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EXPLANATORY NOTE

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

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

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INTRODUCTION

The Inter-American Juridical Committee is honored to submit to the General Assembly of the Organization of American States its Annual Report on the activities carried out during the year 2013, in accordance with the terms of Article 91.f of the Charter of the Organization of American States and Article 13 of its Statutes, and with the instructions contained in General Assembly Resolutions dealing with the preparation of annual reports to the General Assembly by the organs, agencies, and entities of the Organization, such as resolutions AG/RES. 2806 (XLIII-O/13), AG/RES. 2849 (XLIV-O/14) and AG/RES. 2873 (XLV-O/15), all of which were approved over the past three years.

In 2015, the Inter-American Juridical Committee held two regular sessions. The 86th regular session took place March 23 to 27, while the 87th regular session, August 3 to 12, with both meetings being held at IJC headquarters in Rio de Janeiro, Brazil.

The Inter-American Juridical Committee approved three reports, two of which were in response to mandates from the General Assembly, respectively titled “Privacy and Data Protection” (CJI/doc.474/15 rev.2) and “Guide for the Protection of Stateless Persons” (CJI/doc.488/15 rev.1). The third report was also in response to a mandate established by this body: “Migration in Bilateral Relations” (CJI/doc.461/14 rev.3).

It is also of note that, in August, the Committee added two new Rapporteurships to consider the mandates entrusted to it: “Guide on the Application of the Principle of Conventionality;” and “Considerations on the Work of the Inter-American Juridical Committee: compilation of topics of Public and Private International Law.” Additionally, the plenary Juridical Committee decided to continue to address the following topics: Electronic warehouse receipts for agricultural products; Law applicable to international contracts; and Representative democracy. It must be noted as well that the decision was made to write two reports on the topic of immunity, one focusing on immunity of States and the other, on immunity of international organizations.

This Annual Report contains mostly the work done on the studies associated with the aforementioned topics and is divided into three chapters. The first discusses the origin, legal bases, and structure of the Inter-American Juridical Committee and describes all sessions held during the present year. The second chapter describes the issues that the Inter-American Juridical Committee discussed at its regular sessions and contains the texts of the resolutions adopted and specific documents. Lastly, the third chapter concerns other activities developed by the Juridical Committee and its members during the year. As it is customary, annexed to the Annual Report there is a lists of the resolutions and documents adopted.

Dr. Fabián Novak Talavera, Chairman of the Inter-American Juridical Committee, approved the language of this 2015 Annual Report.

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

CHAPTER I

1. The Inter-American Juridical Committee: its origin, legal bases, structure and purposes

The forerunner of the Inter-American Juridical Committee was the International Board of Jurists in Rio de Janeiro, created by the Third International Conference of American States in 1906. Its first meeting was in 1912, although the most important was in 1927. There, it approved twelve draft conventions on public international law and the Bustamante Code in the field of private international law.

Then in 1933, the Seventh International Conference of American States, held in Montevideo, created the National Commissions on Codification of International Law and the Inter-American Committee of Experts. The latter's first meeting was in Washington, D.C. in April 1937.

The First Meeting of Consultation of Ministers of Foreign Affairs of the American Republics, held in Panama, September 26 through October 3, 1939, established the Inter-American Neutrality Committee, which was active for more than two years. Then in 1942, the Third Meeting of Consultation of Ministers of Foreign Affairs, held in Rio de Janeiro, adopted Resolution XXVI, wherein it transformed the Inter-American Neutrality Committee into the Inter-American Juridical Committee. It was decided that the seat of the Committee would be in Rio de Janeiro.

In 1948, the Ninth International Conference of American States, convened in Bogotá, adopted the Charter of the Organization of American States, which inter alia created the Inter-American Council of Jurists, with one representative for each member state, with advisory functions, and the mission to promote legal matters within the OAS. Its permanent committee would be the Inter-American Juridical Committee, consisting of nine jurists from the Member States. It enjoyed widespread technical autonomy to undertake the studies and preparatory work that certain organs of the Organization entrusted to it.

Almost 20 years later, in 1967, the Third Special Inter-American Conference convened in Buenos Aires, Argentina, adopted the Protocol of Amendments to the Charter of the Organization of American States or Protocol of Buenos Aires, which eliminated the Inter-American Council of Jurists. The latter's functions passed to the Inter-American Juridical Committee. Accordingly, the Committee was promoted as one of the principal organs of the OAS.

Under Article 99 of the Charter, the purpose of the Inter-American Juridical Committee is as follows:

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

Under Article 100 of the Charter, the Inter-American Juridical Committee is to:

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

Although the seat of the Inter-American Juridical Committee is in Rio de Janeiro, it may meet elsewhere after consulting the member state concerned. The Juridical Committee consists of eleven jurists who are nationals of the Member States of the Organization. Together, those jurists represent all the States. The Juridical Committee also enjoys as much technical autonomy as possible.

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

A. Eighty-sixth regular session

The 86th regular session of the Inter-American Juridical Committee took place on March 23 to 27, 2015, in Rio de Janeiro, Brazil.

The members of the Inter-American Juridical Committee present for that regular session were the following, listed in the order of precedence determined by the lots drawn at the session's first meeting and in accordance with Article 28.b of the "Rules of Procedure of the Inter-American Juridical Committee":

Dr. José Miguel Aníbal Pichardo
 Dra. Ana Elizabeth Villalta Vizcarra
 Dr. Joel Hernández García
 Dr. José Luis Moreno Guerra
 Dr. Fabián Novak Talavera
 Dr. João Clemente Baena Soares
 Dr. Gélin Imanès Collot
 Dr. Hernán Salinas Burgos
 Dra. Ruth Stella Correa Palacio
 Dr. David P. Stewart
 Dr. Carlos Mata Prates

Representing the General Secretariat, technical and administrative support was provided by Dr. Jean-Michel Arrighi, Secretary for Legal Affairs; Dante M. Negro, Director of the Department of International Law; Luis Toro Utillano, Principal Legal Officer; Christian Perrone, Legal Officer, Maria Lúcia Iecker Vieira and Maria C. de Souza Gomes, all of the Secretariat of the Inter-American Juridical Committee.

At the opening session of the Committee meeting, the Chairman welcomed the new members, Dr. Ruth Stella Correa Palacio of Colombia and Dr. Joel Hernández García of Mexico, who introduced themselves for the first time to the plenary Committee, even though new member's terms do not begin until January 1 of each year. On this occasion, the Director of the Department of International Law, Dr. Dante Negro, then mentioned the mandates envisaged for this session of the Inter-American Juridical Committee.

The Inter-American Juridical Committee had before it the following agenda, adopted by means of Resolution CJI/RES. 208 (LXXXV-O/14), "Agenda for the Eighty-Sixth Regular Session of the Inter-American Juridical Committee":

CJI/RES. 208 (LXXXV-O/14)**AGENDA FOR THE EIGHTY-SIX REGULAR SESSION OF THE
INTER-AMERICAN JURIDICAL COMMITTEE****(from March 23 to 27, 2015)****Topics under consideration:**

1. Immunity of States and international organizations
Rapporteurs: Drs. Carlos Mata Prates and Hernán Salinas Burgos
2. Electronic warehouse receipts for agricultural products
Rapporteur: Dr. David P. Stewart
3. Guidelines for migratory management in bilateral relationships
Rapporteur: Dr. José Luis Moreno Guerra
4. Protection of personal data
Rapporteur: Dr. David P. Stewart
5. Applicable law to international contracts
Rapporteurs: Drs. Ana Elizabeth Villalta Vizcarra and Gélin Imanès Collot
6. Guide for the protection of stateless persons
Rapporteur: Dr. Carlos Mata Prates
7. Representative democracy
Rapporteur: Dr. Hernán Salinas Burgos

This resolution was approved by unanimous at the meeting held on August 8, 2014, by the following members: Drs. João Clemente Baena Soares, Hyacinth Evadne Lindsay, Miguel Aníbal Pichardo Olivier, José Luis Moreno Guerra, Hernán Salinas Burgos, Gélin Imanès Collot, Carlos Alberto Mata Prates, Fabián Novak Talavera and Ana Elizabeth Villalta Vizcarra.

Afterwards, the plenary approved resolution CJI/RES. 214 (LXXXVI-O/15), “Date and venue of the 87th Regular Session of the Inter-American Juridical Committee,” issuing the decision to hold its 87th regular session at its headquarters in the city of Rio de Janeiro, Brazil, beginning on August 3, 2015.

CJI/RES. 214 (LXXXVI-O/15)**DATE AND VENUE OF THE
EIGHTY-SEVEN REGULAR SESSION OF THE
INTER-AMERICAN JURIDICAL COMMITTEE**

THE INTER-AMERICAN JURIDICAL COMMITTEE,

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

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

RESOLVES to hold its 87th regular session as of 3 August, 2015, in the city of Rio de Janeiro, Brazil.

This resolution was approved unanimously at the meeting held on March 27, 2015, by the following members: Miguel Aníbal Pichardo Olivier, Ana Elizabeth Villalta Vizcarra, Joel Hernández García, José Luis Moreno Guerra, Fabián Novak Talavera, João Clemente Baena Soares, Gélin Imanès Collot, Hernán Salinas Burgos, Ruth Stella Correa Palacio, David P. Stewart and Carlos Alberto Mata Prates.

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B. Eighty-seventh regular session

The 87th regular session of the Inter-American Juridical Committee took place on August 3 to 12, 2015, at its headquarters in the city of Rio de Janeiro, Brazil.

The Members of the Inter-American Juridical Committee present for that regular session were the following, listed in the order of precedence determined by the lots drawn at the session's first meeting and in accordance with Article 28.b of the Rules of Procedure of the Inter-American Juridical Committee:

Dr. Gélin Imanès Collot
 Dr. José Luis Moreno Guerra
 Dr. João Clemente Baena Soares
 Dr. Hernán Salinas Burgos
 Dra. Ana Elizabeth Villalta Vizcarra
 Dr. Joel Hernández García
 Dra. Ruth Stella Correa Palacio
 Dr. Carlos Mata Prates
 Dr. David P. Stewart

Drs. Fabián Novak Talavera (President) and José Miguel Aníbal Pichardo were not present due health related and work reasons respectively.

Representing the General Secretariat, technical and administrative support was provided by Dr. Jean-Michel Arrighi, Secretary for Legal Affairs; Dante Negro, Director of the Department of International Law; Luis Toro Utillano, Principal Legal Officer with that same Department; Christian Perrone, Legal Officer, and Maria Lúcia Iecker Vieira and Maria C. de Souza Gomes from the Secretariat of the Inter-American Juridical Committee.

Due to the absence of Chairman Dr. Fabián Novak Talavera, the Vice Chairman, Dr. Carlos Mata Prates, chaired the meeting. Dr. Mata Prates welcomed the Committee Members and congratulated Dr. José Antonio Moreno Rodríguez of Paraguay on his election as a new committee member, remarking that he himself was also reelected by the General Assembly and explaining that both terms begin to run as of January 1, 2016.

On this occasion, the Committee Members held a meeting with recently elected Secretary General of the Organization of American States Dr. Luis Almagro, who discussed the strategic vision of the Organization and, together, envisioned potential topics of cooperation for the Organization and the General Secretariat by the Committee.

At its 87th regular session, the Inter-American Juridical Committee had before it the following agenda, which was adopted by means of resolution CJI/RES. 213 (LXXXVI-O/15) "Agenda for the Eighty-Seventh Regular Session of the Inter-American Juridical Committee":

CJI/RES. 213 (LXXXVI-O/15)**AGENDA FOR THE EIGHTY-SEVEN REGULAR SESSION OF THE
INTER-AMERICAN JURIDICAL COMMITTEE**

(as of 3 August 2015)

Themes for consideration:

1. Immunity of States
Rapporteur: Dr. Carlos Alberto Mata Prates
2. Immunity of international organizations
Rapporteur: Dr. Joel Hernández García
3. Electronic warehouse receipts for agricultural products
Rapporteur: Dr. David P. Stewart
4. Recommendations to the States in their bilateral relations on migration themes
Rapporteur: Dr. José Luis Moreno Guerra
5. Law applicable to international contracts
Rapporteurs: Drs. Ana Elizabeth Villalta Vizcarra and Gélin Imanès Collot
6. Guide on Protection of Stateless Persons
Rapporteur: Dr. Carlos Mata Prates
7. Representative democracy
Rapporteur: Dr. Hernán Salinas Burgos

This resolution was unanimously approved at the session held on March 27, 2015 by the following members: Drs. Miguel Aníbal Pichardo Olivier, Ana Elizabeth Villalta Vizcarra, Joel Hernández García, José Luis Moreno Guerra, Fabián Novak Talavera, João Clemente Baena Soares, Gélin Imanès Collot, Hernán Salinas Burgos, Ruth Stella Correa Palacio, David P. Stewart and Carlos Alberto Mata Prates.

At the August session, the plenary of the Inter-American Juridical Committee decided to hold its next session from April 4-8, 2016, in the city of Washington D.C., United States, as announced in resolution CJI/RES. 215 (LXXXVII-O/15), "Date and Venue of the 88th Regular Session of the Inter-American Juridical Committee." Additionally, it decided to hold the eighty-eighth regular session in Rio de Janeiro beginning on October 3, 2016, as announced in resolution CJI/RES. 216 (LXXXVII-O/15), "Date and Venue of the 89th regular session of the Inter-American Juridical Committee," in view of the fact that the headquarters of the Committee will be the site of the Olympic and Paralympic Games in August and September 2016, respectively.

The Committee also approved its agenda for the upcoming session, consisting of seven topics, as listed in resolution CJI/RES. 217 (LXXXVII-O/15), "Agenda for the Eighty-Eighth Regular Session of the Inter-American Juridical Committee" from 4 to 8 of April, 2015.

CJI/RES. 215 (LXXXVII-O/15)

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

THE INTER-AMERICAN JURIDICAL COMMITTEE,

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

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

RESOLVES to hold its 88th regular session on 4 - 8 April, 2016, in the city of Washington, D.C., USA.

This resolution was approved unanimously at the meeting held on August 6, 2015, by the following members: Gélin Imanès Collot, José Luis Moreno Guerra, João Clemente Baena Soares, Hernán Salinas Burgos, Ana Elizabeth Villalta Vizcarra, Joel Hernández García, Ruth Stella Correa Palacio, Carlos Alberto Mata Prates (Vice President) and David P. Stewart.

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CJI/RES. 216 (LXXXVII-O/15)

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

THE INTER-AMERICAN JURIDICAL COMMITTEE,

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

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

RESOLVES to hold its 89th regular session as of 3 October, 2016, in the city of Rio de Janeiro, Brazil.

This resolution was approved unanimously at the meeting held on August 6, 2015, by the following members: Gélin Imanès Collot, José Luis Moreno Guerra, João Clemente Baena Soares, Hernán Salinas Burgos, Ana Elizabeth Villalta Vizcarra, Joel Hernández García, Ruth Stella Correa Palacio, Carlos Alberto Mata Prates (Vice President) and David P. Stewart.

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CJI/RES. 217 (LXXXVII-O/15)**AGENDA FOR THE EIGHTY-EIGHTH REGULAR SESSION OF THE
INTER-AMERICAN JURIDICAL COMMITTEE**

(Washington, DC, from 4- 8 April, 2016)

Themes for consideration:

1. Immunity of States
Rapporteur: Dr. Carlos Alberto Mata Prates
2. Immunity of international organizations
Rapporteur: Dr. Joel Hernández García
3. Electronic warehouse receipts for agricultural products
Rapporteur: Dr. David P. Stewart
4. Law applicable to international contracts
Rapporteurs: Drs. Ana Elizabeth Villalta Vizcarra and Gélin Imanès Collot
5. Representative democracy
Rapporteur: Dr. Hernán Salinas Burgos
6. Guide for the application of the principle of conventionality.
Rapporteur: Dr. Ruth Stella Correa Palacio
7. Considerations on the work of the Inter-American Juridical Committee: compilation of topics of Public and Private International Law
Rapporteur: Dr. Ruth Stella Correa Palacio

This resolution was approved unanimously at the meeting held on August 11, 2015, by the following members: Gélin Imanès Collot, José Luis Moreno Guerra, João Clemente Baena Soares, Hernán Salinas Burgos, Ana Elizabeth Villalta Vizcarra, Ruth Stella Correa Palacio, Carlos Alberto Mata Prates (Vice President) and David P. Stewart.

* * *

At the end of its regular sessions, the Inter-American Committee took a moment to pay tribute to Dr. Luis Moreno Guerra, whose term end on December 31, 2015. The Members voiced their heart-felt recognition of Dr. José Luis Moreno Guerra for his dedication and invaluable contribution to the work of the Inter-American Juridical Committee. Joined in the praise of the quality of the reports written by Dr. Moreno Guerra, they recognized that his efforts paved the way for an invaluable contribution to development and codification of International Law and of the Inter-American System, especially on topics pertaining to cross-border integration and bilateral agreements on migration.

CJI/RES. 220 (LXXXVII-O/15)

HOMAGE PAID TO DOCTOR JOSÉ LUIS MORENO GUERRA

THE INTER-AMERICAN JURIDICAL COMMITTEE,

CONSIDERING that Doctor José Luis Moreno Guerra will terminate his mandate on 31 December;

RECALLING that Doctor Moreno Guerra has been a member of the Committee since January 2012;

AWARE of the valuable contribution made by Doctor Moreno Guerra throughout the course of his mandates to the work carried out by the Committee, and that his reports constituted an inestimable subsidy to the development and codification of international law and to the inter-American system, in particular as regards those themes related to cross-border integration and bilateral relations on migration questions;

EMPHASIZING the many personal and professional qualities of Doctor Moreno Guerra, among which special mention should be made of his juridical and academic erudition and the affability that distinguished him among his fellow members of the Committee,

RESOLVES:

1. To express its sincere gratitude to Doctor José Luis Moreno Guerra for his dedication and invaluable contribution to the work of the Inter-American Juridical Committee;
2. To wish him every success in his future work, together with the hope that he continues his relationship with the Inter-American Juridical Committee; and
3. To send this resolution to the agencies of the Organization.

This resolution was unanimously approved by the following members at the session held on 7 August 2015: Drs. Gélin Imanès Collot, João Clemente Baena Soares, Hernán Salinas Burgos, Ana Elizabeth Villalta Vizcarra, Joel Hernández García, Ruth Stella Correa Palacio, Carlos Alberto Mata Prates and David P. Stewart.

CHAPTER II

**TOPICS DISCUSSED BY THE INTER-AMERICAN JURIDICAL COMMITTEE
AT THE REGULAR SESSIONS HELD IN 2015**

THEMES UNDER CONSIDERATION

Over the course of 2015, the Inter-American Juridical Committee held two regular sessions, during which it approved three reports. Two of the reports were in response to mandates from the General Assembly, respectively titled “Privacy and Data Protection” (CJI/doc.474/15 rev. 2) and “Guide on the Protection of Stateless Persons” (CJI/doc.488/15 rev.1). The third report was in response to a mandate established for this body: “Migration in Bilateral Relations” (CJI/doc.461/14 rev. 3).

The Committee also created two new Rapporteurships for itself to consider the mandates entrusted to it: “Guidelines for the Application of the Principle of Conventionality Control;” and “Considerations on the Work of the Inter-American Juridical Committee.” This second mandate involves making a compilation of topics of Public and Private International Law of interest to the Organization. Lastly, the plenary of the Juridical Committee decided to continue to address the following topics: Electronic warehouse receipts for agricultural products; Law applicable to international contracts; and Representative democracy. It must be noted as well that the decision was made to write two reports on the topic of Immunities, one focusing on Immunity of States and the other, on Immunity of International Organizations

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

* * *

1. Immunity of States

Document

CJI/doc. 480/15 rev.1 Immunities of jurisdiction of States: scope and validity (Preliminary outline)
(presented by Dr. Carlos Mata Prates)

During the 81st regular session of the Inter-American Juridical Committee (Rio de Janeiro, Brazil, August, 2012), Dr. David P. Stewart proposed to the plenary that the Committee work on an instrument addressing the immunity of States in transnational litigation. He pointed out that in 1986 the Committee had presented a draft convention on the immunity of States that did not prosper. He also observed that the United Nations Convention on the jurisdictional immunities of States and their assets is not in force yet. Furthermore, he noted that States lacked appropriate legislation. In his explanation, Dr. Stewart described the positive implications that an instrument in that area could have for trade, in addition to providing guidelines for government officials. Dr. Fernando Gómez Mont Urueta proposed that the plenary agree to designate Dr. Carlos Mata Prates as Rapporteur for the subject: a proposal met with the plenary's approval.

At the 82nd regular session of the Inter-American Juridical Committee (Rio de Janeiro, Brazil, March 2013), the Rapporteur for the topic, Dr. Carlos Mata Prates, explained that his report would be presented to the regular session of Committee in August 2013. He then engaged in a general reflection. He explained that the purpose of the Rapporteurship's work was to restrict it to States and international governmental organizations, which are subject to International Law, although he was aware that the element of immunity would pertain to institutions, officials, and places, including embassies or warships. In his presentation he noted that the treatment of acts or deeds attributable to a state cannot be tried by a domestic court of another state.

The Rapporteur expressed appreciation for the proposed *questionnaire* prepared by Dr. David P. Stewart, which is to be sent to the states, but expressed doubts about being able to get back replies. Furthermore, noted the important role of tribunals, citing the Law of the Sea Tribunal case between Argentina and Ghana, relating to immunity of an Argentinean warship from jurisdiction (immunity derived from the Law of the Sea Convention).

With regard to international organizations, the Rapporteur explained that immunity is conferred by rule as established in headquarters agreements. He also cited a domestic court decision concerning ALADI officials.

The Chairman asked Dr. David P. Stewart to present his *questionnaire*. Dr. Fabián Novak Talavera urged the Rapporteur to include national practices. Dr. Gélin Imanès Collot proposed that the Rapporteur include in his document references to the 2005 Convention on Immunities of States. In that regard, the rapporteur explained that this issue had already been included in the questionnaire and that the Committee's work will be limited to states of the Hemisphere.

Dr. José Luis Moreno proposed that elements on waiving sovereign immunity should be included and should be distinguished from cases in which sovereign immunity is maintained in order to monitor trials involving nationals. The Rapporteur cited cases in which a State by its action loses its immunity or cases in which disputes are taken to arbitration.

Dr. David P. Stewart read his proposed *questionnaire* aloud to the plenary. The Department of International Law circulated that questionnaire to the permanent missions to the OAS, through Note OEA/2.2/26/13 of April 26, 2013.

At the 83rd regular session of the Inter-American Juridical Committee (Rio de Janeiro, Brazil, August 2013), the Rapporteur for the topic, Dr. Carlos Mata Prates, was not present and no report was sent for the consideration of the Committee. Regarding the *questionnaire* Dr. Luis Toro Utillano provided an explanation on the situation of its responses. He stated that so far there had been six responses, from the following governments: Bolivia; Colombia, Costa Rica, Mexico, Panama and Dominican Republic. In addition, he consulted the Plenary whether a reminder should be sent to the States that had failed to respond. Dr. Fabián Novak suggested the issuance of a reminder involving all the themes, and that the final date for the delivery of the responses could be scheduled for December 15, 2013.

During the 84th regular session of the Inter-American Juridical Committee (Rio de Janeiro, March 2014), the Rapporteur, Dr. Mata Prates, decided to bring forward a part of the report he was preparing, and provided some background to the Committee's work on the issue. Citing studies conducted between 1971 and 1983, he explained that his report would build on previous work and would revisit the status of those concepts. An analysis of the replies received, from 10 countries altogether, would be included.

