanent Court of Arbitration, Canevaro Affair, May 3, 1912, Italy-Peru), J.P. Niboyet, Principles of International Private Law.

The Mergé Case

The case dealt with a claim due to loss of property and compensation in detriment of a person with double nationality, Mrs. Florence Strunsky Mergé, national from the United States by *jus soli* and national of Italy by marriage. On the basis of facts and the claimant's behavior, the Conciliation Commission determined that the Mergé Family did not have the United States as its habitual residence, that the interests and professional life of the head of the family were not established in the United States, reason for which they did not consider that the claimant, Mrs. Mergé, to have "dominant nationality" of the United States.

The Conciliation Commission upheld the opinion that the principle of "effective nationality" and the concept of "dominant nationality" were simply two faces of the same coin. In this case, the Commission expressed: "The principle based on the sovereign equality of the States, which excludes diplomatic protection in the case of double nationality, must give precedence to the principle of effective nationality, as long as that nationality is that of the claiming State. But precedence will not be granted when that predominance is not clearly demonstrated, because the first of these two principles is generally recognized and can constitute criteria for practical application to eliminate any possible uncertainty." (Conciliation Commission Italy-United States in the Mergé Affair in 1955)

The Nottebohm Case

Mr. Friedrich Nottebohm was born on September 26, 1881 in Hamburg, and thus held German nationality. He moved to Guatemala in 1905, where he lived and worked until 1943. However, he maintained family relations in Germany as well as Liechtenstein, where one of his brothers lived as of 1931. In 1939, he requested nationality from the Principality of Liechtenstein, a neutral country during World War II. Liechtenstein granted nationality to Nottebohm that same year, and Nottebohm renounced his nationality of origin and obtaining nationality of the Principality. Nevertheless, Nottebohm continued to live in Guatemala until he was arrested in 1943, detained, expelled and prohibited from returning to Guatemalan territory. His assets (both properties and movables) were confiscated.

For this reason and as a citizen of Liechtenstein, on December 17, 1951 Nottebohm appealed to the International Court of Justice against Guatemala. The Court examined whether the naturalization conferred under these circumstances granted Liechtenstein the right to provide Nottebohm with diplomatic protection against Guatemala, his country of habitual residence.

Guatemala filed a preliminary objection of lack of jurisdiction, arguing that the Declaration by which Guatemala accepted the Court's jurisdiction had expired in January 1952. The Court denied this objection in a judgment dated November 18, 1953. Guatemala also requested that the Court declare the claim by Liechtenstein inadmissible, arguing: 1) that

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Nottebohm had obtained nationality from Liechtenstein in an irregular manner and in contravention of the Principality’s legislation; 2) that said naturalization had not been granted pursuant to generally recognized principles with respect nationality; and 3) that Nottebohm had requested nationality from the Principality in a fraudulent manner in order to acquire the condition of citizenship of a neutral country, with no veritable desire to establish a lasting connection with the Principality.

By a judgment of 11 votes to 3, the International Court of Justice decided that the Principality of Liechtenstein was not entitled to exercise Nottebohm’s diplomatic protection against Guatemala, stipulating that: “According to the practice of States, to arbitral and judicial decisions and to the opinions of writers, nationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties.”

The Court determined that the link that united Nottebohm with Guatemala, although it was not a link of nationality, was stronger than that which united him to Liechtenstein. Therefore, Guatemala was not obliged to recognize the nationality conferred under these circumstances. The Court also established that the connections between Nottebohm and Liechtenstein were “extremely tenuous” in comparison with the close connections between Nottebohm and Guatemala over a period of 34 years, leading the Court to affirm that Liechtenstein did not have title to exercise protection in respect to Nottebohm against Guatemala.

The principle of “genuine connection” emphasizes the real or social connections that an individual has or had during his or her life with a certain country. It is particularly relevant when determining the true motives that lead the individual to seek naturalization in another country.

Subsequently, in its decision of April 6, 1955, the Court held Liechtenstein’s claim to be inadmissible, giving priority to effective nationality based on the following: “According to the practice of States, to arbitral and judicial decisions and to the opinions of writers, nationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties. It may be said to constitute the juridical expression of the fact that the individual upon whom it is conferred, either directly by the law or as the result of an act of the authorities, is in fact more closely connected with the population of the State conferring nationality than with that of any other State.”

The State of effective or dominant nationality may undertake legal actions in respect to a national against another State (Canevaro case, Permanent Court of Arbitration, 1912: jurisprudence that served as a basis for the International Court of Justice in the Nottebohm case.)

In summary, in the Nottebohm case, the Principality of Liechtenstein intended to exercise diplomatic protection in respect to a German national residing in Guatemala (Nottebohm), alleging that, according to its legislation, said individual had acquired its nationality and therefore should not have been considered a German citizen by Guatemalan authorities, who confiscated his properties in treating him as the national of an enemy State (Germany) during World War II. Without deciding on the internal legitimacy of the granting of nationality by Liechtenstein, the Court affirmed that the Principality’s opposition to other States could only be judged by international law and not national law, and international law requires an effective link between the individual and the State. In this case, this condition

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was not met, and therefore the Court denied the legitimacy of Liechtenstein to exercise diplomatic protection of Nottebohm.

THE INTERNATIONAL LAW COMMISSION

Since its 48th Session held in 1996, the United Nations International Law Commission has considered that the theme of diplomatic protection is one of the most ideal in terms of codification and progressive development of international law. In the same year, the General Assembly, through Resolution 51/160 dated December 16, 1996, invited the Commission to examine the topic and indicate its scope and contents with respect to the observations presented by the governments. Since that date, the Commission has been developing the topic in such a way that it now has "draft articles on diplomatic protection" approved by the Commission on first reading. In the part corresponding to diplomatic protection and nationality, said "text of draft articles" stipulates the following:

DIPLOMATIC PROTECTION

Part One

GENERAL PROVISIONS

Article 1

Definition and scope

Diplomatic protection consists of resort to diplomatic action or other means of peaceful settlement by a State adopting in its own right the cause of its nationals in respect of an injury to that national arising from an internationally wrongful act of another State.

Article 2

Right to exercise diplomatic protection

A state has the right to exercise diplomatic protection in accordance with the present draft articles.

Part Two

NATIONALITY

Chapter I

GENERAL PRINCIPLES

Article 3

Protection by the State of nationality

1. The State entitled to exercise diplomatic protection is the State of nationality.

2. Notwithstanding paragraph 1, diplomatic protection may be exercised in respect of a non-national in accordance with draft article 8.

Chapter II

NATURAL PERSONS

Article 4

State of nationality of a natural person

For the purposes of diplomatic protection of natural persons, a State of nationality means a State whose nationality the individual sought to be protected has acquired by birth, descent, succession of States, naturalization or in any other manner, not inconsistent with international law.

**Article 5**

**Continuous nationality**

1. A state is entitled to exercise diplomatic protection in respect of a person who was its national at the time of the injury and is a national at the date of the official presentation of the claim.

2. Notwithstanding paragraph 1, a State may exercise diplomatic protection in respect of a person who is its national at the date of the official presentation of the claim but was not a national at the time of the injury, provided that the person has lost his or her former nationality and has acquired, for a reason unrelated to the bringing of the claim, the nationality of that State in a manner not inconsistent with international law.

3. Diplomatic protection shall not be exercised by the present State of nationality in respect of a person against a former State of nationality of that person for an injury incurred when that person was a national of the former State of nationality and not of the present State of nationality.

**Article 6**

**Multiple nationality and claim against a third State**

1. Any State of which a dual or multiple national is a national may exercise diplomatic protection in respect of that national against a State of which that individual is not a national.

2. Two or more States of nationality may jointly exercise diplomatic protection in respect of a dual or multiple national.

**Article 7**

**Multiple nationality and claim against a State of nationality**

A State of nationality may not exercise diplomatic protection in respect of a person against a State of which that person is also a national unless the nationality of the former State is predominant, both at the time of the injury and at the date of the official presentation of the claim.

**Article 8**

**Stateless persons and refugees**

1. A State may exercise diplomatic protection in respect of a stateless person who, at the time of the injury and at the date of the official presentation of the claim, is lawfully and habitually resident in that State.

2. A State may exercise diplomatic protection in respect of a person who is recognized as a refugee by that State when that person, at the time of the injury and at the date of the official presentation of the claim, is lawfully and habitually resident in that State.