He also noted that it would be important to consider studies done by the UN International Law Commission, the UN Convention on Jurisdictional Immunities of States and Their Property, doctrine, and expert studies on the subject.

He concluded by explaining that based on the ten responses received, none of the States had ratified the UN Convention on Jurisdictional Immunity, and that only one had a parliamentary process underway with a view to said ratification.

Dr. Mata Prates' reply to Dr. Stewart was that some questions dealt specifically with immunity for international organizations. In this context, the value added of the information would include the position of the countries of the Americas on the subject matter. Given the time constraints to have the report ready for the next meeting, however, it was difficult to send out another reminder to include new proposals. The best option would be to approach the Foreign Ministries of the Committee Members' countries of origin.

During the 85th regular session of the Inter-American Juridical Committee (Rio de Janeiro, Brazil, August, 2014), Dr. Carlos Mata Prates, the Rapporteur for the issue, reviewed the background and acknowledged that one more State had responded, totaling 11 States.

Dr. Novak mentioned that both topics were very broad, so that he suggested restricting the subject for the moment to the issue of the immunity of States. He also suggested that perhaps someone else, say Dr. Stewart, could join Dr. Carlos Mata Prates.

The Chairman, Dr. Baena Soares, mentioned that the subject of the immunity of international organizations should not be neglected, especially the experience of the States hosting them. Additionally, the Chairman ascertained a consensus among those present about addressing the issue of the immunity of States first.

During the 86th Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, March 2015), the Rapporteur for the Topic, Dr. Carlos Mata Prates, recalled that this subject has been on the Committee's agenda since August 2012 and that his role had been confined to addressing immunity of States, though no new responses to the *questionnaire* have been received from the States.

As a preliminary finding, the Rapporteur noted that a narrow concept of immunity has been established with regard to States. Notwithstanding, he explained that he would still have a methodological question about how to continue with preparing the report, inasmuch as there weren't enough responses to put together an overview of the practices in the countries of the Americas; that is, only 11 countries responded.

In recognizing the failure of the countries of the Caribbean to provide responses, Dr. Stewart expressed his interest in contacting some members at the embassies in Washington, D.C., and making available to the Rapporteur a study that would be conducted by his students to review the practices of the countries of the Caribbean.

Dr. Hernández García advised the Rapporteur to take into consideration in his study the failure of States in the region to sign the United Nations Convention on Jurisdictional Immunities of States and their Property (2005), and commented on the proceedings before the Federal Senate of Mexico to move toward ratification of the aforementioned Convention. He also confirmed the tendency of courts to resort to international customary practice, inasmuch as domestic law provides no legal basis in this area of law. As for practice in Mexico, not many cases of immunity of States have been brought in the country's courts; while, in contrast, there has been a higher number of cases on immunity of International Organizations.

Dr. Collot noted that the comparative law method proposed by the Rapporteur is very positive and can help to shed light on the negligible number of States that have ratified the United Nations Convention on Jurisdictional Immunities and their Property (2005).

Dr. Hernán Salinas suggested integrating the practices of the countries into a comparison, but using a theoretical basis to explain the status of the subject matter in International Law. Additionally, he recommended conducting a comparative analysis of the differences between the 2005 United Nations Convention and the 1983 Draft Inter-American Convention on Jurisdictional Immunity of the States, and then carrying out an analysis of actual practices in the States.

Dr. Baena Soares believed that we should no longer wait for further responses and proceed to draft a report with the input obtained thus far; acknowledging that it is not easy to get a response to the Committee's *questionnaires* from all States.

Dr. Hernández García suggested creating a legislative guidance on implementation of the United Nations Convention in order to explain the best way to move toward possible ratification of said instrument.

Dr. Salinas Burgos noted that if we do not know the status of the issue and the theoretical framework behind it, it is impossible to move forward or determine what the Hemisphere needs, even though legislative guidance would be necessary.

Dr. Mata Prates pointed out that the theoretical issue is not problematic; judges apply customary law, except in the United States, where a specific law has been enacted. Therefore, it is essential to know the decisions of national judges on said issues.

During a second meeting devoted to discussion of the topic, Dr. Carlos Mata Prates introduced a preliminary report titled "Immunity of States. Preliminary Outline," document CJI/doc.480/15, which includes potential findings and expected outcomes. The report traces over time the development of immunity of States, and how it became relative, reflecting a division between jurisdictional immunity and immunity from execution of judgment.

Dr. Correa Palacio suggested including in the Rapporteur's outline a part on responsibility of the State for damages occurring as a result of the aforementioned immunities.

Dr. Salinas Burgos asserted that the theoretical framework of said report ought to refer to the Inter-American Convention on Jurisdictional Immunity of States, and proposed that the Rapporteur indicate whether or not ratification of said Convention should be encouraged or discouraged, based on the findings of his study.

Dr. Moreno Guerra noted that it is not the Committee's mandate to urge States to ratify or not to ratify a Convention. In this regard, the contribution of the Committee is to provide guidance to address said issues, taking into account all stakeholders involved.

The Chairman reiterated the commitment of the Rapporteur to submit a report during the August meeting as a final product.

During the 87th Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, August 2015), the Rapporteur for the topic, Dr. Carlos Mata Prates, provided a summary on the history of the Juridical Committee dealing with the topic, which originally included immunity of International Organizations. He submitted the new document (CJI/480/15 rev.1), which mentions the background history of addressing this topic in the universal system (United Nations Convention on Jurisdictional Immunities of States and Their Property– 2005) and in the Inter-American System (Draft Inter-American Convention on the Jurisdiction of States). He affirmed that these draft Conventions have not come into force in either of the two systems. This is because the United Nations Convention does not meet the required minimum number of ratifications and the Inter-American Convention has not become an international instrument.

As for the scope of immunity, he believed that the concepts have been viewed narrowly because of a distinction drawn between acts of administration and acts of authority, the latter being covered by immunity, while the former would not be. He emphasized as well that the subject of labor is an exception to jurisdictional immunity.

With regard to the *questionnaires*, he noted that responses have been received from 12 countries, eight of which reported that they have no specific legislation on this subject matter. All States made reference to standards of customary law pertaining to jurisdictional immunity. Moreover, the concept is confined to commercial activities (*jus gestioni*). The definition of said acts, in most States, is based on a particular judge's own assessment on a case-by-case analysis and not based on any specific statutory definition.

In his report, the Rapporteur expressed his intention to pursue the following courses of action: ascertain the status of the scope of said immunities; clarify the degree of consistency of each case with the Conventions adopted within the UN and the OAS; and, draft recommendations on ratification of one of the two Conventions, in order to determine a way forward (propose amendments to the American Convention, draft guiding principles, etc.).

Dr. Salinas expressed interest in the Committee's ability to add enhanced value and, therefore, the work should not be confined to just legal instruments, but should also include Court decisions and standards of customary law.

Dr. Stewart expressed his gratitude for the substantive and comprehensive report, while also regretting States' failure to provide responses. In response to the query of Dr. Salinas, he considered that the work of the Rapporteurship must aim to determine the status of prevailing law in the Hemisphere. It is not the job of the Committee to promote ratification of the Convention, even though it believes it is a worthy document. We must endeavor to produce a more detailed analysis on the situation in the countries. If it were to be established that the sphere of International Law takes precedence, there should be a way to explain this claim.

Dr. Correa confirmed the deep judicial roots of this topic and believed that efforts could involve narrowing the scope of the exceptions, in addition to providing input on the responsibility of States. She urged the Secretariat to promote a greater response to the *questionnaires* and the Rapporteur to prepare guidelines.

Dr. Villalta expressed her support for continuing to pursue the topic by preparing a document to help States to become familiar with the obligations that this kind of immunity would have for purposes of application of the law. She also supported the idea of producing guidelines.

Dr. Collot also voiced his support for Drs. Correa and Villalta. He posited two levels of immunity (jurisdictional immunity and immunity from execution of judgment), and expressed his interest in implementation of these types of immunity in the proper way and, for this purpose, the

immunities must be thoroughly comprehended. Lastly, he mentioned the need to distinguish between immunity and impunity.

Dr. Salinas explained his opinion on the part of the study, which is supposed to determine the current status and suggested, at this time, it is not mature enough to move forward. Additionally, he stated his interest in addressing the topic of immunity of States from international crimes, in view of the fact that work was done on this subject after the Convention was adopted and the International Criminal Court has addressed it.

The Rapporteur explained that the mandate was to establish the current situation in the Hemisphere. Even though few responses have been submitted, it can be asserted that jurisdictional immunity is clearly governed by customary law on the subject matter, except in the United States, where a very comprehensive national law is in force on the subject matter. This assessment is based on rulings of national courts: national judges do not apply a statute, but rather legal precedents and, hence, the difficulty in providing a response to the questionnaire, which would require an examination of the legal precedents of each country. With regard to Dr. Collot's comment, if the country of origin declines to accept jurisdiction, a connection must be sought to the place where the events took place. Likewise, a distinction must be drawn between jurisdictional immunity and immunity from execution of judgment; the former being governed by a restrictive criterion, while in the latter, is absolute. Lastly, on the subject of international crimes, it must be taken into account that the Rome Statute does not allow jurisdictional immunity for individuals, who are responsible for the four crimes over which said Court has jurisdiction.

He suggests that the topic be left open in anticipation of further responses from the States.

Dr. Stewart asked for the *questionnaire* to also be sent to experts in the countries from which no affirmative response has been received.

The Rapporteur agreed with the suggestion of seeking out experts, who could address the topic.

CJI/doc.480/15 rev.1

IMMUNITIES OF JURISDICTION OF STATES: SCOPE AND VALIDITY

(PRELIMINARY OUTLINE)

(presented by Dr. Carlos Mata Prates)

I. PRESENTATION

1. The Inter-American Juridical Committee held in August 2012, and during the 81st regular session, decided to update the scope and validity of the *Jurisdiction Immunity of States* in the Americas.

2. During the 81st regular session the Committee also decided to appoint the undersigned as rapporteur of the theme; accordingly, this report is provided within that framework.

3. With the aim of specifying the scope of this report, I wish to inform that it sets out to provide details on the situation on the immunity of jurisdiction in the American States to date, leaving aside a doctrinary study on the institution which is already endowed with profuse bibliography. In addition, this report is assuming the development carried out by the Inter-American Juridical Committee for more than ten years (from 1971 to 1983) which resulted in the approval of the *Draft Inter-American Convention on Immunity of Jurisdiction of States* (1983).

II. INTRODUCTION

4. One can say that in principle the concept of immunity embraces Immunity of Jurisdiction of the States, and should be complemented by the immunity of international inter-governmental

organizations, as well as that of certain authorities (Heads of State, Government, Ministers of Foreign Affairs, other State representatives, and diplomatic and consular officers). State Immunity embraces military or public vessels and aircraft, as established by International Law, as well as acts and deeds that take place on military premises.

III. CONCEPT

5. When we refer to the immunity of a State, in a broad sense we are saying concretely that the acts dictated or performed by that State cannot be the object of the jurisdiction (comprising the two stages of cognizance and enforcement) of an internal court of another State, thereby applying the principle of the old Law of Nations (*ius gentium - par in parem non habet imperium - jurisdictionem*); consequently, in principle, a court of one State cannot judge on acts and deeds of another State, such as adopting coercive measures against its property.

6. Taking as a start-point the concept detailed in the previous item, we hereby provide our comments as follows:

IV. ANTECEDENTS

7. It bears recalling that at the session held on 9 April 1971, the Inter-American Juridical Committee decided “to undertake a study on the immunity of jurisdiction of the States” and “at the Regular Session held on 10 January 1983, the Inter-American Juridical Committee approved the Draft Inter-American Convention on Immunity of Jurisdiction of the States”.

8. In turn, the United Nations International Law Commission, following long years of study, drew up a draft treaty that was analyzed by the 6th Commission of the General Assembly of the United Nations, later approved and sent for the appreciation of the Member States under the title *Convention on the Jurisdictional Immunities of the States and their Property (2005)*.

9. It is appropriate to mention here that neither the *Inter-American Convention on Immunity of Jurisdiction of the States* nor the *Convention on the Jurisdictional Immunities of the States and their Property (2005)* is in effect; as a matter of fact, both evidence a scant number of ratifications.

10. Finally, it is easy to verify that the majority of American States, through their jurisdictional agencies, do have an opinion regarding the scope of Immunity of Jurisdiction of the States.

V. APPLICABLE NORMS

11. It has now been accepted that the sources of the DIP, or at least most of them, are to be found in Article 38 of the Statutes of the International Court of Justice. Here we refer to the treaties, customs and practice and the general principles of Law recognized by the principal legal systems, to which should be added the norms of *ius cogens*, unilateral acts, general principles of International Law, and so on.

12. In the case of Immunity of Jurisdiction of States, the main formal source applied is international customs and practice, although there are also some conventional rules, such as norms of internal law.

VI. JURISPRUDENCE

13. The case of the evolution of this topic through the decisions ruled by the domestic or international Courts and Arbitration Tribunals is also quite interesting, because the evolution of the institution stems largely from those rulings.

14. In this regard I wish to refer to the recent decision of the Tribunal for the Law of the Sea of December 15, 2012, *in re Argentina vs Ghana*, where one of the main aspects under consideration is the immunity of jurisdiction of a warship – in this case the frigate *ARA Libertad* of the Argentinean Navy in the various maritime spaces established in the Convention on the Law of the Sea (1982).

VII. SCOPE

15. Finally, another aspect that deserves consideration refers to the scope of the institution as the latter has evolved: originally it was acknowledged that immunity had an absolute nature, whilst at present the trend is to consider that immunity of States is not an absolute concept but a relative

one, and for that reason the theory on *iure imperii* and *iure gestionis acta* results in immunity being granted exclusively to the first of them.

16. This evolution on the scope of the immunity of States is crystal-clear in the decisions of the domestic court. In this regard, we may recall that in the 90's the Federal Supreme Court of the Republic of Brazil ruled that in labor cases individuals hired by Diplomatic Missions and engaged in administrative or service duties performed in those Missions, when the case reached a domestic court, the State was not allowed to file an injunction of immunity of jurisdiction, as this would unconditionally imply deprivation of justice, taking into consideration that the former employee would be unlikely to have sufficient money/resources to file an action against the State of his/her own Mission. That is to say, in the case under study the principle of relative immunity of jurisdiction of States is reaffirmed.

17. Also in relation to the immunity of jurisdiction of inter-governmental-type international organizations, these are always included in the respective Headquarters Agreement; in order to invoke it successfully in labor cases – that is to say in the relationship of the international organization with its employees – the existence of an Administrative Court (ALADI, MERCOSUR, and so on) should be included. (In this regard, there is a decision of the Uruguayan Supreme Court of Justice filed by former ALADI employees).

18. Something similar appears in cases involving rental of property, traffic accidents, and so on.

19. As can be appreciated, we are addressing quite a broad and current theme, which is in constant evolution and therefore deserves thoughtful analysis.

VIII. THEORETICAL FRAMEWORK

20. In light of the foregoing, and especially taking into consideration the comments expressed in the introduction, the theoretical framework of this presentation is revealed.

21. In order to better classify it, we must also say that the concept, scope and regulations involving the institution of Immunity of Jurisdiction of the States set up the theoretical framework needed to prepare this study.

IX. METHODOLOGY

22. In order to analyze the current development in this area a *Questionnaire on the Situation of the Immunity of Jurisdiction of States in the American Continent*, which was distributed to the Member States of the Organization of American States (OAS).

23. Some comments will also be provided about the Inter-American Convention on the Jurisdictional Immunities of the States and their Property (2005), and especially about its compatibilities.

X. ANALYSIS OF THE RESPONSES TO THE QUESTIONNAIRE THAT WAS DISTRIBUTED

24. The *questionnaire* was sent to the OAS Member States and so far we have received responses from the following States: Bolivia; Mexico; Brazil; Panama; Colombia; the Dominican Republic; Paraguay; El Salvador; Costa Rica; United States of America and Uruguay.

25. The questions of the *questionnaire* are as the following: 1) *Does the domestic legislation in your country provide jurisdictional immunity for States and International Organizations? In the case of a positive answer, please provide the applicable norm involved. If the response is negative, is there any relevant guide in terms of immunity of the State?;* 2) *Is the determination of the immunity a juridical question decided by the Courts or has it been determined by Government?;* 3) *Does the domestic legislation in your country provide an exception regarding the “commercial activities” carried out by the foreign State or entity? What is the situation regarding the case of “willful” violations or “torts” and in the cases of infringement against the International Law?;* 4) *Has the Judicial Power in your country passed relevant decisions on immunity of States or international organizations. If affirmative, please provide the name/date of those rulings and the*

official citation or copy of the sentences; 5) Is your country a signatory or has it ratified the UN Convention on the Jurisdictional Immunities of the States and their Property, approved in the year 2005?; 6) Is your country a signatory of any other instruments (treaties, conventions, and so on) regarding the immunity of State(s)?; 7) Does the Judicial Power in your country apply customary law (international customary legislation) regarding the immunity of States or the immunity of International Organizations?

26. First of all, we would like to point out that the information received is highly valuable for preparing a work on this topic and also for later studies.

27. Secondly, as the information received is quite substantive in view of the number of responses – especially those referring to certain regions – we are refraining from deducing extrapolatable general conclusions applicable to the American Continent.

28. Without prejudice of the previous statement, the responses received are allowing us to provide some substantial conclusions that we will detail succinctly.

29. As regards the existence of domestic legislation on immunity of jurisdiction of foreign States, eight States replied that they do not have such norms (Panama; Colombia, Bolivia, Brazil, the Dominican Republic, El Salvador and Uruguay). On the other hand, three other countries have reported that they have domestic legislation on the issue and in some cases a detailed norm on the topic (United States of America, Mexico and Costa Rica).

30. As regards the organ in charge of decisions regarding the admissibility of the immunity of jurisdiction over a case, the response was that as a general rule the admissibility is ruled by the judicial system.

31. As regards the scope of the immunity of jurisdiction of the States, all the responses coincide in the restricted scope of the institution, in conformity with the activity performed.

32. In general terms there is no definition for “commercial activities”, since this study corresponds to the judicial systems in which the case has been filed (the exceptions being Mexico and Colombia).

33. Relevant decisions were ruled in all the countries that answered the questionnaire. These decisions recognize the immunity of jurisdiction of States with limited scopes, in accordance with the nature of the activity performed.

34. The States that provided answers to the questionnaire unanimously admitted that none of them had ratified or adhered to the Convention on the Jurisdictional Immunities of the States and their Property (2005).

35. Finally, regarding the responses to the questionnaire, it should be highlighted that the judicial systems apply the customary legislation of the International Law on the issue.

XI. THE INTER-AMERICAN AND THE UNITED NATIONS CONVENTIONS ON IMMUNITY OF JURISDICTION OF STATES

36. The first statement to be given refers that the Draft Inter-American Convention on Immunity of Jurisdiction of States (1983) is a juridical instrument that reaps the work of over a decade of studies and exchanges of the Committee. Consequently, the document is a thoughtful and well-structured production.

37. The second statement is that the Draft Convention is fully operational because the principles it contains are at present recognized by customary international law.

38. The Convention on the Jurisdictional Immunities of the States and their Property (2005) was prepared more than twenty years after the Draft Inter-American Convention, and therefore it reaps the experiences during that long period of time and as such is incorporated to it.

39. It should also be said that both Conventions – as far as the norms they contain are concerned – are compatible, although the United Nations Convention is more updated because it has been drafted more recently.

40. Finally I wish to point out that both Conventions - especially that of the United Nations, precisely for being more recent in time - are consistent with the doctrinarian and jurisprudential evolution of contemporary International Law.

XII. EXPECTED RESULTS

41. With regard to the expected results of the work undertaken, these are detailed below:

- a) checking the status and scope of immunity of jurisdiction of the States on the American continent;
- b) clarifying the similarities and differences between the American Convention and the Convention drawn up in the United Nations, and their consistency with the doctrine of contemporary International Law; and
- c) elaborating, based on the investigation carried out, recommendations that could be forwarded: 1) ratification by the States of one or the other Convention; 2) making amendments to the *Inter-American Convention on Immunity of Jurisdiction of the States*; or 3) elaborating a guide of principles directed to the States for application on this question and resolution of considered cases.

XIII. CONCLUSIONS

42. In light of the foregoing – and taking into consideration the responses sent by the States and the additional information, we conclude:

- 1°) That, for the purposes of juridical safety and the standardization of common criteria on the matter, it is convenient for States to ratify some of the Conventions, either the one drafted in the regional sphere or the universal one, and recognizing that the United Nations Conventions is more updated so far;
- 2°) That the fact that there is no Convention in force on the scope of the Immunity of Jurisdiction of States does not mean that there is no regulation on the issue, but rather that the topic is governed by customary International Law;
- 3°) That as the issue involving the Immunity of Jurisdiction of the States is a question to be resolved by the judiciary, it is understood that the drafting of a guide of principles in this area would be less valuable and weaker than a common-law norm in force, but this does not imply rejecting it completely, as the situation concerned must always be taken into account.

* * *

2. Immunity of International Organizations

Document

CJI/doc.486/15 Immunities of International organizations
(presented by Dr. Joel Hernández García)

During the 81st regular session of the Inter-American Juridical Committee (Rio de Janeiro, Brazil, August 2012), Dr. David P. Stewart proposed to the plenary creating an instrument on immunity of States in transnational litigation. He reported that in 1986 a draft Convention on immunity of States introduced by the Juridical Committee did not go anywhere. Additionally, he noted that the United Nations Convention on Jurisdictional Immunities of States and Their Property has still not come into force. He also stressed that States do not have adequate laws on the topic. In his explanation, Dr. David Stewart described the positive effects that an instrument on this subject area could have in the field of trade, in addition to serving as a guide for government officials.

The Committee has only followed up on the subject of immunity of States during the sessions explained hereafter, as of the current year.

During the 86th Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, March 2015), the plenary Committee decided to divide up the treatment of the subject of immunities and appoint a Rapporteur to be in charge of immunity of international organizations. Dr. Joel Hernández García was appointed to the position and undertook to submit a preliminary report at the next regular session.

During the 87th Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, Brazil, August 2015), Dr. Joel Hernández García, Rapporteur for the topic, submitted his report, document CJI/doc.486/15 and thanked the Secretariat, particularly Dr. Christian Perrone, for his assistance in drafting the preliminary document to serve as the basis for the actual report (DDI/doc. 5/15).

He explained the development of the topic in the Committee and what he has done as Rapporteur since he was appointed in March of the current year. He was pleased at the decision to separate the field of immunities into two sub-topics to be addressed by the Committee: immunities of States and of international organizations. He noted that 12 responses to the questionnaire conducted in 2013 were received from the following States: Bolivia, Brazil, Colombia, Costa Rica, El Salvador, United States, Jamaica, Mexico, Panama, Paraguay, Dominican Republic and Uruguay. Based on the responses provided to the Committee, he was able to establish that only the United States and Jamaica have a national law. The majority of the countries address this issue through international instruments, mainly through headquarters agreements.

As for exceptions to immunity for acts of commerce, he remarked that his study also helped him to ascertain the use of international agreements or treaties to serve as guidelines. He also established inconsistencies among the legal precedents of the countries.

Next, he made reference to the last question on the *questionnaire* regarding provisions of law applied by the judiciary, with most States alluding to international custom, though he did not mention what he considered to be the normative content of the customary law.

He outlined as a first conclusion that it is the practice of States to deal with immunities of International Organizations on a case-by-case basis.

He also commented on the European Court of Human Rights case establishing a limitation on immunity of international organizations, clearly indicating that immunity cannot impede access to justice in light of respect for the right to due process, and the possibility of providing for reparation for

damages. In the view of the Rapporteur, this decision shows that immunities of international organizations is following a parallel path to the concept of functional immunities (*rationae materiae* immunity) of States, inasmuch as it is prohibited to leave persons defenseless.

As a product of his study, the Rapporteur proposed the creation of guiding principles on the application of immunities of international organizations. He cited three possible sources of law to establish general principles: 1) national laws; 2) headquarters agreements; and 3) national legal precedents. Additionally, his study included developments on the extension of immunities in general; exceptions granted by treaty, law and jurisprudence; the scope of the limitations on commercial matters; respect for national legal order; and, remedies to cure violations.

Dr. Salinas noted that the instruments adopted by most important organizations, such as the UN or the OAS, refer to common principles; while other organizations lay out distinctions, which would require verification on a case-by-case basis. As for progressive development, he called for examining the issue of the limitations stemming from human rights, which would help to generate a new perspective on the subject matter.

Dr. Correa Palacio noted that in labor matters, the applicable judicial norm must be verified and identified. She claimed that often when damages occur, there is no person responsible against whom a case can be adjudicated and, therefore, there has to be a way to protect fundamental rights.

Dr. Villalta established that, in Central America, headquarters agreements are usually used as relevant guidance on immunities. She mentioned that in the absence of agreements, the situation is handled mostly on a case-by-case basis and that guiding principles could be useful in the practices of States.

Dr. Hernández García noted that in many aspects he concurs with the comments of the other Members and he proposed to submit a report at the next Committee meeting.

The text of the aforementioned report is as follows:

CJI/doc.486/15

IMMUNITIES OF INTERNATIONAL ORGANIZATIONS

(presented by Dr. Joel Hernández García)

1. Background to the topic within the Inter-American Juridical Committee

At the last period of sessions, the Committee decided to separate its study of the immunities of international organizations from the general topic “Immunity of States and of International Organizations” that it has been discussing since its 81st session.

Three factors fully warrant the separate study of this topic. First, the sources of international law used by the Member States to recognize international organization immunities are different from those used with respect to the immunity of States. Second, in material terms, the immunities differ substantially between the two groups. While international practice is more homogenous in the case of State immunity, the treatment given to international organizations is determined on a case-by-case basis. Finally, and perhaps most importantly, the very nature of these two subjects of international law requires that distinctions be made in how they appear before domestic courts.

This Rapporteurship has benefited from the work carried out by the Committee since the topic was included on its agenda. In addition to the discussions that have taken place within the Committee, the *questionnaire* distributed to the Member States in 2013 contains questions related to the immunities of international organizations. The answers to those specific questions provide a first

understanding of the practices that the states follow. One of this Rapporteurship's first conclusions is that it is not necessary to send out a second *questionnaire* on international organization immunities.

This first report by the Rapporteurship is intended to serve a dual purpose. First, to describe the dimensions of international organizations' immunities, in order to explain how they differ from the immunities granted to States. Second, to present the Committee with a proposed instrument for its consideration, based on the Rapporteur's work.

This initial report is accompanied by a document prepared by the Secretariat (document CJI/09/15), for which the Rapporteurship is most grateful and which will be used as the basis for its work in the future.

2. Results of the *questionnaire* sent by the Committee to the Member States

The questionnaire that the Secretariat distributed among the Member States (document CJI/doc.431/13 rev. 1) has received a total of 12 replies to date, from Bolivia, Brazil, Colombia, Costa Rica, the Dominican Republic, El Salvador, Jamaica, Mexico, Panama, Paraguay, the United States, and Uruguay.

The following questions from the *questionnaire* are of relevance in studying the immunity of international organizations:

1. Does your country's domestic law provide jurisdictional immunity for states and international organizations? If so, please indicate the applicable provisions. If not, are there any guidelines of relevance in connection with state immunity?

3. Does your country's domestic law provide for any exceptions related to "commercial activities" carried out by a state or foreign entity? What is the situation as regards cases of "intentional" or "negligent" violations and breaches of international law?

4. Has your country's judiciary issued any important decisions regarding the immunity of states or of international organizations? If so, please indicate the names and dates of those decisions and provide official citations or copies of the judgments.

7. Does your country's judiciary follow customary provisions (international custom) regarding state immunity or the immunity of international organizations?

Analyzing the responses received yields the following conclusions:

National law on jurisdictional immunity for States and International Organizations

The United States reports that the privileges and immunities of international organizations are granted under an Executive Order of the President pursuant to the International Organizations Immunities Act (IOIA). The other Member States that replied do not have specific legislation for the jurisdictional immunity of either States or international organizations.

Jamaica presented information on its Technical Assistance (Immunities and Privileges) Act of 1982. Likewise, a group of states indicated that the legal basis for dealing with the topic was set down in international treaties. In that the incorporation of international law into the domestic legal order is automatic — in other words, without requiring a separate act of the legislature — international treaties are generally the direct source for granting immunities to international organizations. In the context of the OAS, reference was frequently made to the Agreement on Privileges and Immunities of the Organization of American States of 1948, along with other international instruments, as one of the main sources.

Most of the answers to this question spoke of the hosting agreements signed by international organizations and the States where their headquarters are based as a principal source of International Law. Accordingly, a study of the hosting agreements entered into by the Member States would reveal the treatment given to international organizations in the Hemisphere and, as a result, the States' international practices.

Exception for "commercial activities"

Studying the exceptions to jurisdictional immunities not only reveals their scope but, more importantly, indicates how situations arising as a result of organizations' actions in their host countries are treated juridically, with a view to preventing legal vacuums that could affect third parties and to ensuring that domestic law is enforced. The domestic treatment given to the exceptions that apply to commercial activities should assist in determining whether states follow the absolute or restrictive theory in their relations with international organizations.

The answers were mixed. In some cases, the States deal with this issue based on the international treaties — chiefly hosting agreements — to which they are parties. In others, the matter is settled by different interpretations adopted by the domestic courts, as indicated in the reply of the United States.

Important decisions related to the immunities of international organizations

As regards judicial decisions, Brazil, Colombia, Jamaica, and the United States reported on significant cases before their domestic courts that have resolved matters relating to international organization immunity.

In the document prepared by the Secretariat (document CJI/09/15), the Committee will also see a long list of cases heard by the courts in Argentina, Brazil, Canada, Colombia, Guatemala, El Salvador, the United States, Uruguay, and Venezuela, which will be examined as part of the Rapporteur's work.

International custom

The Member States' replies were unanimous in indicating international custom as one of the sources of International Law used domestically to resolve matters related to international organization immunity. As stated below, one future task will be to identify the content of that custom and its current status.

3. Current status of international organization immunity in international law

Under the principle of *par in parem non habet imperium*, States enjoy immunity from the courts of other States and so cannot appear as respondents in judicial proceedings. This approach derives from the principle of equality among states, which originally granted absolute immunity. As International Law evolved, absolute immunity was curtailed in those cases in which the basis for the action arose from "commercial activity."

The law applicable to international organizations took a different course. As a general rule, the constituent instrument is the treaty in which each of the Member States extends the organization sovereign recognition and grants it its own legal personality for the pursuit of its goals. In addition, the majority of constituent treaties establish and regulate — albeit in a very general fashion — the prerogatives of the international organization in question.

However, there is no treaty that codifies the immunities of international organizations at the global or regional levels; instead, each organization enters into a hosting agreement with each State in which it establishes an office. Thus, each State that accredits an international organization in its territory recognizes and grants it, on a sovereign basis, a series of rights and obligations in accordance with the organization's goals and objectives.

Given the lack of both a general international instrument and national law, the Member States deal with the international organizations accredited in their territories on a case-by-case basis.

In this way, before national courts, international organizations assert the immunities recognized to them in the treaties signed with the receiving States. The topic that most frequently reaches the courts is that of labor relations, brought by the employees of international organizations. To better understand the exception to immunity in labor matters, the 1999 judgment of the European Court of Human Rights in the case of *Waite and Kennedy v. Germany* is germane. That ruling found that the immunity of international organizations depended on the availability of suitable and effective resources for the resolution of disputes, provided that:

- o The granting of immunity did not hinder or reduce the right of due process.

- The limitations (immunities) sought a legitimate goal that would ensure the organization's operations were free of unilateral interference.
- There was a reasonable level of proportion between the measures adopted and the goal sought.

The purpose of the ruling was ensure that the employee or officer was not left in a state of defenselessness or denied the fundamental right of access to justice.

One this Rapporteurship's goals is to determine the practice followed — both in the Americas and globally— to resolve exceptions to the immunity of international organizations.

4. Proposed document to be drawn up by the Inter-American Juridical Committee

The elements gathered so far lead to a preliminary conclusion: the Member States do not have a homogeneous way of dealing with the immunities of international organizations.

Most of the Member States do not have relevant domestic laws, and there is no evidence that they require to adopt such legislation. The States' practice is to use hosting agreements to regulate their relations with the international organizations based in their territories. We can also conclude that in connection with this issue, international custom serves as a source of law for resolving cases brought before the domestic courts. Nevertheless, we have insufficient information to determine what that international custom should be understood as implying.

This Rapporteurship is of the opinion that the conditions do not exist for the Organization of American States to consider drafting a legally binding international instrument on the jurisdictional immunities of international organizations. The case-by-case approach adopted for this topic leads us to conclude, first, that the agencies of the State, both administrative and judicial alike, would benefit from learning about the state practices that are following and feeding an emerging international custom, in order to guide their own decisions.

This Rapporteurship therefore suggests that the Committee draft an instrument containing general principles of International Law in the Americas on the jurisdictional immunities of international organizations.

The Rapporteurship believes that if the principles that are generating international custom can be identified, administrative and judicial agencies will have a reference point for orienting their decisions. The proposed instrument would also assist the international organizations themselves in better conducting their legal relations with host States. Finally, both the Member States and the international organizations would benefit from learning about a wide range of principles to assist them in negotiating future hosting agreements.

5. Working method

Over the coming months, and with the invaluable support of the Secretariat, this Rapporteurship will set about examining three sources of law: the constituent treaties of the inter-American system's agencies, the hosting agreements in force in the Member States, and the court decisions that exist. For this third source, the study will cover decisions adopted by the Member States' courts, but it will also examine domestic case law from other parts of the world.

Subject to adaptations as work progresses, the initial purpose of this comparative analysis will be to determine the following issues:

- a. The material scope of the jurisdictional immunity of international organizations.
- b. Exceptions or limits provided for in treaties or issued by domestic courts.
- c. The scope of the exception to jurisdictional immunity for "commercial activities" or cases in which domestic or International Law is breached, particularly in labor matters.
- d. The scope of the principle that international organizations must abide by the domestic law, including respect for the fundamental right of access to justice.
- e. The resources available to third parties to remedy violations of domestic or International Law.

6. Next steps

This Rapporteurship has set itself the goal of presenting a preliminary draft instrument at the 88th regular session. Once a text has been adopted by the Committee, we suggest that it be presented for consideration by the Member States within the Committee on Juridical and Political Affairs of the OAS, to receive such comments as the Member States deem appropriate, with a view to its adoption by the OAS General Assembly in due course.

* * *

3. Electronic warehouse receipts for agricultural products

Documents

CJI/doc.475/15	Electronic warehouse receipts for agricultural products (presented by Dr. David P. Stewart)
CJI/doc.483/15	Electronic warehouse receipts for agricultural products (presented by Dr. David P. Stewart)

During the 81st regular session of the Inter-American Juridical Committee (Rio de Janeiro, Brazil, August, 2012), Dr. David P. Stewart proposed developing a standard law on electronic customs warehouse receipts relating to the transportation of agricultural products. He explained that many countries use antiquated procedures at various stages in the chain of production.

Dr. Gómez Mont Urueta then asked Dr. Stewart to act as the rapporteur on the subject. Dr. Stewart accepted. Dr. Jean-Michel Arrighi asked Dr. Stewart to look into the scope of the Inter-American Convention on Contracts for the International Carriage of Goods by Road.

At the 82nd regular session of the Inter-American Juridical Committee (Rio de Janeiro, Brazil, March, 2013), the rapporteur of the topic, Dr. David P. Stewart, presented document CJI/doc.427/13, dated January 31, 2013, entitled "Electronic warehouse receipts for agricultural products."

Besides explaining the objective of his proposal, Dr. Stewart offered a general analysis of the issue. He explained that, within the distribution chain, products sent to domestic and international markets are subject to warehousing, which can vary in cost and can lead to indebtedness. In this context, he expressed interest in having an instrument that gives States a form of secure, efficient transaction that is negotiable and has a value; and in modernizing the system to make it electronic.

Both UNCITRAL and UNIDROIT have embarked on global efforts in this arena, but the Committee's work may be relevant at the hemispheric level. He noted as well that the OAS has the advantage of being able to act more quickly than other forums as it already has an instrument on secured transactions. The rapporteur therefore proposed two approaches: a set of draft principles or a model law. In both cases the support of experts would be needed as this was not an area he is used to handling in his work. Dr. Fabián Novak Talavera and Dr. Gélin Imanès Collot both supported the idea of a model law to assist national efforts. The rapporteur noted that while a number of instruments were already dealing with secured transactions, this proposal would fill a gap in this area. Besides, States would find a model law more acceptable over a binding instrument.

The Chairman asked the Rapporteur to submit a proposal model law for the August meeting. He also requested the Secretariat to consult or survey the States on existing legislation in this area.

By note verbale OEA/2.2/33/13 of July 2, 2013, the Department of International Law sent the permanent missions to the OAS a request for information on existing legislation.

At the 83rd regular session of the Inter-American Juridical Committee (Rio de Janeiro, Brazil, August 2013), the rapporteur for the topic, Dr. David P. Stewart, presented a first draft of the document titled "Proposed Principles for Electronic Warehouse Receipts" (registered as document CJI/doc.437/13) and asked the Committee members to convey their proposals and suggestions by December 2013, with a view to submitting final draft in March 2014.

The Rapporteur considered that the focus of model law should be on agricultural products, and that it should be consistent with the Model Law on Secured Transactions, including both electronic and paper receipts. He also noted that he would take into account the work done by UNIDROIT and UNCITRAL as well as the latest developments at the international level. Finally, he said that the document should emphasize the need for government supervision of the whole process.

During the 84th regular session of the Inter-American Juridical Committee (Rio de Janeiro, Brazil, March, 2014), the Rapporteur on the issue, Dr. David P. Stewart presented document CJI/doc.452/14. He mentioned that the same as with the Juridical Committee's report on Simplified Joint Stock Companies, the work focused on small enterprises: in that case, small farmers who normally lack access to financial markets and need a certification that will enable them to finance harvesting based on their output. In that context, electronic transactions – the use of modern technology – could facilitate access to capital for those farmers. He also mentioned that that was not a unique proposition. Rather it existed in various international forums, such as the UNIDROIT, UNCITRAL, World Bank, and national forums, including some in the United States, which was experimenting with the aforementioned technology.

He pointed out that a first version of the Model Law had already been prepared jointly with the Department of International Law. Furthermore, he noted the importance of bringing in other experts on the subject: both governmental and nongovernmental.

Finally, he said he wanted to circulate a first version during the regular session in August.

The Chairman welcomed the rapporteur's Proposal and Dr. Fabián Novak mentioned that the model law format was ideal.

During the 85th regular session of the Inter-American Juridical Committee (Rio de Janeiro, Brazil, August, 2014), the Rapporteur was unwell and unable to attend. Given Dr. Stewart's absence, Chairman Novak suggested that the Committee continue its discussion of the subject at its 86th regular session in March 2015. The other Members agreed.

During the 86th regular session of the Inter-American Juridical Committee (Rio de Janeiro, Brazil, March 2015), Dr. David P. Stewart stressed the positive effects that developments in electronic warehouse receipts for agricultural products could have on the economies of the countries, particularly on small-scale agricultural goods-producing companies. Implementation of an efficient warehousing and receipt system would make it possible to better manage financial transaction systems. Additionally, he recognized the need to create an electronic format secured transactions mechanism. At the end of his presentation, the Rapporteur requested an extension to complete the report in order to be able to continue consulting with technical experts in the region.

Dr. Dante Negro mentioned the existence of associations such as the American Association of International Private Law (ASADIP), which brings subject matter experts together and offers assistance, the Hague Conference on International Private Law. Dr. Negro also brought attention to the network of experts on the subject of secured transactions available to the Department of International Law.

During the 87th regular session of the Inter-American Juridical Committee (Rio de Janeiro, Brazil, August 2015), Dr. Stewart recalled that, in the last report, he had proposed to follow up on the topic and have a subject matter expert on the Committee. In this regard, he expressed appreciation for the presence of Dr. Juan Carlos Sciullo, who explained Argentina's experience in the field.

Dr. Sciullo explained his own personal experience at the Ministry of Agriculture of Argentina and the legislative legacy dating back to 1914. In several countries of Latin America, as well as his country, he has been able to establish that a system is in place, consisting of two documents: the property certificate and the warrants, which serve as the negotiable bonds of certificate of deposit. This dual system would seem to be an obstacle to an electronic warehouse receipt system. In his view, the Committee must address both of these negotiable instruments, in view of the fact that they function autonomously. Credit recovery is a complex procedure and, often, the time periods imposed by the courts pose difficulties. Dr. Sciullo also spoke about the scope of a draft law in his country, which is aimed at, among other things, updating the Argentine system, by creating an exemption for the credits, but not including deposit maintenance fees, or operation of the bankruptcy law. In practice, he believed

it is acceptable to expand the scope of warrants to include live goods. He mentioned the experience of the Chilean law that enables issuance of warrants for a type of shellfish (abalone).

The adoption of electronic mechanisms poses challenges, inasmuch as it requires acceptance of electronic notifications. In his opinion, each country must choose the registration and notification mechanism that is best suited to it.

Dr. Stewart noted that his report shows that the main issue is to take into account the situation of the producer and his or her needs. He asked the expert for his suggestions as to the direction the study should take; what can this Committee do to develop this study in the future and promote these instruments.

Dr. Sciallo mentioned that the study should focus on granting of authorizations to issue these instruments. There must be verification of the kinds of borrowers, which banks should target, wither large or small-scale producers. In the case of the latter, there could be softer criteria in place to grant authorizations.

Dr. Salinas explained the importance of addressing a topic that is of such great economic impact to the region. For his part, Dr. Stewart requested more time to research and carry on with this work.

The Vice Chairman then proposed to leave the topic on the agenda.

The text of the aforementioned documents are as follows:

CJI/doc.475/15

ELECTRONIC WAREHOUSE RECEIPTS FOR AGRICULTURAL PRODUCTS

(presented by Dr. David P. Stewart)

The subject of a proposed model law on electronic warehouse receipts relating to the transportation of agricultural products was first raised in the Inter-American Juridical Committee at its 81st Session in Rio de Janeiro in August 2012. For the Committee's 82nd regular session in March 2013, the rapporteur for this topic, Dr. David P. Stewart, presented a preliminary discussion in the document entitled "Electronic warehouse receipts for agricultural products" (CJI/doc.427/13). At its 83rd regular session in August 2013, the Committee considered a first draft of a document titled "Proposed Principles for Electronic Warehouse Receipts" (CJI/doc.437/13). For the Committee's 84th regular session in March 2014, the rapporteur presented a report together with preliminary draft principles for "Electronic Warehouse Receipts" (CJI/doc.452/14).

Over the course of the past year, the rapporteur has been assisted, very ably, in the ongoing work on this topic by research efforts undertaken by the Department of International Law. The results of this research are summarized in this report and form the basis for the recommendation below.

Background: The background to this topic was set out in some detail in the earlier documents noted above. In brief, throughout Latin America, warehouse receipts are underutilized as a financial instrument in gaining access to credit. A warehouse receipt is a document of title that represents the (agricultural) goods that a producer deposits in a warehouse. In theory, the holder of the receipt (in most cases the depositor, *i.e.*, the producer or farmer) should be able to obtain credit secured against that warehouse receipt. However, it is generally known that warehouse receipts are not widely used

in Latin America as a source of financing. Although there are many reasons for this,¹ the focus of this study has been on the legal hurdles inherent in the instrument itself.²

Civil Law – Dual Document System: Upon delivery and deposit of goods with a warehouse operator, the operator typically issues a warehouse receipt to the depositor. Under the common law system, a single document is issued, known as a “warehouse receipt.” Under the civil law system, the operator issues a two-part document: 1) a certificate of property (“certificado de propiedad”) or title of ownership (“título de propiedad”) and 2) a certificate of pledge or bond (“bono de prenda”).

Under the common law, the warehouse receipt serves as both proof of ownership and as negotiable paper capable of being given as collateral in a financial transaction. By contrast, under the civil law, the certificate of property indicates ownership and the bond or pledge is the negotiable paper capable of being given as collateral. The reason for the dual documents is the principle in civil law that prohibits a creditor from keeping and taking ownership in the property that was given as a guarantee (*prohibición de pacto de lex comisoria*). Hence, the transfer of a receipt to a financial institution as a pledge in exchange for credit cannot connote the transfer of property rights in the goods. It is understood as an unacceptable conflict of interest.

In accordance with this legal theory, the certificate of property should remain with the depositor and the certificate of pledge should remain with the lender. In practice, however, it seems that this is not so and that in most cases both documents remain together, usually with the warehouse operator who may also serve as lender. The complexity of this dual document system is thought to be one of the reasons for the underutilization of warehouse receipts as a financing instrument.

Electronic Warehouse Receipts: Introduction of a system of electronic warehouse receipts may help to resolve the complexity and limitations of the dual document system – and thereby advance the use of warehouse receipt finance - simply by leapfrogging over the issue. When paper-based documents are replaced with an electronic register, there is no longer any need for differentiation between the “single document” (common law) or “dual document” (civil law) system because the potential conflict of interest “disappears,” given that the lender is no longer in possession of *any* paper documents.

The challenge, however, is in the transition. Any model law for electronic warehouse receipts should also recognize the validity of paper-based documents, especially as many countries do not yet acknowledge the legality of electronically transferable records. Consequently, the issue – whether an attempt should be made to modernize and replace the dual document with a simplified single documentary system - cannot be avoided. Even though the dual document system does not appear to be actually used in practice, it seems the legal fiction has to be maintained.

Research to Date: To help resolve this conundrum, discussions have been held over the past year with experts in Mexico, Chile, Argentina and the United States. Using the legislation and other information that has been provided by OAS Member States and otherwise obtained by the secretariat, a legislative comparison is underway (attachment). Research is ongoing, in particular, to consider whether and how reforms in various civil law countries address the dual document system; in most cases, it is being retained.

Recommendation: The Committee may wish to consider a recommendation that this topic be sent to a group of experts for further consideration and development of a draft model law for the Committee’s consideration.

¹ Practical reasons include the following: 1) lack of knowledge of this tool, both by producers and the financial system; 2) lack of sufficient numbers of credible (bonded) warehouses; 3) high cost of services.

² Other legal issues include the following: 1) uncertainty of whether deposited goods are free of liens; 2) difficulty with enforcement; 3) interference of an intervening bankruptcy (of warehouse operator).

* * *

CJI/doc.483/15

ELECTRONIC WAREHOUSE RECEIPTS FOR AGRICULTURAL PRODUCTS

(presented by Dr. David P. Stewart)

The subject of a proposed model law on electronic warehouse receipts relating to the transportation of agricultural products was first raised in the Inter-American Juridical Committee at its 81st Session in Rio de Janeiro in August 2012. For the Committee's 82nd regular session in March 2013, the rapporteur for this topic, Dr. David P. Stewart, presented a preliminary discussion in the document entitled "Electronic warehouse receipts for agricultural products" (CJI/doc.427/13). At its 83rd regular session in August 2013, the Committee considered a first draft of a document titled "Proposed Principles for Electronic Warehouse Receipts" (CJI/doc.437/13). For the Committee's 84th regular session in March 2014, the rapporteur presented a report together with preliminary draft principles for "Electronic Warehouse Receipts" (CJI/doc.452/14). For the 86th regular session in March, 2015, the rapporteur presented a report of the progress made on the topic over the course of the previous year (CJI/doc.475/15).