3. Paragraph 2 does not apply in respect of an injury caused by an internationally wrongful act of the State of nationality of the refugee.
The Commission has understood that diplomatic protection is the procedure employed by the State of the nationality of the person injured in order to guarantee the protection of said person and to obtain rectification of the injury caused by the internationally wrongful act. In exercising diplomatic protection, the State adopts as its own the cause of the national injured by the internationally wrongful act of the other State. This means that there must be an injury caused to a national as the result of the wrongful act of the other State.

The Commission has also indicated that although it is true that a State has the right to decide who its nationals are, this right is not absolute, in such a way that a State against which a claim has been formulated may challenge the nationality of the person when said person has acquired the nationality against international law, in which case the burden of proof shall fall on the State that challenges the nationality of the injured person.

In the case of multiple nationality and claim against a State of nationality (article 7 of the draft text), the Commission insists that the claimant State demonstrate that its nationality is predominant, both at the time of injury and on the date of official presentation of the claim. The Commission has also considered that the principle enabling a State of “dominant or effective” nationality to present a claim against another State of nationality reflects the current position in common international law. In this sense, although it is true that the document uses the terms “effective” or “dominant” to describe the necessary link between the claimant State and its national, in situations in which the State of nationality presents a claim against another State of nationality. [sic]

The Commission has considered using the term “predominant” to describe this link, since this gives an idea of relativity and indicates that the person maintains closer links with one State than with the other. In addition, this was the term used by the “Italy-United States Conciliation Commission” in the Mergé affair, which may be considered the starting point of the development of the current consuetudinary rule.

In this order of ideas, it is clear that for the United Nations International Law Commission, the following are basic elements for exercising diplomatic protection: that injury has been caused to a national as the result of the wrongful act of another State, and that nationality has not been acquired in a manner inconsistent with international law, that is, fraudulently.

For the Commission, article 8 corresponds to the progressive development of international law since it enables a State to exercise diplomatic protection in respect of a person who is not its national when this person is stateless or a refugee.

With respect to refugees, this issue is diplomatic protection by the State of residence since refugees can not or do not want to resort to the State of nationality. The Commission has preferred not to put limits on the term refugee so that any State may grant diplomatic protection to any person deemed to be and treated as a refugee.

The Commission has also considered that the State of refuge may not exercise diplomatic protection against the State of nationality of the refugee since nationality is the predominant basis for the exercising of diplomatic protection. The exercising of diplomatic protection must absolutely not be interpreted in a sense that affects the nationality of the protected person.

FRAUD IN LAW

Fraud in Law may occur in cases of “fraudulent naturalization.” People often use the faculties they enjoy to change circumstances of connection or points of contact (nationality, domicile, situation, etc.) with the exclusive objective of avoiding legislation that would interfere
with or prejudice their goals or interests, placing themselves under another power more favorable to the ends they pursue. This situation constitutes “Fraud in Law” in private international law.

In this sense, “Fraud in Law” consists of the voluntary and conscious evasion of a determined law and placement under the power of another through the real and effective change of certain circumstances or factors of connection.

In this respect, nationality may be changed for many reasons, for example: to escape a very severe marriage regime, to deduct the payment of certain taxes, to evade certain public obligations such as military service, to evade a request for extradition or an order of expulsion, etc. In the same way, domicile may be used to vary applicable law.

Niboyet defined this aspect as follows: “In private international law, the notion of Fraud in Law is the necessary recourse so that the law conserves its imperative nature and its sanction in cases in which it ceases to be applicable to a juridical relation when those interested have fraudulently resorted to a new law.”

In order for “Fraud in Law” to apply, the presence of the following requisites is necessary: a) the intention to evade or deceive imperative or prohibitive provisions of determined legislation; that is, fraudulent intent, b) the intention to substitute said provisions with those of other legislation; that is, the desire to provoke the application of other legislation; c) the change of certain circumstances of connection or points of contact must be carried out deliberately and with the stipulated purposes; on the contrary, fraud in law would not occur but rather the violation of law; d) said change must be real and effective; and e) the legislation eluded, evaded or deceived must be lex fori (the law of the jurisdiction where the case is pending).

Fraud in law basically seeks to make the application of the competent foreign juridical provision ineffectual. In private international law, fraud in law tends to evade the law contained in a provision that prohibits the implementation of a determined act, submitting instead to the power of a more tolerant law.