Since the last report, the rapporteur has been apprised of significant developments in work related to this topic by other organizations. These developments are summarized in this report and form the basis for the recommendations below.

Background: The background to this topic was set out in some detail in the earlier documents noted above. In brief, throughout Latin America, warehouse receipts are under-utilized as a financial instrument in gaining access to credit. A warehouse receipt is a document of title that represents the (agricultural) goods that a producer deposits in a warehouse. In theory, the holder of the receipt (in most cases the depositor, *i.e.*, the producer or farmer) should be able to obtain credit secured against that warehouse receipt. However, at this point in time warehouse receipts are not widely used in Latin America as a source of financing.

Although there are many reasons for this situation, one possible legal hurdle is inherent in the instrument itself, or more particularly, inherent in the legal system pursuant to which the instrument is issued. Under the common law, a single document "warehouse receipt" is issued and serves both as proof of "ownership" and as negotiable paper capable of being given as collateral in a financial transaction. By contrast, under the civil law a dual document system is typically used whereby a certificate of property ("certificado de propiedad" or "título de propiedad") indicates "ownership"

¹ and a separate bond or pledge ("bono de prenda") is the negotiable paper capable of being given as collateral. The complexity of this dual document system – particularly the associated increase in the potential for fraud – is thought to be one of the reasons for the underutilization of warehouse receipts as a financing instrument in civil law countries in the Americas.

Introduction of a system of *electronic* warehouse receipts might help to resolve the complexity and limitations of the dual document system and thereby advance the use of warehouse receipt finance. However, any set of principles or model law for electronic warehouse receipts should also recognize the validity of paper-based documents, especially as many countries do not yet

¹ Subsequent to the previous report, further research revealed that the "certificate of property" issued under the civil law system does not convey absolute and permanent title to the goods stored, but rather, a set of rights that falls short, which is referred to as a "preferential possessory right." This nonetheless allows the holder to claim the possession of the goods stored with preference over the claims of "historical" owners and depositors of the stored goods. It has been suggested that in this regard, the rights of the holder of a warehouse receipt under the single receipt system (common law) are no different.

acknowledge the legality of electronically transferable records. Consequently, the issue remains as to how the dual document system should best be addressed.²

In order to advance discussions, the secretariat has a) initiated discussions with experts in Mexico, Chile, Argentina and the United States; b) requested OAS Member States for relevant legislation; and c) prepared a legislative comparison.

Recent Developments: During the course of this study, the rapporteur has been apprised of work in related areas being undertaken by other organizations, as follows:

a) FAO - Since the last report of the rapporteur, a publication has been released by the Food and Agriculture Organization of the United Nations, entitled “*Designing Warehouse Receipt Legislation: Regulatory Options and Recent Trends*.” This comprehensive study points out the importance of defining the national policy objectives behind such a legislative initiative. It reviews the forms and core elements of warehouse receipt legislation and provides an extensive set of case studies (which include Argentina, Brazil and the United States) to illustrate these concepts. Particularly noteworthy, after an explanation of the “single” and “double” receipt systems, is the finding that “(i)t is crucial that the receipt format be consistent with the general legal framework to ensure smooth implementation within the commercial order and rapid uptake by warehouses and lenders” (page 35). The Brazilian case study illustrates the double receipt system in which warehouse receipts “are initially issued in duplicate paper form, the agricultural certificate of deposit and agricultural warrant, [and then] proceed in electronic format after registration.” Thereafter follows the observation that “an important challenge to ensure the integrity of electronic receipts is creating a unique electronic equivalent” (page 40). The conclusions note that “(s)pecific elements of legislation that deserve focused research in view of their recent introduction worldwide are electronic warehouse receipts and options for their legal design” (page 51).

b) UNCITRAL – The United Nations Commission on International Trade Law, Working Group IV on Electronic Commerce has, since 2011, been studying electronic transferable records which, as defined, would include electronic warehouse receipts.³ Subject to a final decision to be made by the Commission (July 2015), the Working Group has agreed to proceed with the preparation of a draft model law on electronic transferable records that “should provide for both electronic equivalents of paper-based transferable documents or instruments and for transferable records that existed only in an electronic environment” (UNCITRAL A/CN.9/834, para. 12). It has been widely felt that generic rules should be developed encompassing various types of electronic transferable records (A/CN.9/761, paras. 17-18) (i.e., rather than focusing on specific types).

c) NATLAW – The National Law Centre for Inter-American Free Trade has been working towards a draft model law that would cover both paper-based and electronic receipts. Most recently, however, the direction appears to be inclined towards sector-specific models: “In the absence of an unrealistic and impractical multi-sector, multi-trade Master Agreement, a standardized EWR text for a given trade within a given sector, such as for cotton, grains or coffee, offers a more realistic and practical path not only toward a Trans-Pacific EWR but also towards uniform national registries or a multi-national registry of EWRs. It would contain the terms and conditions of issuance, transfer, negotiation and pledge of the EWR as agreed upon by regular participants in that trade across national borders.” (Second Pacific-Rim Colloquium on Economic Development and the Harmonization of Commercial Law 2015: Summary, page 14).

² For example, the rapporteur has been apprised of a draft model law that would essentially replace the dual document system with a single document for paper-based receipts. It remains to be determined whether that is a feasible approach because, as recognized in the FAO study, the receipt format must be consistent with the general legal framework.

³ The term “electronic transferable *record*” (in contrast with a “transferable *instrument*”) generally refers to the electronic equivalent of both a transferable instrument *and* a document of title (UNCITRAL, A/CN.9/WG.IV/WP.119). Because under most legal systems a warehouse receipt is generally considered to be a document of title, an electronic warehouse receipt would be considered an “electronic transferable record” (UNCITRAL, A/CN.9/WG.IV/WP.118).

Recommendations: These new developments have confirmed the highly technical and complex nature of this subject. In order to significantly advance the draft principles that have been presented to this Committee and to ensure consistency with other related projects as noted above, further and extensive consultations would be required with experts in the subject, not only legal experts but also those familiar with industry practice, as had been recommended in the Rapporteur's previous report. However, at this time the necessary resources to permit such a meeting are not available and this situation is unlikely to change in the near future, especially given that under its new leadership, the OAS Secretariat is presently in a transitional period.

Accordingly, while recognizing the potential value of a draft set of principles or model law on electronic warehouse receipts for our hemisphere, the rapporteur recommends that:

- further consideration of the proposed draft be deferred until substantive consultations with appropriate experts becomes feasible; and
- the secretariat consider posting the draft principles to a closed website and exploring the feasibility of arranging for "virtual" online consultation with experts.

4. Migration in bilateral relations

Documents

CJI/doc.461/14 rev.3	Report of Inter-American Juridical Committee. Migration in bilateral relations
CJI/RES. 219 (LXXXVII-O/15)	Recommendations for actions in the area of migration in bilateral relations (Annex: CJI/doc.461/14 rev.3)

At the 83rd regular session of the Inter-American Juridical Committee (Rio de Janeiro, Brazil, August 2013) Dr. José Luis Moreno Guerra proposed a new issue for the Inter-American Juridical Committee to work on, entitled “Guidelines for migratory management in bilateral relationships,” (CJI/doc. 442/13). Taking note of the existence of an earlier study by the Committee on a related topic, the plenary supported the proposal and appointed Dr. Moreno Guerra as rapporteur for the subject. Dr. Moreno Guerra said that he would present a draft at the next session.

At the 84th regular session of the Inter-American Juridical Committee (Rio de Janeiro, March 2014), the Rapporteur for the issue, Dr. José Luis Moreno, presented document CJI/doc.456/14, in keeping with the mandate issued by the Juridical Committee at its 83rd regular session in August 2013, to draw up a model bilateral agreement on migration.

Dr. José Luis Moreno explained that the aim was to prepare a model applicable to bilateral relations, particularly with respect to States with common borders or adjacent islands, and to facilitate settlement of disputes with the nearest neighbors. In this context, he recommended using the example of the Neighborhood Commission in border relations, bearing in mind the experience gained in the movement of capital and people. His view was that amnesty and partial agreements had not been an effective remedy. The Rapporteur explained how immigration had influenced the survival of the human species, stressing that the sedentary nature of hominids dates back 30,000 years, with the adoption of agriculture and animal domestication. According to the Rapporteur, migration was a basic and inherent part of Human Rights.

Dr. Novak cited the example of Peru, which for many years has been an exporter of migrants and is now taking in immigrants, especially from European countries. He argued for consideration to be given to differences in the reality among the countries of the region. He therefore proposed that a study be done with legal responses to those realities.

The Rapporteur pointed out that in conducting his study, various bilateral agreements had been taken into consideration. He cited the example of the Mexico-Canada agreement for temporary migrant workers. Legal migration between Haiti and the Dominican Republic would also be much less costly, he observed, pointing to the example of migration waves in South America, including Ecuadorians going to Colombia at one point, but the direction has changed in recent years with Colombians now the ones going to Ecuador. Finally, he gave the example of Mexico and the United States, which handled mainly through amnesty and reciprocity. From his standpoint, ideally a comprehensive solution would be proposed through a model agreement.

Dr. Salinas said he had concerns about the mandate, particularly as regards policy guidelines, since the Committee was expected to present legal studies. He suggested changing the title to "Guidelines for migration regulation."

Dr. Novak said there was no clarity as to what kind of document or product the Committee was to deliver. He further proposed drawing up guiding principles instead of a model bilateral agreement, given how hard it is for model agreements to "reflect the diverse bilateral realities" between countries in the region.

Dr. Salinas supported the position expressed by the Chair and other members of the Committee. He said the specificity of a single agreement would be very complex as it could not represent those multiple realities.

The Rapporteur said he had taken note of the comments from all the members and would take them into consideration when drafting his report. During the 85th regular session of the Inter-American Juridical Committee (Rio de Janeiro, August, 2014), Dr. Moreno Guerra presented the report entitled “Bilateral Agreement on Migration”, document CJI/doc.461/14, which, at the behest of the Chairman, the Committee reviewed section by section.

Next, there was a thorough exchange among the Members of the Committee on each of the provisions introduced by the Rapporteur for the topic.

The Chairman noted the importance of having “Guidelines” rather than “an Agreement” as the best way to represent a collective view of the Committee Members in an area fraught with difficulties. He also urged the Rapporteur to work with Committee Members, especially Hernán Salinas and Carlos Mata, who had come up with valid comments designed to facilitate the drafting of a document that is realistic and practical. He said approval would be left pending for the next working session of the Inter-American Juridical Committee.

During the 86th regular session of the Inter-American Juridical Committee (Rio de Janeiro, Brazil, March 2015), Dr. Moreno Guerra reminded the Members that at the previous session, the text of the Guidelines was approved with the inclusion of some observations to the new version, which contained a vision with an eminently human approach, based on persons’ right to freedom of movement.

Dr. Mata Prates mentioned the link of this topic to statelessness, which is also on the Inter-American Juridical Committee’s agenda. He expressed the need to review certain items, specifically, provisions 41 and 44, bearing in mind that they would appear to go beyond the aim of a set of guiding principles. He suggested changing the text or deleting the appropriate provisions from Chapter VI. In his opinion, the job of the consul should not interfere with States’ internal relations and, furthermore, this could be viewed as granting considerable powers to consuls.

Additionally, he expressed his concern over Chapter VII, which is about education certificates and diplomas or degrees. In this regard, he explained that in MERCOSUR, as well as other bilateral forums, the States of the Americas have attempted to agree, unsuccessfully, on provisions regarding these topics and, therefore, he finds it appropriate to keep them in the guidelines.

He also explained his disagreement with provision 53, which guarantees students with scholarships the chance to work in neighboring countries, taking into account that practice usually excludes these principles. He then suggested deleting provision 59, which would seem to confuse the topic of migration with refugee status.

Lastly, he established that the definition of family unit, as set forth in the document, is inconsistent with the current status of practice.

Dr. Hernández García made specific remarks on the agreed role for consuls and ambassadors, and noted his preference for reflecting in Chapter VI the terms of Article 36 of the Vienna Convention on Consular Relations, regarding the right to notification and consular access. He also was in favor of excluding from the proposal the role of the consul in collective bargaining.

As for provision 53, he disagreed with Dr. Mata Prates because, the way he understands it, there is a new trend to promote agreement on work/study programs for foreigners for limited periods of time. Therefore, he believes, this type of agreement should be encouraged.

He established that the expression “enganchador” in provision 2 [in the Spanish version, the means ‘recruiter’] can be understood in different ways in Spanish. In Mexico, for example, it has a pejorative connotation and, therefore, he suggested that it be replaced by “job placement company”

[*empresa de colocación*] or “hiring.” Lastly, he suggested that the phrase “certification of criminal record” be replaced by “no criminal record.”

Dr. Hernán Salinas noted that he differs with the Rapporteur’s opinion as to the nature of the document. He recalled that in prior meetings it was agreed that the document would be guidelines. In this regard, the language used in the document is of a normative nature and, therefore, he suggested changing it so that it is more consistent with the proposal for it be a set of guiding principles.

Dr. Villalta requested amendment to provision 66, which is about the topic of refugees, as it is inconsistent with the purpose of the guidelines and, instead, it should refer to the topic of migration.

Dr. Stewart inquired about possibly changing the wording of some provisions to make them clearer. He asked to narrow the guarantees addressed in provision 11. As for provision 44, he suggested adding the expression “temporary absence” from work. Under provision 58, he recommended clarifying that it is about arbitrary concentration or confinement or detention.

The Chair proposed eliminating the ‘whereas clauses’ of the guidelines.

Dr. Moreno Guerra noted that the guidelines seek to enable States to choose the ones that best suit their circumstances. As for the ‘whereas clauses’, the Rapporteur explained that they serve to provide a rationale for the provisions as an introduction. He then moved on to provide explanations for the specific topics.

He thanked Dr. Hernández and proposed replacing the term “enganchadores” [‘recruiters’] in provision 2 with “*empresa de contratación*” [‘hiring company’].

The Rapporteur explained that provision 11 is intended for the son or daughter of a migrant to be recognized as a subject of law, just as his or her parents are, when he or she reaches legal age, and not be compelled to start the immigration process over or become an undocumented alien.

He established that the criminal record certificate is called different things in different countries, but its purpose is to attest to the person having no criminal record.

With regard to the role of the consul, the Rapporteur found discrepancies between his proposal on Chapter VI and the provisions of Article 36 of the Vienna Convention, inasmuch as in his opinion, it is an administrative aspect entailing a minimum of assistance to nationals, regardless of whether they are migrants in fact or by law.

As for provision 45, he found Dr. Stewart’s remark to be very relevant and noted on the record that States must respect the contributions that these people make as workers.

Regarding provision 51, while we should not lose sight of the expenses incurred by a State in educating its citizens, that does not prevent a person that has been educated in a foreign country from practicing his or her profession in the country of arrival.

He also asked for provision 53 to be construed in a favorable, as opposed to an unfavorable light to the immigrant, inasmuch as it is widely applicable.

He explained the reason for provision 58 as a solution to the fact that immigrants usually arrive in great numbers at one time. This situation makes it easy for these immigrants’ rights to be violated. As he understands it, refugee status is asylum for the poor; while asylum is an insurance policy for the rich, who have fallen on hard times. This is why we have intended to create a guideline for people to be treated humanely.

The Rapporteur established the relevance of provision 66, because a person who requests refugee status is essentially an immigrant in fact.

As to the definition of “family unit,” he suggested replacing it with the following phrase: “serves as a guarantee to not affect the family nucleus.” He mentioned the example of the children of immigrants who have the nationality of the country where they are living with their parents, who are

immigrants in fact and because their parents are targets for expulsion from said country, their children will be left in a difficult situation.

Dr. Correa Palacio was glad with the change in the expression “certificate of criminal” record and requested greater clarity regarding the rights of the children of immigrants, because it is not clear whether it means children who migrate along with their parents or children who remained in the country of origin.

Dr. Hernán Salinas revisited the topic of the legal nature of the document and requested that a draft model agreement be prepared instead of guiding principles.

Dr. Hernández García suggested including Article 23 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families in Chapter VI as it pertains to provisions 41 and 42; the text of the aforementioned article reads as follows:

Article 23: Migrant workers and members of their families shall have the right to have recourse to the protection and assistance of the consular or diplomatic authorities of their State of origin or of a State representing the interests of that State whenever the rights recognized in the present Convention are impaired. In particular, in case of expulsion, the person concerned shall be informed of this right without delay and the authorities of the expelling State shall facilitate the exercise of such right.

The Chairman confirmed that the previous minutes reflect that an agreement was made for the document to be a set of guiding principles. He then requested the opinion of the Members on the topic of substance raised by Dr. Salinas on the nature of the document (a set of rules or guiding principles).

Dr. Moreno Guerra mentioned that a draft agreement was introduced at the 84th Regular Session and a request was made to turn it into guiding principles and, consequently, we would now be changing the nature of the document once again. He cannot go along with this proposal since it would make the draft less important.

The Chairman explained that in the minutes it had been agreed that guiding principles would be prepared. Dr. Pichardo concurred with the Chair regarding the discussions that took place at previous meetings, which were included in the respective minutes. Additionally, he mentioned that the changes in provision 15 on the topic should also be made in provision 16. With regard to provisions 59 and 66 on asylum and refugee status, he established that the latter was redundant and, therefore, unnecessary.

Dr. Baena Soares concurred with the remark of the Chair that the two terms “guideline” and “provision” stand in apparent contradiction. Therefore, it was suggested to adopt this report in the form of a set of guiding principles and avoid any reference to norms, rules or provisions (“normas”).

The Chairman suggested that a consensus would be to prepare “guiding principles.”

Dr. Moreno Guerra requested in this regard guidance on the title of the document.

Dr. Mata Prates proposed that if the consensus were to create guiding principles, the wording would be changed to avoid the imperative.

Dr. Joel García mentioned that it could be a set of non-binding recommendations. In the end, the General Assembly would be using it as a handbook of recommendations.

Dr. Moreno Guerra concurred with Dr. Joel García’s proposal regarding the title. “Handbook of recommendations on migration.” He pledged to submit the document with the changes, but noted that he would need a reasonable length of time to make them.

The Chairman then requested the Rapporteur to submit the document at the August meeting of the Inter-American Juridical Committee.

During the 87th Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, Brazil, August 2015), Dr. José Luis Moreno Guerra, Rapporteur for the topic, submitted his report titled, “Migration in bilateral relations,” document CJI/doc.461/14 rev.2.

He recalled that this document had been subjected to several revisions and that the latest version reflects opinions offered previously. He recalled the changes that were made regarding the final nature of the report: initially it had been proposed to create a model bilateral agreement, then a handbook of rules was drafted and, in the end, it was decided to adopt a report with recommendations to the States.

The Chairman suggested adopting the report by consensus, as there were no further observations.

Following there are the transcripts of the approved documents and its respective resolution.

CJI/doc.461/14 rev.3

REPORT OF INTER-AMERICAN JURIDICAL COMMITTEE.

MIGRATION IN BILATERAL RELATIONS

MANDATE

The Inter-American Juridical Committee decided by consensus, at the session of August 9, 2013, corresponding to 83th regular session, to incorporate into the following session's agenda the Rapporteurship on "Guidelines for migratory management in bilateral relationships of the American States," as part of the attributions envisaged in Articles 99 and 100 of the Charter of the Organization of American States and Article 12, subparagraph c) of its Statute, for the purpose of subsequently drafting the model bilateral agreement on migration; at the same session the Rapporteur who shall be submitting to the consideration of the Committee a preliminary document for review and discussion was designated.

At the 84th regular session, held in Rio de Janeiro on March 10-14, 2014, the "guidelines" were adopted and the Rapporteur was requested to proceed with the drafting of a "Model Bilateral Agreement on Migration", to be reviewed during the next session.

Subsequently, at the 85th regular session, held in Rio de Janeiro in August 2014, the Rapporteurship's document was adopted with the recommendation that it take the form of a guide to rules governing migration in bilateral relations between American States.

Finally, at the 86th regular session, held in Rio de Janeiro in March 2015, the Rapporteur was asked to make another change to the title of the document, calling it not a "Guide to Rules" but rather "Recommended Actions" addressed to American States on the subject of "Migration in Bilateral Relations."

CONSIDERATIONS

- That, given the enormous difficulty of adopting an Americas-wide agreement on migration, it would be advisable to diversify the approach in such a way that each country can handle the issue separately with its adjoining or neighboring countries.
- That it is indispensable to regulate, in general and on an ongoing basis, the principal aspects of migration between neighboring states.
- That the rights to mobility and settlement, inside and outside countries, are inherent to human beings.
- That it is individually and socially useful to fulfill the drive for self-improvement of immigrants, who as a rule become stakeholders bearing and creating advancement.
- That migration must be considered and treated as a fundamental human right and punitive, law-enforcement approaches discarded.
- That migration must be considered and treated as a phenomenon that is eminently social, cyclical, and permanent, with its own characteristics, not subject to any equivalencies in terms of the number of persons, quotas, or periods.

- That facilities for obtaining an “immigrant visa” be granted to avoid or reduce the number of “de facto” migrants.
- That the legal vulnerability of *de facto* immigrants also leads to economic damages for the society that receives them.
- That obtaining a visa must be facilitated as a way of preventing and stopping *de facto* immigrations.
- That temporary migration for labor purposes requires a treatment that is expeditious, simple, and timely.
- That the concept of family unity must guide the actions and prevail in the decisions taken by national authorities having jurisdiction.
- That dual and multiple nationality best guarantee the rights of immigrants and ethnic groups in border areas, while at the same time avoiding cases of statelessness.
- That classifying a citizen of a neighboring country as an inadmissible alien to prohibit entry, return him/her to the home country, or deny a visa must be based on criteria of danger to the community and not on subjective or discriminatory appraisals.
- That cooperation and mutual assistance by adjoining or neighboring states is necessary to effectively combat international crime for the sake of social peace and to prevent free and unfair resistance to immigrants.
- That the inalienable right of emigrants to return to their countries of origin must be guaranteed and provided with indispensable facilities.
- That recognizing studies, certificates, diplomas, and degrees is an essential part of the guarantees that immigrants and their children require; it will also be useful for nationals abroad when they return.
- That affiliation to any social security system is a guarantee that the immigrant, whether temporary or permanent, shall not be or become a public charge.

RECOMENDATIONS

Based on the above considerations, it is recommended that the American States take the following steps with respect to “Migration in Bilateral Relations.”

Temporary migrations

1 Authorize nationals of neighboring country to work temporarily provided they are affiliated to a social security system and have the corresponding visa.

2 Authorize migration by groups of temporary, sponsored by the employer and intermediary, if any, which the employer and labor contractor are jointly and severally responsible for the transportation, housing, social security affiliation, wages or salaries, other legally stipulated benefits, and return trip.

3 Check that the minimum wage for temporary workers is not less than the minimum wage.

4 Agree on the length of time for which a temporary worker’s visa is valid.

5 Grant student visas, either inside or outside the country, with the showing of a school enrollment or registration affidavit; it can be renewed for the duration of the studies upon presentation of the certificate from the school proving that the school year or its equivalent has been passed.

6 Agree that a scholarship visa shall remain valid for the duration of the scholarship; when applying, the applicant shall present the written certification from the organization or entity awarding the scholarship.

7 Issue a trainee or intern visa upon presentation of the written acceptance by the institution that will be receiving the trainee or intern.

8 Allow for the visas for temporary workers, students, scholarship recipients, interns, and trainees to cover family members who are the holder's dependents.

Permanent migrations

9 Standardize the requirements for obtaining a permanent immigrant visa and simplify the necessary paperwork.

10 Establish identical grounds for suspending and canceling a visa.

11 Grant an immigrant's child, when he/she reaches the legal age of adulthood, the same rights and guarantees granted to the holder of the original visa.

12 Grant indefinite validity to permanent immigrant status, except in cases where it is revoked for just cause.

13 To suspend the request for a visa by a person on trial until the judge having jurisdiction rules on the case.

14 Allow someone whose visa application has been rejected to carry on with a visa application when he/she has met all the remaining requirements.

Residents:

15 Admit a national from a neighboring country who has been granted temporary protection as an established immigrant ("afincado") with a view to he or she obtaining an immigrant's visa by becoming affiliated to social security scheme.

16 Provide facilities for an established immigrant ("afincado") to obtain the identity document or the police record certification from the country of origin at that country's Consulate.

17 Agree to allow an established immigrant to obtain a permanent immigrant's visa when he or she has submitted a certification that she or he has no criminal record in the country of origin and has been affiliated to the social security system of the receiving country for more than six months.

18 Prevent deportation of an established migrant while the application for a permanent immigrant visa is being processed.

19 Grant an immigrant's visa without the need to return to the country of origin.

Recognition of nationality and naturalization

20 Encourage immigrants to register the births of their children with the consulate of the country of origin so that they have access to dual or multiple nationality.

21 Expedite the naturalization of permanent immigrants; nationality status acquired through naturalization shall cover the spouse, under-age children and those children who are of age but subject to parental custody.

22 Simplify the naturalization paperwork for relatives of the naturalized person who are dependent upon that person.

23 In the Naturalization Letter paperwork, dispense with the requirement to renounce the nationality of origin.

Social Security

24 Ensure that employers meet their obligation to affiliate temporary or permanent worker to any social security system, whether state, private, or mixed.

25 Make it possible for a worker on his or her own to affiliate to a social security system in the country of immigration.

26 Accept affiliation to any kind of social security in the country of immigration upon presentation of an I.D. and compliance with the required procedures.

27 Make sure that Students, scholarship recipients, trainees, and interns have social security coverage.

28 Make sure that Social Security offers the affiliated immigrant those medical and hospital services for illness, maternity, occupational accidents, professional illnesses, benefits for the elderly

and the disabled, and other stipulated benefits to which he/she is entitled, without any discrimination whatsoever.

29 Sponsor mechanisms among social security administrations of neighboring states for settlement and compensation for services provided to affiliated immigrants.

30 Agree to the transfer of contributions to Social Security in the country of origin to the Social Security system of the country of immigration.

31 Allow retirement and pension funds to be accredited to the country of immigration.

32 Support agreements between Social Security institutions of neighboring countries so that active affiliated members of one country, when he/she is passing through the territory of the other country, can benefit from healthcare services and protection.

33 Standardize/harmonize Social Security affiliation paperwork in neighboring countries.

34 Arrange for Social Security institutions in neighboring countries to offer a similar range of services and set the same number of retirement fund quota contributions for immigrants.

35 Make benefits available to affiliated immigrants immediately, without any waiting periods.

36 Cut the amount of paperwork for affiliating workers, be they temporary or permanent.

37 The social security administrations of the neighboring countries may establish a binational technical committee, with the capacity to hear and settle application problems or complaints, with respect to immigrants' Social Security.

Protection and Assistance

38 Establish management systems to identify jobs for temporary or permanent immigrants and for those nationals who wish to return.

39 Guarantee for immigrants the same rights and obligations as those of the national, as a result of which no taxes shall be levied for this reason, no additional documents other than those specified in each case shall be required, no periodical or occasional supplementary procedures shall be imposed, and no discriminatory requirements shall be created.

40 Offer to assist collectively hired immigrants in their relations with their employers, through consular officers who could take part in the bargaining and actual placement process.

41 Instruct national diplomats and consular officers to obtain and provide information about labor supply and demand in the country in which they operate, specifying required qualifications, length of job, wages, working hours, availability of housing and living expenses, transportation expenses, and explanations about existing risks.

42 Facilitate arrangements for money earned by immigrants to be remitted back to the country of origin.

43 Exempt income from temporary or permanent immigrants' work from taxes in the country of origin.

44 Protect the labor rights of immigrants by ensuring that they are not forfeited when, for whatever reason, they leave the country.

45 Include immigrants in national adult literacy programs.

Studies, certificates, diplomas, and degrees

46 Once they have been authenticated or annotated, recognize studies completed by emigrants in their country of origin at the primary, secondary, vocational, college preparatory, university or professional specialization levels, whether for years, semesters, or quarters completed and passed.

47 Allow immigrants and their children to enter schools, whether public, private or mixed, at the beginning of the year or at any time before and after, upon presentation of Identity document; and authenticated certificate of the last year, semester, or quarter passed or registration or grade completion.

48 Recognize the certificates, diplomas, and degrees certifying completion of primary, secondary, vocational, college preparatory or university education granted by the competent national authority in an immigrant's country of origin, after authentication or annotation.

49 Allow immigrants to work in the area of their specialty, even if there is no equivalency with the country of residence.

50 Authorize immigrants to practice their profession once the equivalency of their degree has been established.

51 Ensure that the costs of enrollment, registration, tuition or other schooling fees, at all levels, are the same for both immigrants and nationals.

52 Agree to students, trainees, or interns engaging in in paid, part-time activities.

Return

53 Establish that the household belongings and working tools of emigrants returning definitively to their country after two or more years of absence shall be tax and duty free, subject to requirements, restrictions, and procedures established by the Parties.

Special Situations

54 Establish objective indicators for defining the following persons as inadmissible aliens: agitators, criminals, accused persons, provocateurs, persons with an arrest record, fugitives, seditionists, convicts, subversives, terrorists, and traffickers.

55 Disqualify anyone classified as inadmissible from obtaining any kind of visa.

56 Provide guarantees for the security of, and respect for, any person who is returned or classified as inadmissible.

57 Do not allow a resident or immigrant alien to be placed in a concentration camp or confined.

58 Make every effort to meet the needs of displaced persons, to facilitate their return, or to grant them refugee status.

59 Specify the grounds on which an undocumented, illegal, or irregular person may be subject to concentration, expulsion, or internment by order of a competent national authority.

60 Establish the grounds on which a resident or immigrant alien may be returned or deported.

61 Stay/suspend the expulsion of a person whose status is undocumented, illegal, or irregular and whose request for an identity document, passport, police record, or certificate of social security from his/her country of origin is being processed.

62 Safeguard the dignity and fundamental rights of persons being repatriated.

63 To quarantine of nationals of the neighboring country only in justified cases, safeguarding the dignity and rights of persons.

64 Report the presence, movements, and arrest of criminals who are nationals of the neighboring country.

65 Provide mutual assistance to prevent the entry of the persons classified as criminals by the neighboring country.

66 Commit to prevent, hinder, punish, and redress all discrimination against the nationals of the other neighboring country.

67 Refrain from expelling, deporting, returning, or interning immigrants whose under-age children, dependents, spouse or partner were born in the country of immigration.

68 Deny fugitives the status of temporary or permanent immigrant.

69 Adopt the binational passport as a prior step to facilitating and speeding up the adoption of the Andean, Latin American or regional passport.

General Provisions

70 Define the principal terms used in the recommended actions in an annex hereto.

71 Extend the benefits of a temporary or permanent immigrant visa to cover family members accompanying the holder and enables them to perform any trade, craft, profession, or paid legal activity.

72 Train instructors in charge of preparing the staff who must discharge duties in the service centers along national borders, in seaports, airports, and other public offices in charge of ensuring compliance with migration provisions.

73 Agree that the granting of immigrant visas and temporary or permanent immigrant status shall not be subject to any equivalency in terms of numbers between neighboring countries, nor subject to quotas or time-limits.

ANNEX

DEFINITIONS:

For a better understanding and application of the proposed rules, the following definitions listed in alphabetical order are hereby adopted.

Accused – Person who has been called to trial by a judge having jurisdiction.

Affiliate – Worker benefiting from social security coverage.

Alien – Any person who does not hold the country's nationality.

Benefits – Social security allowances, whether in cash or in kind, to the affiliate or next of kin in case of decease.

Border area: Area composed of administrative districts along the Parties' borders with special rules favoring the inhabitants of those districts.

Concentrated person – The national from the neighboring country whose freedom of mobility has been restricted by the national authorities, forcing him/her to stay temporarily in an enclosed compound or premises, for justified administrative purposes.

Convict – Person who has been convicted and sentenced by an authority having jurisdiction in a judgment handed down.

Criminal – Person who has committed a crime and it has been so declared by the authority having jurisdiction.

Day laborer – Person who provides his/her services in farming activities.

Defendant – Person against whom legal proceedings have been filed by an authority having jurisdiction.

Deportee – Alien whose transfer to his/her country of origin has been ordered by the national authority having jurisdiction.

Displaced person – Person who is forced to abandon his/her country of origin because of famine, disaster, violence, war or other calamities.

Draft Evader – A person who is punished for refusing to perform military service.

Emigrant – National who leaves his/her country for the purpose of settling abroad.

De jure emigrant - Term used to describe a person who holds a residence, work, or student visa.

De facto emigrant - Term used to describe someone who lacks a residence visa.

Employer - Person or entity for whose account or at whose order a job is performed.

Expelled person – Alien taken out of the country or forced to leave the country, on previously established grounds.

Extraditee – National handed over to the other country for trial or serving a sentence, at the request of a competent authority.

Family unity – Legal guarantee protecting the nuclear family (parents and their children).

Fugitive – Person who has fled from justice or a penitentiary where he/she was serving his/her sentence.

Illegal – Alien who enters the country surreptitiously or who stays in the country after his/her permit or visa has expired.

Immigrant – Alien who settles in the country under the protection of one of the categories for migration visas.

Inadmissible alien – Alien who is denied entry into the country or a visa on previously established grounds.

Intermediary: A person or enterprise supplying workers to one or more employers.

Intern – A professional, technician, or student accepted for short-term, unpaid attachment (not employment) at an institution in another country to observe and learn in his or her field of training.

Internee – Alien who must remove him/herself from the periphery or border to other places inside the country for legal, regulatory, humanitarian, or security reasons.

Irregular migrant – Alien who has not complied with certain administrative procedures to regularize his/her stay in the country.

Labor contractor – The middleman who provides one or various employers with workers.

Migrant – Person who changes his/her residence from one country to another.

National – Person who has legal ties with the State, as a result of *jus sanguini*, *jus soli* or naturalization.

Naturalized person – Alien who willingly and after meeting legal requirements receives the nationality of the country where he/she is residing.

Nuclear family – Family group comprised of the spouses, couples, parents, children, and the family members dependent on the head of the household.

Pensioner – A person who collects a monthly pension for life, which ensures the beneficiary and family members a subsistence income.

Protected person – The national from the other country who benefits from temporary protection of the country's authorities or an international organization.

Quarantine – Time of required permanence of persons in a sanatorium, in the event of an epidemic or pandemic.

Refugee – The national of the neighboring country who receives protection, when he or she is persecuted for reasons of ethnicity, religion, nationality, conscience, sexual choice, for belonging to a social group, for his/her political views, or for other reasons of intolerance.

Rejected person – Alien who has been denied visa or entry into the country on previously established grounds.

Resident – The national of the neighboring country who has settled in the country without visa protection.

Retiree – Beneficiary of a disability or old age pension.

Returned person – Person handed over to the authorities of his/her country at their request and for reasons that were fully substantiated.

Returnee – The national who has been returned to his/her country at the request of the competent authorities.

Risks – Events not depending on one's will, leading immediately or eventually to an imbalance in the health or finances of the insured and his/her family.

Social security – Institution aimed at providing personal risk coverage.

Trafficker – Person engaged in the illegal trade of narcotics, psychotropic drugs, arms, trafficking in adult persons, children, organs and any other good or service whose trade is forbidden.

Trainee – A professional or technician accepted at an institution in another country for short-term, unpaid practice related to his or her training.

Undocumented immigrant – Alien who does not have the papers to accredit his/her identification.

Worker – Person who voluntarily pledges to provide a licit service or carry out a job in exchange for payment.

* * *

CJI/RES. 219 (LXXXVII-O/15)

**RECOMMENDATIONS FOR ACTIONS IN THE AREA OF
MIGRATION IN BILATERAL RELATIONS**

THE INTER-AMERICAN JURIDICAL COMMITTEE,

CONSIDERING the decision taken during the 83rd Regular Session in August 2013 to include in the agenda of the following regular session the report on the “Guidelines on migration policy in bilateral relations of American States”, within the assignments of the Committee for establishing mandates by its own initiative;

HAVING SEEN the report presented by the Rapporteur of the theme “Migration in bilateral relations”, document CJI/doc.461/14 rev.2 of June 1st, 2015,

RESOLVES:

1. To thank the Rapporteur of the theme, Dr. José Luis Moreno Guerra, for his presentation of the report “Migration in bilateral relations”, document CJI/doc.461/14 rev.2 of June 1st, 2015.
2. To approve the Report of the Inter-American Juridical Committee with the “Recommendations for Actions” addressed to the American States on the theme “Migration in Bilateral Relations”, attached to this Resolution – CJI/doc. 461/14 rev.3.
3. To consider that the studies of the Inter-American Juridical Committee on this topic are concluded.

This Resolution was approved by the following members during the meeting of August 11, 2015: Drs. Gélin Imanès Collot, José Luis Moreno Guerra, João Clemente Baena Soares, Hernán Salinas Burgos, Ana Elizabeth Villalta Vizcarra, Carlos Alberto Mata Prates and David P. Stewart.

5. Privacy and data protection

Documents

CJI/doc.474/15 rev.2	Inter-American Juridical Committee Report. Privacy and data protection
CJI/RES. 212 (LXXXVI-O/15)	Protection of personal data (Annex document CJI/doc.474/15 rev.2)

At the forty-third regular session of the OAS General Assembly (La Antigua, Guatemala, June 2013), the Inter-American Juridical Committee was instructed by Resolution AG/RES. 2811 (XLIII-O/13) “to prepare proposals for the Committee on Juridical and Political Affairs 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.”

At the 83rd regular session of the Inter-American Juridical Committee (Rio de Janeiro, Brazil, August 2013) the Chairman requested Dr. David P. Stewart to be the Rapporteur for the topic, which he accepted. Dr. Hyacinth Lindsay asked to work with the Rapporteur on this topic.

At the 84th regular session of the Inter-American Juridical Committee (Rio de Janeiro, March 2014), the Rapporteur for the issue, Dr. David P. Stewart, presented a report, document CJI/doc. 450/14). In addition, he sought the Committee's opinion on the steps to be taken with respect to the General Assembly mandate on this issue. The new mandate could be interpreted as a request for drafting a model law. The Rapporteur felt nonetheless that it would be better for a more in-depth study of the principles to be done. He argued that it would be very difficult to develop a model law as there were many ways to deal with the matter, since the countries of the Hemisphere had chosen different ways to follow up on this issue. A detailed explanation of those principles with a view to the Member States accepting and applying them would be more suitable than proposed model legislation. Each State would thus decide how best to amend its legislation.

Thanking the Rapporteur, the Chairman said he was in favor of a legislative guide.

Dr. Mata Prates said that this is one of the important issues in the hands of the Juridical Committee. He noted that the hemisphere had made significant progress on access to public information, but that more progress needed to be made in terms of the protection of personal data. Regarding the work to be done, he proposed a guide and a model law be done, and that in every instance it would be useful to mention the impact on the interpretation of the countries' constitutional rules.

Dr. Hyacinth Lindsay shared about the work done in Jamaica by Parliament, and undertook to study the matter further.

Dr. Moreno Guerra quoted from the Romans who had said "give me the facts and I will give you justice." The facts are already there; we would stand naked before the states and the prospects for privacy protection. Progress in access to information, computers, and the Internet have transformed the system. His understanding was that the Committee could take the lead on this issue, as what was being pursued was a pioneer effort. He proposed that a declaration of principles be produced, rather than a model law.

The Chairman pointed out to the existing underlying agreement on the merits, and suggested starting with a definition of principles, and then either a guide or a declaration. While principles are important, how they are to be presented should be discussed as well.

Following this, Dr. Dante Negro reported on the event held in Guatemala with the Ibero-American Personal Data Protection Network, for which the OAS obtained observer status. He said there were apparently various schemes, the European System being the most comprehensive on several

levels. The United States also had a more sector-specific scheme. Meanwhile, the system established in Latin America based on *habeas data* involves an aggrieved person filing a claim with the courts and then being granted access to personal information in databases in order to correct and update the information. Reminding the Juridical Committee Members that a Guide to Principles for access to information and protection of personal data had already been produced, he argued that the General Assembly mandate was broad and gave the Committee enough latitude to either develop the principles or work on an explanatory guide to the principles already adopted.

Dr. Villalta said she had taken part in the meeting of the Ibero-American Network as a representative of her State. She noted the importance of striking a balance between access to information and protection of personal data, and pointed to the importance the country delegates had ascribed to the report that was with the Committee.

Dr. Novak, explaining that the mandate issued by the General Assembly was not specific in its wording, said that the mandate referred to "various ways of regulating" data protection. He therefore asked the staffers who had attended the General Assembly about the spirit of the mandate.

Dr. Dante Negro said the resolution on access to information and data protection was submitted by the delegation of Peru; and because the mandate was not discussed, there were no further details on the resolution. He noted at the same time that within the CAJP the expectation was that model legislation would be drafted.

The Rapporteur agreed with the information shared by Dr. Dante Negro. Given its complexity, the issue of privacy was more of a challenge than access to information, even though the model itself was considered. But he felt privacy would be too broad an idea and, thus, difficult to implement. Hence his doubts with respect to the final outcome. The Rapporteur said he had consulted with various stakeholders engaged in the issue. Specific guidelines should be provided for legislators when the work is completed.

At the end of the discussion, the plenary of the Committee decided to change the title of the mandate to reflect its specificity: "Protection of personal data", mindful that the Committee has already worked on access to information.

During the 85th regular session of the Inter-American Juridical Committee (Rio de Janeiro, August, 2014), the rapporteur was unable to attend due to health issues. Nevertheless, he remitted the report entitled "Privacy and Data Protection," document CJI/doc.465/14, which summarizes the current status of research in that field and the rapporteur's commitment to provide legislative guidelines for the Committee's next session. Given the rapporteur's absence, Chairman Fabián Novak suggested addressing the matter during the 86th regular session, in March 2015.

On December 4, 2014, Dr. David P. Stewart made a presentation before the Committee on Juridical and Political Affairs of the OAS where he explained the advances made in the study concerning the mandate assigned to the Juridical Committee through the General Assembly's Resolution on Access to Public Information and Personal Data Protection, document AG/RES. 2842 (XLIV-O/14). On the same opportunity, Dr. Stewart present the document "Principles on Privacy and Personal Data Protection in the Americas", document CP/CAJP/INF – 244/14, in which he shows the advancements in the subject which will be present in the 86th Regular Sessions, on March, 2015.

During the 86th regular session of the Inter-American Juridical Committee (Rio de Janeiro, Brazil, March 2015), Dr. David P. Stewart introduced his report, CJI/doc.474/15 rev.1, titled "Privacy and Data Protection," which was a legislative handbook to aid in complying with the mandate of the General Assembly, in view of the difficulty in finding an established blueprint to follow in this field of action.

Additionally, he noted he had presented these observations to the OAS Member States in December 2014, and the response had been positive. He also mentioned holding consultations with experts on the subject and everyone supported the idea of drafting a handbook.

He asserted how complex the subject matter is in light of the existing wide variation in availability and use of personal data in a context of respect for privacy.

The Rapporteur was cautious about the demand for flexibility suggested by some actors, particularly by businesses interested in developing new technologies, taking into consideration that the entities, which hold the data, should not have total freedom to use the data submitted to them.

Additionally, he indicated that there is a need to place the burden of responsibility on the companies and not on the State alone. Lastly, he expressed concern that it was necessary to propose these principles in general to all countries of the Americas.

The Chair thanked the Rapporteur for his excellent input, which was characterized by the quality of the report's substance. He also praised the ingenious format of introducing guiding principles instead of a model law, and the timeliness of adopting a document of this nature.

Dr. Hernán Salinas congratulated the Rapporteur and mentioned that in his view as well, the topic was completed. Dr. Baena Soares joined in the congratulations, in addition to noting the positive impression of how the topic developed and he suggested forwarding the report to the Member States. Dr. Mata Prates and Dr. Villalta shared the view of the other Members, congratulating the Rapporteur and supporting submission of the report to the General Assembly.

Dr. Correa Palacio expressed concern over the role that the State must play in information management. She mentioned the tension between the State's obligation to provide information and preserve privacy. In this regard, she suggested including a way to address this tension.

Dr. Moreno Guerra expressed his concern over the amount of data that is located in the cloud.

Dr. Hernández García concurred that it is a product that is ready to be forwarded to the General Assembly. He only inquired about the few exceptions appearing under principle twelve. He asked whether gross human rights violations should not be included among these exceptions.

Dr. Pichardo echoed the congratulatory words of the Members.

Dr. Stewart appreciated the words of support from the other Members. As to the Dr. Correa Palacio's comment, he mentioned that the OAS has previously adopted a model law on access to public information and, therefore, there could be a connection to this topic, and suggested to not address it in this document. In light of the final concerns, he requested additional time to discuss it with the interested Members, and find a way to include their ideas.

After putting the existing consensus on record, the Chair moved to approve the report and forward it to the General Assembly.

A transcript of the approved document and its respective resolution follow:

CJI/doc. 474/15 rev.2

INTER-AMERICAN JURIDICAL COMMITTEE REPORT.

PRIVACY AND DATA PROTECTION

The Inter-American Juridical Committee adopted a "Proposed Statement of Principles for Privacy and Personal Data Protection in the Americas" at its 80th Regular Session in Mexico City in CJI/RES. 186 (LXXX-O/12) (March 2012). These principles aim at encouraging Member States of the Organization to adopt measures ensuring respect for people's privacy, reputations, and dignity. They were intended to provide the basis for Member States to consider formulating and adopting legislation to protect the personal information and privacy interests of individuals throughout our hemisphere.

At its 44th regular session (Asunción, June 2014), the OAS General Assembly took note of the Committee's resolution and instructed it, before the 45th regular session of the General

Assembly, “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.” AG/RES. 2842 (XLIV-O/14).

At the 83rd regular session of the Inter-American Juridical Committee (August 2013), the Chairman had requested Dr. David P. Stewart to serve as the rapporteur for the topic.

As reported to the Committee at its 85th Regular Session, the Rapporteur has continued to consult with experts and others involved in the development of relevant principles and practices, including within the European Union and other regional groups, as well as with representatives from governmental, academic, corporate and non-governmental institutions. Information has also been requested from Member States of the Organization about their current practices and laws in the area.

On the basis of these consultations, the Rapporteur concluded that the most productive direction for this project at the current time would be to pursue a proposed legislative guide for Member States. The guide would be based on the 12 Principles previously adopted by the Committee, subject to some minor modifications, taking into account the various other sets of guidance prepared within the EU, the OECD, APEC, etc. The objective is to expand upon the Principles by giving additional context and guidance to Member States to assist in their preparation of national legislation. Such an approach retains the focus on fundamental principles and best practices, taking into account the experience of others in the field, rather than trying to agree on the precise details of exact legislative language.