Article 6 of the 1981 Inter-American Convention on General Rules of Private International Law regulates the principle of fraud in law: The law of a State Party shall not be applied as foreign law when the basic principles of the law of another State Party have been fraudulently evaded. The competent authorities of the receiving State shall determine the fraudulent intent of the interested parties. In this sense, the Convention established fraud in law as an exception to the application of foreign law.

Fraud in law is based on the adage “Fraus Omnia Corruptit” (fraud corrupts all), which assumes that fraud must be sanctioned not only in internal law but also in private international law.

When it seeks to divert or distort the reason for being of the rules of private international law or the objective sought by the legislator in dictating said rules, fraud in law resembles, as claimed by Professor Armijón, “abuse of process,” since it is based on the abuse of the ability to acquire a foreign nationality, domicile or residence abroad in order to deceive the law of the former nationality, domicile or residence.

Relying on the above-mentioned aphorism of Fraus Omnia Corruptit, French jurisprudence has declared that any exclusion from a legal precept based on a fraudulent
connection with foreign law is ineffective and, therefore, the precept that was sought to be eluded must be applied. 7

In this sense, there is an obligation that States abstain from providing safe haven to corrupt functionaries who have exercised political power and from this position have committed crimes of corruption, as well as to cooperate so that said functionaries are made available to the corresponding authorities of the countries in which they committed the crimes, to be judged by their national courts. This obligation implies abstention from providing sanctuary to corrupt functionaries and refusal to accept justifications based on fraud in law or abuse of process, since the granting of sanctuary to these individuals leads to impunity and constitutes an obstacle against the due imparting of justice, thus affecting the broad international cooperation that States must afford in order to combat this scourge. In this sense, “fraud in law” or “abuse of process” with respect to dual nationality can be used as a means to avoid justice and therefore to favor impunity. For this reason, any fraudulent action whose objective is to evade or avoid the application of justice for crimes of corruption affects the relative rules of international juridical cooperation.

Based on the above, impunity is the juridical effect that may occur as a result of the granting of safe haven in regional or extra-regional countries to public functionaries and persons accused of crimes of corruption after having exercised political power. This promotes the evasion of justice and acts as an obstacle against the due administration of justice, affecting at the same time the rules related to the international juridical cooperation that States must provide in order to fight against this scourge, converting these States into veritable paradises or sanctuaries for corruption. This affects international peace and security, since corruption weakens democracy and undermines the legitimacy of its institutions; erodes the rule of law and hampers governmental capacity to respond to other threats against security; and works against society, justice and the moral order and against the integral development of peoples. Thus the needs to prevent, detect, combat and penalize it.

It is here that extradition plays an important and essential role as an effective mechanism in the fight against corruption. This is the reason that both the “Inter-American Convention against Corruption” and the “United Nations Convention against Corruption” recognize that crimes of corruption are considered to be included among those crimes that give rise to extradition in all treaties in effect between State Parties and that, in the absence of a Treaty of Extradition, the Convention is considered a sufficient juridical base. For this reason, it is necessary that regional and extra-regional States cooperate more effectively and opportunistically in the fight against this problem by celebrating bilateral or multilateral agreements to carry out extradition or to increase its efficiency; by ensuring expeditious, effective and efficient procedures for ongoing requests for extradition; and by ensuring to the extent possible that these requests are not rejected, since this would favor impunity.

It is advisable that the State Parties whose legislation so allows do not consider to be of a political nature any of the crimes typified as crimes of corruption in the “Inter-American Convention against Corruption” and the “United Nations Convention against Corruption.” Otherwise, corrupt functionaries could hope to make use of the right to asylum or safe haven in order to avoid the administration of justice. In this sense, before conceding asylum or safe haven State Parties must take into due consideration the importance of fighting corruption and of conferring upon crimes of corruption the character of common rather than political crimes, so as to prevent the promotion of impunity and the creation of sanctuaries or paradises for corrupt public functionaries and individuals.

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In this sense, Article XVII (Nature of the act) the Inter-American Convention against Corruption literally states: “For the purposes of articles XIII, XIV, XV and XVI of this Convention, the fact that the property obtained or derived from an act of corruption was intended for political purposes, or that it is alleged that an act of corruption was committed for political motives or purposes, shall not suffice in and of itself to qualify the act as a political offense or as a common offense related to a political offense.”