In the Rapporteur’s view, the field of personal privacy and data protection continues to be characterized by rapid technological developments as well as constantly evolving threats to personal privacy. Moreover, different responses to these developments and threats have been adopted in different regions of the world. Within our hemisphere, a uniform coherent “regional” approach does not seem to have emerged. The most important contribution the Committee can make is to draw on the experiences and achievements in other regions while taking into account developments in our own hemisphere, in order to formulate a proposed framework for the American States to use in addressing this critical area.

The proposed elaboration of the Principles is attached to this report:

OAS PRINCIPLES ON PRIVACY AND PERSONAL DATA PROTECTION
WITH ANNOTATIONS

The purpose of the OAS Principles on Privacy and Personal Data Protection is to establish a framework for safeguarding the rights of the individual to personal data protection and informational self-determination. The Principles are based on internationally recognized norms and standards. They are intended 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 and implementation of national legislation and related rules within OAS Member States. Each OAS Member State should adopt and implement a clear and effective policy of openness and transparency about all developments, practices and policies with respect to personal data. In doing so, each OAS Member State should provide appropriate opportunities for affected individuals and organizations to comment upon and contribute to specific legislative proposals.

Each Member State must 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 the individual’s right to benefit from the free flow of information and access to the digital economy.

National rules must ensure that personal data may only be collected for lawful purposes and may only be processed in a fair, lawful and non-discriminatory manner. The rules must be aimed at ensuring that individuals are provided with the necessary information about the persons or entities collecting the data, the purpose for which the data is collected, the protections that are afforded to

individuals and the ways in which individuals can exercise those rights. They must ensure that those who collect, process, use and disseminate personal data do so appropriately and with due regard of the rights of the individual.

At the same time, national rules must also protect the right of individuals to benefit from the digital economy and the information flows that support it. The rules must balance the right of individuals to control how their personal data is collected, stored and used with their right to access data and the interests of organizations in using personal data for legitimate and reasonable business purposes in a data-driven economy.

Privacy rules must allow consumers and companies to benefit from the use of personal data in a secure and protected manner. The rules must be balanced and technology-neutral, and they must permit the free flow of data within each country and across national boundaries in a way that fosters technological innovation and promotes economic development and the growth of commerce.

In addition to (1) effectively protecting personal privacy and (2) guaranteeing the free flow of data in order to promote economic progress, OAS Member States should also follow (3) a clear policy of transparency in respect of their policies and procedures. In order effectively to exercise their rights, individuals must know and understand how the rules operate and what protections and procedures are available to them.

These Principles aim to provide the basic elements of effective protection. States may provide additional protections for the privacy 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 life.

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

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.

respect and protection for privacy, personal dignity and family honor, the inviolability of home and private communications, personal data, and related concepts. Almost all OAS Member States have adopted some form of legislation regarding privacy and data protection (although their provisions vary considerably 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 data, and protection of privacy, identity, dignity and reputation.

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 OAS 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 considerably 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, 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

Personal Data. As used in these Principles, the term “personal data” includes information that identifies, or can be reasonably be used to identify, a specific individual, whether directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his or her physical, physiological, mental, economic, cultural or social identity. The term does not include information that does not identify (or cannot reasonably be used to identify) a particular individual.

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.

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 this guide, the term “data controller” refers to the natural or legal person, private entity, public authority or other body or organization (alone or jointly with others) with responsibility for the storage, processing, use, protection and dissemination of the 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.

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. Typically, the data processor is separate from the data collector. 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.

Data Protection Authority. Some OAS Member States have established national 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 single approach is reflected in the various OAS Member States, these Principles avoid addressing the specific nature, structure, authorities and responsibilities of these “data protection authorities.”

Nonetheless, 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 establish the minimum requirements for whatever kind of data protection authorities they may choose, in order to provide the necessary resources, funding and technical expertise in order to carry out their functions effectively.

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 or sexual preferences, religious beliefs, 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.

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.

OAS 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 must 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.

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 must 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 must 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 consumers and induce them to disclose their credit card numbers, bank account data or other sensitive personal information.

"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: CLARITY AND CONSENT

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

This Principle also focuses on the collection of personal data. It rests 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 purposes for which personal data is collected should be specified, generally not later than the point at which collection begins, and (ii) personal data should only be collected with the consent (explicit or implicit) of the individual concerned.

Transparency

As a rule, the purposes for which personal data is collected should be specified clearly at 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 may be needed than just the purposes of the collection and handling of those data. It can also be 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 person responsible for handling them, any data transfers that may be involved, and the means at their disposal for exercising their rights in respect of their personal data.

Consent

As a rule, the individual must 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 should 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 must have the ability to exercise a real choice.

There must be no risk of deception, intimidation, coercion or significant negative consequences to the individual from refusal to consent. (Of course, in some commercial situations, providing the requested data may be a legitimate prerequisite to the individual's ability to use the service or product in question.)

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. No specific form of consent is required, but in principle it 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.

Context

The consent requirement must 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 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 must 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 must 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 must come first. The collecting and processing of data under the legitimate interests condition must be fair and lawful and must comply with all the data protection principles.

Sensitive personal data may 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.

An individual is entitled to withdraw consent depending on the nature of the consent given and the purposes for which the data is collected. In general, withdrawal of consent does not affect the validity of anything already done on the basis of the consent.

THIRD PRINCIPLE: RELEVANT AND NECESSARY

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

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

Accuracy

Personal data should be correct, accurate, complete and up-to-date as necessary with respect to the purposes for which it was collected. Data quality 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. The data collector or processor should therefore adopt mechanisms to ensure that the personal data is correct, accurate, complete, and up-to-date.

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 must be one of "necessity," that is, the data in question must be accurate, complete and up-to-date *to the extent necessary for the purposes of use*.

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.

Relevance

The requirement that data be "relevant" means that it must 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.

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 must 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 must be handled for definite and lawful purposes. Retention and use of personal data must be consistent with individuals' reasonable expectations, their relationship with the data controller collecting the data, the notice(s) provided by the data controller, and commonly accepted practices.

Personal data must 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.

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

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 only as long as required by the purpose for which it was collected and as prescribed by relevant domestic law. 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 must be disposed of when it is no longer needed for its original purpose or as otherwise required by national law.

However, it is not intended to suggest that data controllers must *always* delete data when no

longer needed. 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.

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 must 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.

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.

SIXTH PRINCIPLE: PROTECTION AND SECURITY

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

Under this Principle, data controllers have a clear duty to take necessary practical and technical steps to protect personal data in their possession or custody (or for which they are responsible) and to ensure that such personal data is not accessed, lost, destroyed, used, modified or disclosed except in accordance with the individual's knowledge or consent or other lawful authority.

The specific obligation is to 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, 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 must 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.

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 the OAS, the 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 accurate and up-to-date to the extent necessary for the purposes of use.

Accuracy and precision are vitally important for the protection of privacy.

When personal data is collected and retained for continuing use (as distinct from one-time uses or periods of short duration), the data controller has an obligation to take steps to ensure that the data is current and accurate as necessary for the purposes for which it was collected and is being used.

This 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 controller 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 accurate, complete, correct and up-to-date, and that the rights of the individual in question are not impaired.

Data controllers must 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.

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.

EIGHTH PRINCIPLE: ACCESS AND CORRECTION

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

Individuals must 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 correction is one the most important safeguards in the field of privacy protection.

The essential elements are the individual’s ability to obtain data relating to him or her within a reasonable time, at a reasonable charge, 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.

Within the American 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 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 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, for a reasonable price, in a reasonable manner and in a reasonably intelligible form. The burden and expense of producing the data should never be unreasonable or disproportionate. Any data to be furnished to the data subject must be provided in an intelligible form, using a clear and simple language.

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 must 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 must 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 Correct Errors and Omissions

The individual must 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 or excessive. 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 or 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 or 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 must 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 must 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.

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. This right is sometimes described as the right to omit or suppress specific information, to “de-identification” or “anonymization.”

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. It also raises difficult questions about who or what makes such decisions and by what process, and whether the obligation should apply only to the original (or primary) collector of the data in question (data controller) or also to subsequent intermediaries.

These Principles embrace the rights of access, challenge and correction. Because, at this point in time, a “right to erasure or deletion” remains contentious and subject to differing definitions and views, the Principles do not explicitly endorse a right to deletion of personal data which (while true or factually accurate) is considered personally embarrassing, excessive or merely irrelevant by the individual concerned.

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 affecting the most intimate aspects of individuals. Depending on the specific cultural, social or political context, it might include data related to an individual's personal health or sexual preferences, religious beliefs, or racial or ethnic origins.

In certain circumstances, this data might be considered entitled to 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.

The nature of the sensitivity may vary from situation to situation. In certain settings and cultures, for example, it is entirely predictable that disclosure of certain types of personal data might result in harm to personal reputation, discrimination with respect to employment or freedom of movement, political persecution, or even physical violence, while by distinction disclosure of the

same data in other circumstances would pose no difficulties at all.³

Within the Member States of the OAS, a wide variety of cultural and legal settings exists, making it difficult to say, as a general matter, which specific types of data are categorically more likely to lead to especially serious encroachments on individual rights and interests.

Accordingly, appropriate guarantees should be established within the context of national law and rules, reflecting the circumstances within the relevant jurisdiction, 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. Explicit consent of the individual concerned should be the governing rule for the collection, disclosure and use of sensitive personal data. The context in which a person provides such data should be taken into account when determining any applicable regulatory obligations.

The burden must 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.

TENTH PRINCIPLE: ACCOUNTABILITY

Data controllers should adopt and implement appropriate procedures to demonstrate their accountability for compliance with these Principles.

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 must 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” must 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.

Specific programs and procedures must take into account the nature of the personal data at issue, the size and complexity of the organization which collect, store and process 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.

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.

³ In some contemporary privacy instruments, certain types of data are categorized as *per se* sensitive. This characterization may be linked to certain historical events that have created specific sensitivities, or because the revelation of data in certain contexts gives rise to particular issues. See, for example, *ILO Convention 108, Article 6*, which provides that “Personal data revealing racial origin, political opinions or religious or other beliefs, as well as personal data concerning health or sexual life, may not be processed automatically unless domestic law provides appropriate safeguards. The same shall apply to personal data relating to criminal convictions.”

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 privacy enforcement authority or another entity responsible for promoting adherence to a code of conduct. National enforcement authorities can only leverage internal accountability mechanisms if data controllers are willing and able to demonstrate to them what those mechanisms are and how well they are functioning.

Sharing 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 must be informed about, and given appropriate opportunities to consent to, such additional sharing.

These Principles require that data controllers must 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 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. As a result, requiring identical privacy protection rules as a precondition to cross-border data transfers between Member States could unduly restrict trans-border flows, to the detriment of

individual rights as well as economic growth and development.

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 are held accountable for providing such protection.

Cross-Border 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 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 must 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.

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. 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 must 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 by these OAS Principles.

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 must themselves assume responsibility for assuring a continuing level of protection consistent with these Principles.

Data controllers must 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 cooperation and enhanced capacity-building between privacy enforcement authorities in the OAS region based upon common standards for assuring the basic requirements of trans-border accountability.

TWELFTH PRINCIPLE: DISCLOSING EXCEPTIONS

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

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 must 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 administration of justice, regulatory compliance or other essential public policy prerogatives. 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.

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.

ANNEX A

Part I. Right to Privacy

As indicated in the text, provisions on privacy, protection of personal honor and dignity, freedom of expression and association, and the free flow of information are found in all the major human rights systems of the world.

For example, the concept of privacy is clearly established in Article V of the American Declaration of the Rights and Duties of Man (1948) as well as Article 11 of the American Convention on Human Rights (“Pact of San Jose”) (1969).⁴

Article V of the American Declaration of the Rights and Duties of Man provides:

Every person has the right to the protection of the law against abusive attacks upon his honor, his reputation, and his private and family life.

See also Article IX (“Every person has the right to the inviolability of his home”) and Article X (“Every person has the right to the inviolability and transmission of his correspondence”).

Article 11 of the American Convention on Human Rights provides:

1. Everyone has the right to have his honor respected and his dignity recognized.
2. No one may be the object of arbitrary or abusive interference with his private life, his family, his home, or his correspondence, or of unlawful attacks on his honor or reputation.
3. Everyone has the right to the protection of the law against such interference or attacks.⁵

European Charter

Only the Charter of Fundamental Rights of the European Union (adopted 2000) specifically addresses privacy in the context of data protection.

Article 8 of that Charter provides:

- (1) that everyone has the right to the protection of personal data concerning him or her,
- (2) that such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law, and that everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified, and
- (3) compliance with these rules shall be subject to control by an independent authority.

The EU Charter thus appears to distinguish data protection from the right to respect for private and family life (art. 7), freedom of thought, conscience and religion (art. 10), and freedom of expression and information (art. 11). Scholars continue to debate whether an independent right to

⁴ See also the Universal Declaration of Human Rights (arts. 12, 18-20), the International Covenant on Civil and Political Rights (arts. 17-19), the European Convention on Human Rights and Fundamental Freedoms (arts. 8-10), the Charter of Fundamental Freedoms of the European Union (arts. 1, 7, 8, 10-12), and the African Charter of Human and Peoples’ Rights (arts. 5, 8-11 and 28).

⁵ In addition, Article 14 of the American Convention (“Right of Reply”) provides:

1. Anyone injured by inaccurate or offensive statements or ideas disseminated to the public in general by a legally regulated medium of communication has the right to reply or to make a correction using the same communications outlet, under such conditions as the law may establish.
2. The correction or reply shall not in any case remit other legal liabilities that may have been incurred.
3. For the effective protection of honor and reputation, every publisher, and every newspaper, motion picture, radio, and television company, shall have a person responsible who is not protected by immunities or special privileges.

protection of personal information does exist, or is instead properly considered part of a more general right to privacy.⁶

Part II. The Right to Free Flow of Information

Article IV of the American Declaration of the Rights and Duties of Man provides:

Every person has the right to freedom of investigation, of opinion, and of the expression and dissemination of ideas, by any medium whatsoever.

Article 13 of the American Convention on Human Rights provides:

1. Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice.
2. The exercise of the right provided for in the foregoing paragraph shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary to ensure:
 - a. respect for the rights or reputations of others; or
 - b. the protection of national security, public order, or public health or morals.
3. The right of expression may not be restricted by indirect methods or means, such as the abuse of government or private controls over newsprint, radio broadcasting frequencies, or equipment used in the dissemination of information, or by any other means tending to impede the communication and circulation of ideas and opinions.
4. Notwithstanding the provisions of paragraph 2 above, public entertainments may be subject by law to prior censorship for the sole purpose of regulating access to them for the moral protection of childhood and adolescence.
5. Any propaganda for war and any advocacy of national, racial, or religious hatred that constitute incitements to lawless violence or to any other similar action against any person or group of persons on any grounds including those of race, color, religion, language, or national origin shall be considered as offenses punishable by law.

Article 19 of the Universal Declaration of Human Rights (1948) states:

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (entitled "Freedom of Expression") provides:

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

⁶ See for example Orla Lynskey, "Deconstructing Data Protection: The 'Added-Value' of a Right to Data Protection in the EU Legal Order," 63 Int'l & Comp. Law Q. 569 (2014).

The World Summit on the Information Society's 2003 Declaration of Principles (paras. 24-26) (available at <http://www.itu.int/wsis/docs/geneva/official/dop.html>) emphasized that:

The ability for all to access and contribute information, ideas and knowledge is essential in an inclusive Information Society.

The sharing and strengthening of global knowledge for development can be enhanced by removing barriers to equitable access to information for economic, social, political, health, cultural, educational, and scientific activities and by facilitating access to public domain information, including by universal design and the use of assistive technologies.

A rich public domain is an essential element for the growth of the Information Society, creating multiple benefits such as an educated public, new jobs, innovation, business opportunities, and the advancement of sciences. Information in the public domain should be easily accessible to support the Information Society, and protected from misappropriation. Public institutions such as libraries and archives, museums, cultural collections and other community-based access points should be strengthened so as to promote the preservation of documentary records and free and equitable access to information.

Part III. Appended Texts on Data Privacy and Protection

The following includes a selection of the texts most likely to be useful to legislators and other governmental authorities.

- OECD Guidelines for the Protection of Privacy and Transborder Flows of Personal Data (1980, as revised in 2013)
- The Madrid Resolution: International Standards on the Protection of Personal Data and Privacy (2009)
- The APEC Privacy Framework (2004)
- APEC Cooperation arrangement for Cross-Border Privacy Enforcement
- EU Directive 2002/58/EC on privacy and electronic communications (July 12, 2002)
- EU Directive 95/6/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data (Oct. 24, 1995)
- COE Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (No. 108, Jan. 28, 1981) and Protocol (2001)
- UN Guidelines for the Regulation of Computerized Data Files (1990)
- AU Convention on Cyber Security and Personal Data (adopted June 27, 2014)

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CJI/RES. 212 (LXXXVI-O/15)

PROTECTION OF PERSONAL DATA

THE INTER-AMERICAN JURIDICAL COMMITTEE,

CONSIDERING the mandate agreed at the General Assembly in June 2013 through Resolution AG/RES. 2811 (XLIII-O/13), which commissioned the Inter-American Juridical Committee "to prepare proposals for the Commission on Legal and Political Affairs on the different ways in which the protection of personal data, can be regulated including a Law Model on Data Protection, taking into account international standards in that area".

IN VIEW OF the report presented by the Rapporteur of the theme, Dr. David P. Stewart, on 24 March 2015, "Privacy and data protection", CJI/doc.474/15 rev.1, which contains legislative guidelines for the Member States comprised of twelve "OAS Principles on protection of privacy and personal data, with notes",

RESOLVES:

1. To thank the Rapporteur of the theme, Dr. David P. Stewart, for his presentation of the document “Privacy and data protection”, CJI/doc.474/15 rev.1.
2. Approve the report of the Inter-American Juridical Committee, “Privacy and data protection”, CJI/doc.474/15 rev.2, annexed to this resolution.
3. Send this resolution to the Permanent Council of the Organization of the American States.
4. Consider the work of the Inter-American Juridical Committee on this theme concluded.

This resolution was unanimously approved at the session held on March 27, 2015 by the following members: Drs. Miguel Aníbal Pichardo Olivier, Ana Elizabeth Villalta Vizcarra, Joel Hernández García, José Luis Moreno Guerra, Fabián Novak Talavera, João Clemente Baena Soares, Gélin Imanès Collot, Hernán Salinas Burgos, Ruth Stella Correa Palacio, David P. Stewart and Carlos Alberto Mata Prates.

6. Law applicable to international contracts

Documents

- | | |
|-------------------|---|
| CJI/464/14 rev. 1 | Law applicable to international contracts
(presented by Dr. Ana Elizabeth Villalta Vizcarra) |
| CJI/doc.481/15 | Questionnaire on the implementation of the Inter-American Conventions
on Private International Law
(presented by Drs. David P. Stewart and Ana Elizabeth Villalta Vizcarra) |

At the 84th regular session of the Inter-American Juridical Committee (Rio de Janeiro, March 2014), Dr. Elizabeth Villalta introduced a new topic, which had not been on the agenda established in August 2013. In that connection, she presented a document entitled "Private International Law" (CJI/doc.446/14) aimed at promoting certain conferences held under the purview of the CIDIP, in particular the Convention of Mexico on the Law Applicable to International Contracts, ratified by two OAS Member States. She briefed the plenary on her participation in the ASIDIP Symposium, where she observed an interest in that Convention on the part of private international law experts, which proposed innovative and modern solutions in international contracts.

Among reasons for such few ratifications she cited the lack of promotion and awareness about it and the fact that back then (1994) these solutions would have been too novel; the provision for autonomous free will; and the reference to *Lex Mercatoria*. Her conclusion was that Mexico could settle many international contracts problems with the Hemisphere's own solutions.

Dr. Novak also thanked Dr. Villalta for keeping the Committee abreast of developments in private international law. Dr. Salinas joined in commending Dr. Villalta and asked whether the fact that it had not been ratified could be because other international instruments may have superseded the Convention or the need for it. Dr. Stewart explained his interest in studying the instruments on international contracts, including ways to facilitate the dissemination and ratification of the Convention of Mexico.

Dr. Dante Negro, who also took part in the ASIDIP meetings, noted that there was consensus that certain Conventions adopted by the CIDIPs, particularly the 1994 Convention of Mexico, needed reviewing. He noted the interest in having Inter-American Juridical Committee support to disseminate those conventions. Dr. Dante Negro also spoke about the last CIDIP and the impasse about consumer protection, as well as the States' lack of agreement on holding another CIDIP. He said no specific new resolution on CIDIP's had been adopted, in terms of new topics or finding a solution to the consumer issue. He said the Department of International Law had informally approached states to promote ratification of the Conventions on Private International Law.

Meanwhile, Dr. Arrighi, who has also taken part in the ASADIP meetings, noted that some members of the ASADIP held senior positions with their governments and never suggested ratification of the Conventions was a priority. He added that doing protocols or amendments to conventions already signed and ratified would depend on the willingness of States Party. A review of the Convention of Mexico should therefore be proposed by Mexico or Venezuela - the only ones to have ratified it. Finally, he noted the important role played by the Inter-American Juridical Committee in creating a network of experts who supported initiatives in this area.

Dr. Salinas said what Dr. Arrighi spoke about was important to understanding why the Convention had not been ratified by a significant number of countries. He pointed out further that if consultations were to be held, they should include experts and practitioners in this field.

The Chairman said that some consensus was already developing: Firstly, on keeping the issue on the agenda for August; Secondly, that a study of the convention would be useful; and thirdly, that consultations should be held with the states and experts and practitioners as well.

Dr. Collot hailed Dr. Villalta for proposing this topic. He said Dr. Villalta had touched on several concepts that were important to private international law, particularly the concept of *Lex Mercatoria*.

Dr. Villalta said that the position of the members of the ASIDIP was that the Committee could play a key role in the promotion of Private International Law. Additionally, the members of the Juridical Committee decided to change the title to “Law applicable to international contracts” instead of Private International Law.”

During the 85th regular session of the Inter-American Juridical Committee (Rio de Janeiro, August, 2014), Dr. Elizabeth Villalta presented another report, entitled “Law Applicable to International Contracts,” document CJI/doc.464/14, which refers to all the Conventions on Private International Law adopted at the Inter-American Specialized Conferences on Private International Law (CIDIP’s). She pointed out that the Mexico Convention of 1994 had been the subject of intense negotiations, including a meeting of top-level academic experts to develop its legal and structural foundations.

She explained that despite the aforementioned, some countries indicated that the translations of the Conventions were not particularly felicitous, and that that was an obstacle to its ratification. However, she mentioned that there were ways of correcting those deficiencies, so she suggested that the Committee bring countries' attention to the mistakes.

She said the Convention needed to be more widely disseminated, especially considering the current importance of international contracts and international arbitration. The conventions on this subject could resolve many of today's legal issues, such as the free will (contractual freedom) principle. This principle had been incorporated into Venezuelan legislation and in a bill (draft law) in Paraguay. Thus, material incorporation could, she said, be the path to reception of the principles enshrined in the Convention.

Finally, she said that the benefits of the Convention included receptivity to the principles of *lex mercatoria* and various other principles developed in international forums and trade customs and practices.

The Co-Rapporteur on the subject, Dr. Gélín Collot, gave an oral presentation of his report, called "Inter-American Convention on Law Applicable to International Contracts," document CJI/doc.466/14 rev.1. He highlighted the applicable legal instruments and broadly compared the Inter-American instrument with the European Treaty. He also expounded the principles regarding determination of the consent of the parties and the equivalence or near-equivalence of the considerations. He noted that the Convention on the Law Applicable to International Contracts does not cover extra-contractual obligations derived from the performance of contracts. Accordingly, he proposed directing the discussion toward the possibility of expanding the domain of applicable law under the Convention.

Regarding the translations, Dr. Arrighi said there had been no clear indication of where errors had been committed. In his view, the problem had to do with the difficulty of reconciling the vehicles used for solutions: uniform laws and uniform conventions.

Dr. Hernán Salinas said he agreed with Dr. Arrighi that there was a substantive issue at stake that maybe explained why the Mexico Convention had not been ratified. Failure to ratify signaled disinterest in the Convention. For that reason, he suggested pondering Dr. Arrighi's query about pursuing new legislative initiatives.

The Chairman pointed out that silence with respect to ratifying was in itself a form of political response. Dr. Salinas said that some instruments adopted in The Hague suffered the same fate as some of the Inter-American conventions, in the sense of being ratified by only a handful of States. Dr. Elizabeth Villalta pointed out that her report mentions the possibility of incorporating solutions (developed in the Convention) into domestic law, as Venezuela had done and Paraguay was in the process of doing.

The Chairman then proposed, as a way of concluding this discussion, that the Rapporteurs consult the States, including practitioners and academics, and that they come up with pertinent questions for the Secretariat to distribute in the form of a *questionnaire*. This proposal was adopted by the plenary.

During the 86th Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, Brazil, March 2015), Co-Rapporteur for the topic, Dr. Elizabeth Villalta, submitted a new version of the report, document CJI/doc.464/14 rev.1, which incorporates actions taken in the subject matter by other international organizations, such as the United Nations Commission on International Trade Law (UNCITRAL) and the International Institute for Unification of Private Law (UNIDROIT). Additionally, the document explains the implementation process of the principles of the Inter-American Convention on the Law Applicable to International Contracts (1994 Mexico Convention), as conducted by some States in their domestic legislation, using as examples the laws of Venezuela, Dominican Republic, Panama and Paraguay.

Lastly, she released the *questionnaire* written for the States and academic experts and said that the first version of the questionnaire had been forwarded by the Secretariat to the Permanent OAS Missions in the second week of March and that, thus far, no State has responded.

The Chairman proposed shortening the list of questions posed to the States on the *questionnaire*.

Co-Rapporteur for the Topic, Dr. Gélin Collot, for his part, suggested shortening the *questionnaire* to a total of seven questions. Additionally, he supported the proposal to gear the *questionnaire* toward three categories of persons: 1) representatives of the States 2) practitioners and experts, and 3) academicians. He suggested requesting help from students on distribution.

Dr. Dante Negro noted that this meeting provides a good opportunity to revise the *questionnaire*. He said, perhaps we could go back to the original purpose of the study, which was to understand why the Mexico Convention was not ratified by more States. As for the experts, he mentioned that we could call on the American Association of Private International Law (ASADIP) to collaborate, inasmuch as it is the ideal forum to deal with topics of Private International Law and it has offered its good offices to support the work of the Juridical Committee.

Dr. Hernández García commented that the *questionnaire* would seem to be aimed at academicians or operators of justice as opposed to States. He suggested that the Committee identify gaps in conflicts of law in order to take steps to fill them.

Dr. Stewart suggested tailoring the questions in the *questionnaire* to the relevant audience (academia, operators and States). States should be asked to give their reason for failing to ratify. Additionally, he believed it would be useful to check into the work of other organizations on the subject matter, given that other important instruments dealing with the subject of Private International Law have emerged since the time the Mexico Convention was written. It would also be useful to check into issues currently being addressed by other International Organizations in order to identify new projects for the Committee to undertake without duplicating efforts.

Dr. Salinas Burgos also mentioned that the objectives of this study must be clearly defined. He noted that as a group of technical experts, we must endeavor to learn the technical difficulties that the issue poses and try to fix them. Therefore, we must check to see if any Inter-American standards exists and endorse the most suitable option.

Dr. Arrighi recalled that the process of drafting the Mexico Convention began in the Committee. As he understands it, no distinction should be drawn between representatives of government, academicians and experts. He also suggested focusing on a new process. He noted that the CIDIP was an eminently Latin American process. The current challenge is to bring every country of the Organization into the fold in an attempt to promote private relations in the system.

On this score, he questioned the use of conventions to solve the variety of issues besetting the Hemisphere in this field.

Dr. Villalta explained that the *questionnaire* is useful to learn the opinions of States on the subject of international contracts. She proposed forwarding the questionnaire to the ASADIP and the Mexican Academy of Private International Law (AMEDIP).

The Chairman noticed that the Members were in agreement in shortening the *questionnaire* and, particularly, in learning the reasons for States not ratifying the Mexico Convention. Therefore, he requested the rapporteurs to shorten the *questionnaire* and that Dr. Stewart would take part in drafting a revised version. He also requested Drs. Villalta and Stewart to provide a list of topics of Private International Law, on which the Committee could focus.

Dr. Correa Palacio raised the need to agree on the ultimate aim of the *questionnaire*. She agreed with Dr. Collot's suggestion to tailor specific questions to the different categories of persons.

Dr. Hernández García supported the Chair's suggestion and added that the questions must be aimed at learning how provisions of International Law currently in force help or hinder private relations.

Dr. Salinas Burgos, on the other hand, noted that questions of a general nature do not necessarily enable you to learn what you are trying to learn and, therefore, the Committee must conduct an analysis on what trouble spots may be found in the Convention.

The Chairman suggested the Department of International Law to carry out a mapping exercise of the topics under discussion in other international forums.

Dr. Dante Negro proposed to the plenary submitting a list of topics that are under analysis by other international forums, including the status of these studies, connections with topics previously discussed in the OAS and existing sticking points in dealing with these topics in the aforementioned forums.

Dr. Hernández García noted that the golden age of codification of international law has ended and these days many forums deal with implementation of international conventions as a priority. The Committee must make drawing up a list of today's challenges to implementing international standards one of its goals, whether the challenges are of a normative or technical nature.

The Chairman suggested that two *questionnaires* be drawn up: one on international contracts and the other on the challenges faced by the region in the field of private international law. He also requested Co-Rapporteur Villalta to disseminate the questions to the other Members prior to submitting them to the States and experts, leaving the decision on formatting and content up to them.

During the 87th regular session of the Inter-American Juridical Committee, held in August 2015 at its headquarters, the city of Rio de Janeiro, Brazil, the Committee held the First Meeting on Private International Law in collaboration with the American Association of Private International Law (ASADIP).

During the 87th Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, Brazil, August 2015), Co-Rapporteur for the Topic, Dr. Elizabeth Villalta, introduced the document "Law applicable to international contracts" (CJI/doc.487/15), reviewing the first four responses to the questionnaire sent to the States, that had been received as of then (Bolivia, Brazil, Jamaica and Paraguay). Additionally, she mentioned and thanked academicians who responded to the questionnaire: Mercedes Albornoz, Nuria Gonzales, Nadia de Araújo, Carmen Tiburcio, Sara Feldstein de Cárdenas,

Cecilia Fresnedo, Sara Sotelo, Didier Operti, José Martín Fuentes, Alejandro Garro and Peter Winship.

In concluding her presentation, Dr. Villalta asked the plenary if it would be reasonable to expect further responses to the questionnaires from the States.

Dr. Collot urged disseminating more widely these instruments among public officials, in view of the lack of awareness among public servants.

Dr. Stewart mentioned that academia's support of the Mexico Convention appeared to be weaker than was anticipated and he added he felt there was more of a consensus on drafting a Model Law or Guiding Principles on the subject.

Dr. Villalta proposed sending a reminder to the States that have not responded, because no time limits were established for responses. She stressed that the responses submitted by most of the experts revealed that the Mexico Convention was very forward thinking at the time it was approved, but in our times, the consensus seemed to support a soft law solution.

The Chairman noted that the consensus of the Juridical Committee would be to keep the topic on the agenda and he requested the Secretariat to send out a reminder to the States, reflecting the importance the Juridical Committee attaches to Private International Law.

At the request of Dr. Correa, the Chairman requested the Secretariat to incorporate in the multiyear agenda the topics that arose during the Meeting on Private International Law between the Inter-American Juridical Committee and the American Association that took place on Friday August 7, and was attended by accomplished professors and experts.

Following are the reports submitted:

CJI/doc.464/14 rev.1

LAW APPLICABLE TO INTERNATIONAL CONTRACTS

(presented by Dr. Ana Elizabeth Villalta Vizcarra)

I. MANDATE

At the 84th regular session of the Inter-American Juridical Committee, held in the city of Rio de Janeiro, Brazil, on March 10 to 14, 2014, I presented the topic "Inter-American Convention on the Law Applicable to International Contracts (the 1994 Convention of Mexico City)," in compliance with Article 99 of the Charter of the Organization of American States, as an initiative for the progressive development and codification of International Law.

On that occasion, it was decided it would be useful to review some of the Private International Law conventions signed under the *aegis* of the Inter-American Specialized Conferences on Private International Law (the CIDIP process), in order for the Organization's Member States to take advantage of and benefit from some of the innovative solutions proposed in those Conventions.

The Inter-American Convention on the Law Applicable to International Contracts was taken as the reference for this review and analysis, since it represents a significant step forward in harmonizing the legal systems of the States that make up the Inter-American System (*common law* and *civil law*), unifying the provisions governing conflicts of laws in contractual matters on the basis of modern solutions adapted to the constant changes of international trading practices.

During the debate on this topic among the Members of the Inter-American Juridical Committee and given the importance of the issue for the codification and progressive development of Private International Law, it was agreed that it would remain on the Committee's agenda as "Law Applicable to International Contracts."

At the 85th regular session of the Inter-American Juridical Committee, held in the city of Rio de Janeiro, Brazil, on August 4 to 8, 2014, it was decided it would be useful to present a *questionnaire* to the States – and, in addition, to experts, legal practitioners, and academics – on their interest in the Inter-American Private International Law conventions and, most particularly, the Inter-American Convention on the Law Applicable to International Contracts.

This Rapporteur’s Report presents the *questionnaire* for distribution to the Organization’s Member States, along with a series of thoughts on the progress made with this issue, given that several countries in the region – such as the Dominican Republic, Panama, and Paraguay – have recently enacted modern laws on the topic.

II. CONSIDERATIONS

Rapporteur’s Report CJI/doc.464/14, “Law Applicable to International Contracts,” which I presented at the 85th regular session of the Inter-American Juridical Committee, held in the city of Rio de Janeiro, Brazil, on August 4 to 8, 2014, described the May 2013 presentation to the Congress of the Republic of Paraguay of a bill for the law applicable to international contracts. The aim of that bill was to equip Paraguay with a law containing a set of norms embodying the principles regarding the law applicable to crossborder contracts, which were taken from the Principles on Choice of Law in International Commercial Contracts, recently adopted by the Hague Conference on Private International Law, and from the Inter-American Convention on the Law Applicable to International Contracts (Convention of Mexico City of 1994), which was a source of inspiration for the Hague Principles.

The Paraguayan bill is now a reality, after the President of the Republic of Paraguay signed it into law on January 15, 2015, as Law No. 5.393 on the Law Applicable to International Contracts. In doing so he announced that Paraguay was adopting a piece of legislation that contained the principles on the law applicable to crossborder contracting that were recently adopted at the Hague Conference on Private International Law, given that Paraguay’s regime for international contract law was out of date and that this new law was a part of the policy of facilitating investment and trade in goods and services with the rest of the world.

This bill, as stated by one of its drafters, Dr. José Antonio Moreno Rodríguez: “was inspired by the Hague Principles on Choice of Law in International Commercial Contracts published by the Hague Conference on Private International Law”.

This instrument addresses the applicable law when the parties have a choice of law, and one of its main sources was the Convention of Mexico City on the Law Applicable to International Contracts, adopted by the Fifth Inter-American Specialized Conference on Private International Law (CIDIP-V) of the Organization of American States (OAS).

The Convention of Mexico City, reproduced almost *verbatim*, was also the inspiration for the provisions contained in the Paraguayan law for situations in which no choice of law was made, a matter that was not addressed by the Hague Principles.

In several of the “whereas clauses” of its preamble, Paraguay’s recently adopted Law No. 5.393 on the Law Applicable to International Contracts states:

With this law proposal, we intend to provide Paraguay with a body of law which contains the “Principles” on applicable law to cross-border contracting, principles which were recently proposed by The Hague Conference of Private International Law, maximum codifying organ in the field.

It shall be taken into account that our country counts with an anachronistic regime in matters of applicable law to contracting for cross-border commerce, situation that must be reverted, which is fundamental for a Mediterranean country like Paraguay. A large proportion of the current norms contained in the Civil Code, are inspired in ancient treaties or nineteenth century codes, which contradict the commercial necessities of today’s world.

The Principles afore mentioned, among other uses, shall serve as an inspiration to national legislators for the elaboration of laws which unify the regulation on the

matter, which is highly desirable to achieve major predictability in international commercial relationships.

It is known that Paraguay has had active participation in the elaboration of such instrument, as in official representation of the country before the special committee created in The Hague for such matter, and through participation of a conational in the Group of Experts whom for many years elaborated the “Principles” project.

The present law proposal basically reproduces the approved text at the mentioned The Hague Conference, which results highly recommendable, along with some convenient modifications, in order to synchronize it with the Mexico Convention of 1994 on applicable law to international contracts, approved by Inter-American Specialized Conferences on Private International Law (CIDIP’s) of the Organization of American States, whose text served as an inspiration in the elaboration of the abovementioned “Hague Principles”. As a matter of fact, the Mexico Convention can be incorporated via ratification or via the adoption of a law which captures the regulation’s spirit- as it has already occurred in Latin America.

This law proposal incorporated the virtues of the Mexico Convention, also capturing the advancements of the approved instrument in The Hague.

Currently possessing one of the most antique regimes of the world on cross-border contracting matters, accordant to what was previously pointed, Paraguayan law will – with this new body of law- become forward-looking. This law can even inspire others, which may be dictated in the world, given that it sets a path on how to embody The Hague principles in a legislative text.

It is important to say that this law proposal, if approved, will have a great impact in the world, and Paraguay will be counting with the most modern law in the matter.

An analysis of the Republic of Paraguay’s recently adopted Law No. 5,393 on the Law Applicable to International Contracts reveals that most of its provisions were taken from the Inter-American Convention on the Law Applicable to International Contracts (1994 Convention of Mexico City) and from the Hague Principles on Choice of Law in International Commercial Contracts.

Analyzing the Hague Principles on Choice of Law in International Commercial Contracts, chiefly as regards the selection of applicable law, it can be seen that the universal system for the codification of Private International Law took its inspiration from the regulations set forth in the Inter-American Convention on the Law Applicable to International Contracts (Mexico City Convention), as was noted in the feasibility studies conducted by the Hague Conference on Private International Law into the choice of applicable law in international contracts, given that the 1994 Convention of Mexico City served as the basis for drafting the Hague Principles on Choice of Law in International Commercial Contracts.

Similarly, many of the Hemisphere’s most innovative and groundbreaking laws for international contracts – among them, Venezuela’s Law on Private International Law of 1998 –are based on the Mexico City Convention on the Law Applicable to International Contracts, through the inclusion of its main principles.

In consideration whereof, it would be useful for the States of the Inter-American System to have innovative laws on this matter, with which they could meet the new challenges posed by international contracting. It must be borne in mind that the situation has changed substantially since 1994, when the forward-looking Inter-American Convention on the Law Applicable to International Contracts (Mexico City Convention) was adopted. Modern legal frameworks that reflect new forms of crossborder contracting must now be enacted, as Paraguay has done with its Law No. 5,393 on the Law Applicable to International Contracts.

Thus, the preamble to Paraguay’s recently adopted law indicates how the Inter-American Convention on the Law Applicable to International Contracts (Mexico City Convention) can be adopted by the legislations of the Inter-American System’s Members by stating that it may be incorporated by ratification, or by the enactment of a law that reflects the spirit of its provisions.

That was how Venezuela incorporated the guiding principles of the Inter-American Convention on the Law Applicable to International Contracts (Mexico City Convention) into its Law on Private International Law of 1998: not material incorporation by *verbatim* copying of the Convention's articles, but by using it as a source of law for producing modern domestic international contracting legislation. In that way, the Convention complements the new law and, in addition, becomes a basic element for interpreting the law and applying solutions in accordance with it.

Thus, should a country decide against the ratification of the Inter-American Convention on the Law Applicable to International Contracts (Convention of Mexico City), it can use it as a starting point through the incorporation of its guiding principles, as Venezuela did with its Law on Private International Law of 1998 and, more recently, as Paraguay did with its Law No. 5,393 on the Law Applicable to International Contracts of 2015. In this way, the states that make up the Inter-American System can equip themselves with modern domestic laws that are capable of meeting the new challenges of international contracting.

On October 15, 2014, the Dominican Republic enacted its Law No. 544-14 on Private International Law, the preamble of which contained the following clauses:

That the provisions of private international law contained in the Civil Code and in special laws must be completely replaced by a new legal instrument that responds to the nation's current and future needs, in line with the agreements, conventions, and treaties signed and ratified by the Dominican Republic;

That this new legal instrument, while not diverging from the French juridical tradition that is consubstantial to our legal system, cannot ignore the developments occurring within the Inter-American Specialized Conference and the contributions of the Hague Conference on Private Law, above all because of the Dominican Republic's recent adoption of several of their conventions;

That it is necessary for the State to enact provisions for efficiently regulating civil relations, such as divorce between foreigners, respecting the autonomy of choice and in line with international treaties.

Regarding the determination of the law applicable to a contract, the Dominican Republic's Law No. 544-14 on Private International Law of October 15, 2014, states that contracts shall be governed by the law chosen by the parties by means of an express agreement, which leads to the conclusion that it is based on the principle of autonomy of choice.

In the absence of an express agreement, the choice of applicable law shall be indicated in an evident fashion by the conduct of the parties and by the clauses of the contract taken as a whole.

The section dealing with contracts of the Republic of Panama's Law of May 8, 2014, enacting the Code of Private International Law – another of the hemisphere's new laws based on the principle of autonomy of choice – states that the parties' autonomy of choice shall regulate and govern international contracts, with the sole limitations of public order and fraud under the applicable law, and that the Inter-American Convention on the Law Applicable to International Contracts (the Mexico City Convention of 1994), as regards the determination of applicable law, refers to the broadest possible application of the principle of autonomy of choice.

In addition, many of the Hemisphere's States have used the CIDIP process as a source of law in planning amendments to their domestic legislation. The CIDIP's have been a constant reference point for doctrine, jurisprudence, and legislative amendments in the domestic laws of the countries of the Americas, to the extent that many of the solutions in its conventions have been taken as a reference in model laws and as guiding principles for lawmakers in the field of Private International Law.

With all these contributions, it would be useful for the OAS Member States to refer again to the Inter-American Convention on the Law Applicable to International Contracts as a unifying element of Private International Law on the topic of cross-border contracting. Thereby, it would help to bring State's laws into line with the demands of the contemporary world, standardizing the conflict of law provisions applicable to contracting, and taking as their foundation modern solutions adapted to the constant changes in international commercial practice.

Accordingly, it would be advisable for regional experts and academics to conduct a thorough analysis of how to make use of and benefit from the innovative solutions proposed in the Inter-American Convention on the Law Applicable to International Contracts. This instrument, in addition, incorporates the provisions of both common law and civil law, given that when it was negotiated, Canada and most of the Caribbean states that joined the OAS after 1990 were already Members of the Organization, and a meeting of experts involving top-level academics was held to develop its legal and structural bases.

The discussion held within the plenary of the Inter-American Juridical Committee concluded that a questionnaire should be prepared, for distribution to the States, experts, legal practitioners, and academics, in order for them to indicate whether there is any interest in reviewing the Inter-American Conventions produced by the CIDIP process, particularly the Inter-American Convention on the Law Applicable to International Contracts, known as the Convention of Mexico City of 1994.

That *questionnaire* is of major importance at the present time because this year marks the fortieth anniversary of the Inter-American Specialized Conferences on Private International Law, which began in Panama City in 1975 and established the CIDIP process.

Accordingly, as one of the Rapporteurs for this topic, I present the following *questionnaire* in order for the Secretariat for Legal Affairs, through its Department of International Law, to distribute it among the Member States of the Organization of American States.

III. *QUESTIONNAIRE*

QUESTIONNAIRE ON THE IMPLEMENTATION OF THE INTER-AMERICAN CONVENTIONS ON PRIVATE INTERNATIONAL LAW

1. Is there any indication that the Hague Principles on Choice of Law in International Contracts use, as one of their main sources, the Inter-American Convention on the Law Applicable to International Contracts, known as the Convention of Mexico City of 1994?
2. The general trend visible at the global level that of enshrining the principle of autonomy of choice in the selection of applicable law in international contractual relations, and the Inter-American Convention on the Law Applicable to International Contracts assigns a key role to that principle. Is that one of the fundamental aspects of the Convention?
3. The Mexico City Convention's enshrining of the principle of autonomy of choice for selecting applicable law in international contracts could lead to its rejection because of the possibility of causing disadvantages or imbalances for the weaker party in a contractual relationship. If that were the case, could this be overcome through the enforcement of the provisions related to mandatory requirements and public order contained in Articles 11 and 18 of the Inter-American Convention on the Law Applicable to International Contracts?
4. In the event of a failure to choose or an ineffective choice, the Inter-American Convention on the Law Applicable to International Contracts provides that the applicable law shall be that with which the contract has the closest ties. For the Latin American countries with *civil law* traditions, does this flexibility demand a major change of mentality, and could adapting to it foster fear and insecurity?
5. Could the failure to make use of the most characteristic performance principle for determining the applicable law affect the enforcement of the Inter-American Convention on the Law Applicable to International Contracts?
6. Is taking into account the General Principles of International Commercial Law accepted by international organizations (UNIDROIT Principles) in determining objective and subjective elements an innovative aspect of the Inter-American Convention on the Law Applicable to International Contracts?
7. Is the fact that the Inter-American Convention on the Law Applicable to International Contracts refers to the *lex mercatoria* important for the regulation of Private International Law?
8. The Inter-American Convention on the Law Applicable to International Contracts excludes the topic of consumer contracts from its scope of application, and it is therefore unsuited and insufficient for protecting the region's consumers. What other matters regulated by the Inter-

American Convention on the Law Applicable to International Contracts would not be appropriate for the Hemispheric Law of the Americas Region?

9. Would it be useful to undertake an appropriate dissemination effort of the benefits that the Inter-American Convention on the Law Applicable to International Contracts provided for crossborder contracting in order to encourage its ratification by the OAS Member States - given that it represents a significant step forward in harmonizing the legal systems of the States that make up the Inter-American System (*common law* and *civil law*) and that it unifies the provisions for conflicts of law in contracting by basing itself on modern solutions that are adapted to the constant changes in international commercial practice?
10. Could the dissemination effort described in the previous question be used in connection with other Inter-American Private International Law Conventions of importance for bolstering cross-border trade in the region or for strengthening regional integration processes, to enable the OAS Member States to take advantage of and benefit from the innovative solutions proposed in those conventions?
11. Given the progress that has been made in arbitration in recent years due to current conditions having changed since the adoption of the Convention in 1994, would an appropriate information and dissemination effort on the contents and innovative solution mechanisms of the Inter-American Convention on the Law Applicable to International Contracts be received positively in the countries of the Inter-American System,?
12. Venezuela's 1998 Law on Private International Law bases some its provisions on the Inter-American Convention on the Law Applicable to International Contracts. Does that mean that the spirit of its provisions remains up-to-date in contemporary international contracting?
13. Similarly, the Republic of Paraguay's Law No. 5,393, on the Law Applicable to International Contracts, enacted on January 15, 2015, uses the Inter-American Convention on the Law Applicable to International Contracts as one of its main sources. Does that mean that the spirit of its provisions remains up-to-date?
14. The Dominican Republic's Law No. 544-14 on Private International Law of October 15, 2014, states that, as regards the determination of applicable law, a contract shall be governed by the law chosen by the parties by means of an express agreement and that, in the absence thereof, the determination shall be indicated in an evident fashion by the conduct of the parties and by the clauses of the contract taken as a whole. Thus, does this law reflect the spirit of the Inter-American Convention on the Law Applicable to International Contracts?
15. The Republic of Panama's Law of May 8, 2014, adopting the Code of Private International Law, stipulates that Party Autonomy shall regulate and govern international contracts, with the sole limitations of public order and fraud under the applicable law. Hence, does this law reflect the spirit of the provisions of the Inter-American Convention on the Law Applicable to International Contracts?
16. Would it be useful to urge the States of the Americas to ratify the Inter-American Convention on the Law Applicable to International Contracts? If not, could it be incorporated by means of its guiding principles, through the enactment of laws that reflect the spirit of its provisions, as has occurred in several countries of Latin America, particularly Venezuela and Paraguay?
17. Could the principles set out in the Inter-American Convention on the Law Applicable to International Contracts be used as a source by the lawmakers of the Americas in drafting legislation to standardize the regulations governing international contracting in the region?
18. Forty years after the first Specialized Conference on Private International Law, which was held in Panama City and which created the CIDIP process that has worked for the harmonization of Private International Law in the Hemisphere, would it be useful to review the many other conventions produced by that process in order to secure additional ratifications or to incorporate their provisions by the enactment of laws that reflect their spirit?