The Convention does not consider an act of corruption as a political offense or as a common offense related to a political offense precisely so that the figure of extradition can be exercised, since acts of corruption become extraditable crimes and the Convention itself a juridical basis for extradition.

In addition, because the “act of corruption” does not constitute a political offense or a common offense related to a political offense, the elements of asylum and safe haven cannot take shape, since both are based on political persecution and in the case of corruption we would be dealing with common offenses. Consequently, the treatment that should be awarded to requests for asylum in cases involving individuals accused of corruption, in order to prevent impunity, is to qualify them as inadmissible because acts of corruption do not qualify as political offenses or common offenses related to political offenses, and in order to proceed with asylum the juridical nature of the offense must be of a political character. In this sense, those who request asylum must be pursued for political offenses or motives; in the case of common offenses, the person does not have the right to asylum. As acts of corruption are not political in nature, the element of asylum does not proceed and, therefore, these acts cannot remain unpunished. In a similar manner, the granting of safe haven for acts of corruption would not proceed.

E) CONCLUSIONS AND RECOMMENDATIONS

In the global arena as well as at the hemispheric and sub-regional levels, corruption is one of the new threats against security, a threat that must be fought through international cooperation, mutual judicial assistance in criminal matters, extradition and concerted action by the international community.

The phenomenon of corruption is not only seen at local and national levels but also on a transnational scale. Therefore, the fight against it now involves international instruments. Corruption itself, along with related offenses, is regulated in these instruments, including the 1995 Framework Treaty on Democratic Security in Central America, the 1996 Inter-American Convention against Corruption and the 2003 United Nations Convention against Corruption.

All of these instruments emphasize the need for expeditious, effective and efficient international judicial cooperation: This is one of the reasons that the Inter-American Convention on Mutual Assistance in Criminal Matters has been established within the inter-American arena, and the Treaty of Mutual Legal Assistance in Criminal Matters has as been created Central American level. In the same way, agile procedures have been adopted for extradition in order to fight corruption, with the Conventions serving in many cases as the legal basis for extradition. In this way, the fight against impunity advances and States are prevented from becoming sanctuaries for corrupt officials.

The fight against corruption must be effective. As we have seen in this report, corruption is an assault against democracy and its institutions, against the rule of law and against democratic governance. It harms society, justice and the moral order, and it prevents the integral development of peoples.
Therefore, the public and private fight against corruption must be a task not only for States and their governments but also for civil society, so that efforts in this struggle become effective and thus counteract one of the new threats facing today's international security.

In this sense, it is helpful to remember that the "Inter-American Convention against Corruption" is currently in effect between Member States of the Organization of American States (OAS). It has been ratified by 33 Member States, for which its fulfillment is obligatory.

There is a need to urge States within the international community to sign and ratify the "United Nations Convention against Corruption," so that this instrument enters into effect as soon as possible, as well as to demand its fulfillment.

That States ensure that the rules of international judicial cooperation come into effect so that extradition and mutual judicial assistance become expeditious, effective and efficient through the completion of multilateral and bilateral treaties on extradition and mutual judicial assistance; or, in the event that such treaties do not exist, that the "Inter-American Convention against Corruption" and the "United Nations Convention against Corruption" become the legal basis for said cooperation; or, as a last resort, that requests for extradition and judicial assistance proceed based on reciprocity and international judicial cooperation, so that corrupt functionaries who have exercised political power in their respective States can be brought before corresponding authorities in the countries in which they committed said offenses of corruption and thus be judged by their national courts, thereby strengthening the rule of law and the administration of justice and fighting not only corruption but also impunity. Such a fight against this new scourge will help to preserve international peace and security, since both corruption and impunity are among the new threats against these conditions.

It is necessary for all States of the international community to ensure the practical application of these rules, so as not to become sanctuaries or paradises for those accused of crimes of corruption after having exercised political power.

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24- Sentencias de la Corte Internacional de Justicia de 1953 y 1955. (Liechtenstein versus Guatemala) Asunto Nottebohm

25- Sentencia del Tribunal Permanente de La Haya, 3 de mayo de 1912 (Italia versus Perú)