19. Is there any complementarity between the Inter-American Specialized Conferences on Private International Law (the CIDIP process) and the Hague Conference on Private International Law, or are the processes mutually exclusive?
20. In order to publicize the Inter-American Conventions on Private International Law produced by the CIDIP process, so that the OAS Member States can confirm the innovative solutions that they provide in the area of contemporary Private International Law, would it be advisable to adopt a follow-up mechanism to ensure uniformity in their interpretation and execution, thereby making use of the spirit contained in its their provisions and keeping the Region's States from preferring the universal codifying body?

* * *

CJI/doc.481/15

**QUESTIONNAIRE ON THE IMPLEMENTATION OF THE INTER-AMERICAN
CONVENTIONS ON PRIVATE INTERNATIONAL LAW**

(presented by Drs. Ana Elizabeth Villalta Vizcarra and David P. Stewart)

Part A: The Mexico City Convention (For Governments)

1. There is increasing acceptance at the international level of the principle of party autonomy in the choice of applicable law in international commercial contracts. The 1994 Inter-American Convention on the Law Applicable to International Contracts (known as the Mexico City Convention) embraces that principle. Is your domestic law consistent with that principle?
2. The Convention also provides that, if the parties to a contract do not choose the applicable law (or make an ineffective choice), the applicable law shall be the one with which the contract has the closest ties. Is your domestic law consistent with that rule?
3. A novel aspect of the Inter-American Convention on the Law Applicable to International Contracts is that it takes into account the general principles of international commercial law (UNIDROIT principles), as well as *lex mercatoria*. Are references to them important for your country's legislation?
4. If your country has not yet signed or ratified the Mexico City Convention, what specific issues or problems prevent that from occurring? Are any amendments to the Convention needed to resolve those issues or problems?
5. Would it be useful for the OAS to convene a meeting of government and private experts to discuss the Convention, its provisions and the benefits which would be achieved by widespread ratification and implementation among OAS Member States? Would your government send a representative?
6. Would it be useful to disseminate the potential benefits to OAS Member States of the Inter-American Convention on the Law Applicable to International Contracts and of other inter-American conventions on private international law that promote cross-border trade in the region and regional integration processes, so that the OAS Member States can take advantage of and benefit from the novel solutions put forward in those conventions?

Part B: For Academics and Expert Practitioners

1. Why has the 1994 Inter-American Convention on the Law Applicable to International Contracts ("the Mexico City Convention") not (yet) been widely accepted (ratified) by OAS Member States? What problems (if any) prevent ratification by your own government?
2. Are any specific amendments needed to make the Convention acceptable?
3. There is growing international acceptance of the Principle of Party Autonomy in choice of law applicable to international contracts. The Inter-American Convention on the Law Applicable to International Contracts or Mexico City Convention of 1994 embraces that principle. Is that beneficial for the states' legislation?
4. Do you agree that the Convention represents a significant step forward in modernizing and harmonizing domestic legal systems with the OAS, in particular with respect to their provisions on conflicts of laws in international contracts?
5. Venezuela's 1988 Law on Private International Law based some of its provisions on the Inter-American Convention on the Law Applicable to International Contracts. The principles of the Convention are also reflected in the Republic of Panama's Law of May 8, 2014, the Dominican Republic's Law No. 544-14 (October 15, 2014) and Republic of Paraguay's Law No. 5,393 (January 15, 2015). Do you agree that the spirit of the Convention's provisions remain up-to-date and of importance to contemporary international contracting?

6. It has been said that one of the principal sources of the Hague Principles on Choice of Law in International Contracts was the Inter-American Convention on the Law Applicable to International Contracts. Do you agree with that statement?
7. Would it be useful to include the guiding and informative principles of the Inter-American Convention on the Law Applicable to International Contracts in a model law (framework law) so that Member States can use it when preparing draft domestic legislation?
8. Do you agree with the idea that a broad interpretation of the Inter-American Convention on the Law Applicable to International Contracts, as well as other Inter-American Conventions on Private International Law, would help improve cross-border trade in the region and strengthen regional integration processes?
9. Forty years after the first Inter-American specialized conferences on private international law in Panama, would it be useful to embark on an extensive effort to disseminate the Inter-American Convention on the Law Applicable to International Contracts, along with other inter-American conventions adopted in connection with the CIDIP's, so that the OAS Member States can take advantage of and benefit from the novel solutions put forward in those conventions?

* * *

7. Protection of Stateless persons in the Americas

Documents

CJI/doc.467/14 rev.3	Statelessness in International law: a challenge to the Member States of the OAS (presented by Dr. Gélin Imanès Collot)
CJI/doc.482/15	Measures recommended for the States of the Americas to prevent statelessness (presented by Dr. José Luis Moreno Guerra)
CJI/doc.488/15 rev.1	Inter American Juridical Committee Report. Guide on the protection of stateless persons
CJI/RES. 218 (LXXXVII-O/15)	Guide on the protection of stateless persons (Annex: CJI/doc.488/15 rev.1)

At the forty-fourth regular session (Asuncion, Paraguay, June 2014) the General Assembly issued a new mandate and instructed the Inter-American Juridical Committee to draft, in consultation with the Member States, “a set of Guidelines on the Protection of Stateless Persons, in accordance with the existing international standards on the topic”.

During the 85th regular session of the Inter-American Juridical Committee (Rio de Janeiro, August, 2014), Dr. Gélin Imanès Collot presented a preliminary document, registered as CJI/doc.467/14 of July 30, 2014. In the document he identified the situation of the persons of Haitian descent in Dominican Republic.

Dr. Pichardo stressed that there is no judgment of the Constitutional Court of the Dominican Republic that leaves hundreds of thousands of Dominicans of Haitian origin in the Dominican Republic stateless. The judgment refers to the *status* of one person in particular and requests that steps be taken to regularize that person's situation and grant Dominican citizenship. That ruling did not remove the nationality of the person referred to because that person had never acquired it. He reported, moreover, that the person referred to in the judgment had already acquired citizenship and an I. D. Dr. Pichardo likewise explained that the Dominican State had published a law to facilitate the acquisition of nationality and intended to issue regulations applicable to any Haitian citizen who had lived in the Dominican Republic in the past four years, aimed at regularizing his/her migration status. In that context, he suggested including, in the second paragraph on page 2, a reference to the judgment confirming what he had explained.

Dr. Gélin Imanès Collot suggested including French as a language for discussions in the Inter-American Juridical Committee because he feared that he might be unable to express his thoughts clearly in English. He explained that it had not been his intention to create tension between two countries on the Committee or to substitute for debate among countries in the region. However, he mentioned that everyone was well aware of the dispute between Haiti and the Dominican Republic and of the various impacts of the decision by the Constitutional Court of the Dominican Republic. He ended by saying he was very much interested in complying faithfully with the General Assembly mandate by producing a report highlighting the interests involved in the matter at hand and giving grounds for reflection, taking into consideration the background to this issue, especially resolution AG/RES. 2787 (XLIII-O/13).

The Chairman suggested that Dr. Gélin Imanès Collot revise the document and that he present a new version of it the session scheduled for March.

Dr. Carlos Mata Prates thanked Dr. Gómez Mont for the appointment and said he intended to follow the same methodology that was used in the mandate regarding the immunity of States, that is to

say, sending States a questionnaire to elicit their views, considering that the request was for guidelines drafted in coordination with them.

Dr. Gélin Imanès Collot stressed the need for objectivity in the discussion of these matters and urged that the committee members work together harmoniously.

The Chairman emphasized that there was no problem with Members voicing their positions but, at the same time, he invited them to avoid mentions of situations between specific countries that did not help the Committee fulfill its mandates.

In putting an end to the debate, the Chairman said that the plenary therefore looked forward to conducting, at its next session, an analysis of the States replies to the *questionnaire* to be drawn up by its Rapporteur and distributed among the States by the Secretariat.

During the 86th regular session of the Inter-American Juridical Committee (Rio de Janeiro, Brazil, March 2015), the Rapporteur for the Topic, Dr. Carlos Mata Prates, gave a presentation on the subject matter. He explained that at the beginning of the current year, a *questionnaire* was submitted to the OAS permanent missions to get information on the norms and practices of the States on the subject matter. He added that as of the present time, a reasonable number of States had responded to the *questionnaire*. In this regard, Dr. Luis Toro Utillano took the floor and added that the *questionnaire* was distributed in late January and the first week in March was set as the deadline to return the responses. He noted that as of the present date, ten countries had responded: Argentina, Colombia, Costa Rica, Ecuador, El Salvador, United States, Honduras, Paraguay, Peru, and Uruguay, He also indicated that through a survey conducted by the Secretariat with the support of an intern, laws and draft legislation of Brazil, Chile and Mexico were collected.

Dr. Hernán Salinas expressed concern about the response that the Committee will send to the States, given that a General Assembly mandate is involved. In his view, there must be applicable international standards on the subject matter and, therefore, it would be appropriate to have a first draft on the status of laws on the subject matter by the next meeting. As he understands it, States' failure to provide a response should not pose an obstacle to drafting the report.

Dr. Moreno Guerra noted that because of use of the principles of *jus soli* and *jus sanguinis*, the concept of statelessness is not common in our hemisphere. Additionally, he mentioned that there is a trend toward restricting and punishing migration, with certain States even stripping some individuals of nationality, which should be cause for concern.

The Chairman agreed with the opinion of Dr. Hernán Salinas as to the importance of producing a report that includes international standards. He also mentioned the practice of the Committee to efficiently respond to the mandates of the General Assembly; and that this practice was stressed by the States when they allocated a higher budget to the Inter-American Juridical Committee. Lastly, he recalled the experience in Peru under the left wing military regime, when members of the political opposition were stripped of their nationality and expelled from the country.

Dr. Mata Prates noted that from the strictly legal point of view, the topic should not be a source of difficulty, inasmuch as the right to nationality is clearly established, and he referred to Article 20 of the American Convention on Human Rights. In this context, the Rapporteur believes it would be important and useful to know the specific practices of States in fulfilling their duties. Notwithstanding, he pledged to have a report ready by August.

Dr. Correa Palacio added that, up until 1990, the Colombian Constitution still stripped a person of nationality, when he or she took on a new one. Dr. Mata Prates remarked on this point that this is a procedure, which often is contingent on a request by the State of which the person is becoming a national.

Following what was mentioned, the Chairman requested Dr. Collot to present a revised version of the report titled "Statelessness in International Law: a challenge to the Member States of the OAS,"

registered as document CJI/doc.467/14 rev. 3. Dr. Collot explained that after holding a discussion with Dr. Pichardo, he was in a position to eliminate any mention of Haiti and the Dominican Republic and, consequently, he would submit, the next day a new version of the document.

The Chairman clarified that the new revised document, with deletion of mention of the countries, would be distributed as soon as possible.

Dr. Pichardo noted that he agreed with the deletion and with the amended text.

The Chairman requested the Rapporteur for the topic, Dr. Mata Prates, to present his report during August's session.

During the 87th regular session of the Inter-American Juridical Committee (Rio de Janeiro, Brazil, August 2015), the Rapporteur for the topic, acting as Chairman, recalled that this is the only topic for which there is a mandate from the General Assembly. As a theoretical framework, he cited the following conventions as universal norms: the Universal Declaration of Human Rights (1948), the Convention relating to the Status of Stateless Persons (1954) and the Convention on the Reduction of Statelessness (1961). As for regional norms, the following were mentioned: American Declaration of the Rights and Duties of Man (1948) and the American Convention on Human Rights (1969). Lastly, he cited the draft model law written by the UNHCR. He cited the contribution of Dr. Moreno Guerra and the support provided by the Secretariat.

The report explains the definition of stateless persons and the doctrines used as the basis for granting nationality (*jus soli*, *jus sanguinis* and *jus laboris*). The Rapporteur also clarified that his report includes as international customary law the definition appearing under Article 1 of the Convention relating to the Status of Stateless Persons, which is a norm of *jus cogens*. The report also identifies the right to nationality, as established in Article 20 of the American Convention on Human Rights, as a universal right, applicable not only to States Parties but also to every OAS Member States, inasmuch as it is international custom. He explained that a *questionnaire* was sent to the States in order to receive input on practices in each one.

In this regard, the Rapporteur confirmed he had received responses from the following countries: Argentina, Colombia, Costa Rica, Ecuador, United States, El Salvador, Honduras, Paraguay, Peru and Uruguay. The Rapporteur explained that not all countries are parties to the specific conventions on the subject. As to the government entity in charge of the topic, there is great variation between countries in this regard: Ministries of Foreign Relations, Commission of Refugees, Migration authority, and others that have no specific competent authority in the area. He explained that all responding States have statutes regulating the 1961 Convention.

In light of the responses submitted, he suggested proposing that the States accede to the Convention relating to the Status of Stateless Persons (1954) and the Convention on the Reduction of Statelessness (1964). He also suggested enacting a domestic law for the protection of stateless persons and implementing effective regulations, which provide for a minimum of formality and a reasonable length of time periods. He urged providing for favorable treatment to persons with this status, in view of the vulnerable situation they face. He also included a suggestion to allow access to work and to basic services such as health care.

Dr. Moreno Guerra noted that even though the report was succinct, it warranted his recognition. By way of comment, he mentioned the doctrine of *jus laboris* would not be the most felicitous term. Additionally, he suggested that the last part could be changed to read: "have the right to work in the State where they are located," because it could be taken to mean that they should have a public job.

The Rapporteur replied that the expression *jus laboris* is the name given to the phenomenon of persons acquiring nationality through work, but that it is a very narrow principle. In this regard, the Rapporteur fleshes out the legal doctrine used as the basis to grant nationality (*jus soli*, *jus sanguinis* and *jus laboris*). Additionally, the report references the definition appearing in Article 1 of the Convention on the Status of Stateless Persons and established that this definition must be enshrined as

international customary law, in addition to being a norm of *jus cogens*. He noted as well that Article 20 of the American Convention establishes this right as universal, applicable not only to the parties to the Convention but also to other countries, inasmuch as it is part and parcel of customary International Law.

Dr. Collot observed that were not present all the elements that would be expected in a study on this topic, such as a comparison on the use of the doctrine of *jus soli* and *jus sanguinis* among member states. Furthermore, he suggested that the two international Conventions of 1954 and 19611 have reduced the number of stateless persons in the world, but they have not been able to do away with statelessness altogether. Following, he questioned whether the Secretariat had received a response from the State of Haiti.

The acting Chairman explained that no response had been received from Haiti and that is why the country is not mentioned in the report. In his view, the trouble with the topic does not lie in the legal framework, but rather in implementation of international standards by Member States.

Dr. Collot explained that he had not said that Haiti sent in a document, rather that they were interested in doing so and that he had an unofficial report in his possession.

Dr. Baena Soares noted that the item would now be closed and deemed complete.

Dr. Moreno Guerra shared Dr. Baena Soares' assessment. Notwithstanding, he noted that it could be added that the source of statelessness goes beyond the will of the States. The main issue is the clash between *jus soli* and *jus sanguinis*; other issues are usually of an eminently administrative nature. He affirmed that there is no way to compel States to amend their Constitutions.

The acting Chairman noted that every circumstance of the topic would now be covered in the document. The aim is to verify the proof of the person with a document, who is recognized as stateless and, based thereon, he or she would have access to certain rights.

Dr. Moreno Guerra argued that the circumstances given by Dr. Villalta would not be situations linked to statelessness; though they may be Human Rights violations.

The acting Chairman approved the document, pending further considerations from Dr. Hernández García and Dr. Stewart. In the end, the report was approved with a recommendation to forward it to the Permanent Council.

The supporting documents offered by Drs. Gelin Collot and José Luis Moreno Guerra are included. Furthermore, a transcript of the approved document, based on the work submitted by the rapporteur, Dr. Carlos Mata Prates, and its respective resolution follow:

CJ/doc.467/14 rev. 3

**STATELESSNESS IN INTERNATIONAL LAW:
A CHALLENGE TO THE MEMBER STATES OF THE OAS**

(presented by Dr. Gélin Imanès Collot)

Under the regulations of the IAJC, we are pleased to offer to the thinking members of this organization the following theme: **"Statelessness in International Law: A challenge to the Member States of the OAS."**

The General Assembly of the OAS held in Antigua, Guatemala on June 5th, 2013 adopted in plenary Resolution No. AG/RES. 2787 (XLIII-O/13) on the prevention and reduction of statelessness and the protection of the stateless in the Americas.

The decision recalls the previous resolutions of the regional Assembly, for example: AG/RES. 1971 (XXXIII-O/03), AG/RES. 1963 (XXIX-O/99) AG/RES.1762 (XXX-O/00), AG/RES.1832 (XXXI-O/01), and AG/RES. 1892 (XXXII-O/02) AG/RES. 2511 (XXIX-O/99),

AG/RES. 2599 (XL-O/10) and AG/RES.2665 (XLI-O/11) on stateless persons, and takes into account the United Nations Resolution of 7-8 December 2011 on the same subject, on the occasion of the 60th anniversary of the 1951 Convention, as amended by the 1954 Convention relating to the status of stateless person and the protection of stateless persons, on the 50th anniversary of the 1961 Convention on the reduction of statelessness.

In addition to this resolution, the recent Assembly held on June 4, 2014 at its 44th regular session recalls the last resolution in terms of the formal obligation for member States to reduce statelessness and to promote protection to stateless persons, which requires actions on the part of the IAJC:

Emphasizing that this year¹ marks the sixtieth anniversary of the adoption of the 1954 Convention relating to the status of stateless persons and that, as part of the Commemorations for the 30th anniversary of the 1984 Cartagena Declaration on Refugees (Cartagena + 30 ‘), the Member States are considering the adoption of a new strategic framework that will enable them to promote the protection of stateless people and refugees over the coming decade².

The resolution of the regional Assembly also recalls the Brasilia Declaration of 11 November 2010 on the protection of refugees and stateless persons, and in turn, encourages States to promote legal reflection on the thorny problem of statelessness and the conducting of joint comparative studies of nationality law in the Americas or in the Committee for Legal and Political Affairs, with the support of the Department of International Law of the General Secretariat and in line with the teaching of law in our academic communities. It is this latter context, Mr. Chairman, that we believe should guide the legal thinking in this field of significant relevance.

1. Reflection on relevance

According to a report by the United Nations High Commissioner for Refugees (UNHCR), there are about **12 million stateless people worldwide**, including children, who represent nearly 55%. They are victims of the circumstances of their birth, the conflict of laws between states, or other forms of discriminatory treatment.

Most often, the stateless people are victims of a double violation of rules of law: violation of domestic law on nationality, perhaps, and violation of international juridical instruments prohibiting statelessness and protecting human rights. They are supposed to be under the protection of the 1951 Convention, as amended by the 1954 Convention relating to the status of stateless person and the protection of stateless persons and the 1961 Convention on the reduction of statelessness.

In addition to these two international juridical instruments, the Universal Declaration of Human Rights³ in the article 15.2 forbids the statelessness in the following terms: “*No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality*”.

These two well-known International Instruments forbid statelessness and the protect of the stateless persons in the world. This is the reason why international organizations involved in the protection of human rights are very concerned by statelessness, because it is evidently considered as a violation of human rights.

2. Objectives, expected results and expected impacts

The conducting of a study with a comparative approach should seek some legal systems in the region. However, the choice of legal systems cannot be left to chance, or give rise to stereotype considerations. It must proceed from a representative sample of 35 states of the OAS Member States, including 16 in the Caribbean sub-region area.

The study would focus on the positive law of selected states (laws and regulations, jurisprudence and doctrine, to the extent possible) and should identify in each state the main

¹ The year 2014.

² AG./RES/doc.5480/14, OAS.

³ December 10, 1948.

guidelines and criteria chosen between the two broad principles, – *jus sanguinis* and *jus soli* – that govern the granting of nationality to natural persons in private international law, which are usually factors of conflict of laws.

The conducting of this comparative study will involve the participation of several colleagues of the IAJC. It will produce significant impacts on at least two orders of interest to contributors, on the one hand, and to the Heads of State and Government of Member States, on the other.

In terms of self-interest contributors, this study will enrich knowledge of the law in the region in this area, despite historical, cultural and linguistic differences, and above all allow each and every participant to become more familiar with his/her national law, as in all comparative law studies.

In terms of state interest, where the need is most intensely felt, the study should also open the eyes of the public authorities (Heads of State and Heads of Government) to various nuances that fuel conflict laws and citizenship and contribute to statelessness in the region and sub-region in defiance of two highly significant international legal instruments.

Finally, the study should refocus everyone's attention on the need to adhere to the two Conventions on the subject, to ratify and incorporate them either directly into the national law of Member States, or to encourage developing laws and regulations to eliminate, or at least reduce, statelessness through a solid agreement between the states, or at least mitigate its effects in each Member State.

Following this study, the Inter-American Juridical Committee could possibly develop and propose a model law providing for a *modus vivendi* between the states, such as the establishment of an interstate dialogue structure to avoid statelessness, or at least indicate ways to mitigate the effects. The Inter-American Juridical Committee could also intervene on the topic at the University level in conferences of the Department of International Law of the General Secretariat.

Mr. Chairman, I congratulate you on accepting my request to conduct studies on statelessness in order to contribute to reduce it and mitigate its effects worldwide. That is one of the best ways to contribute to the protection of human rights in the Americas.

CJI/doc.482/15

MEASURES RECOMMENDED FOR THE STATES OF THE AMERICAS TO PREVENT STATELESSNESS

(presented by Dr. José Luis Moreno Guerra)

Mandate

The OAS General Assembly instructed the Inter-American Juridical Committee to prepare a document with recommendation for the Members States, aimed at avoiding statelessness.

Concept

Nationality is an individual's legal bond to the state; the absence of that bond brings about statelessness.

Sources of nationality

- *Jus soli*
- *Jus sanguinis*
- *Jus domicilii*
- *Jus argentum*

Jus soli Right to nationality of a country on whose soil a person is born.

Jus sanguinis Right to nationality of one's father or mother, or of both.

Jus domicili Option of gaining naturalization in a state in which a foreigner is permanently resident.

Jus argentum Incentive whereby a state offers nationality to a foreigner who invests a certain previously-determined minimum amount.

Causes of statelessness

- A state's refusal to recognize dual and multiple nationality.
- Cancellation of nationality as punishment for a crime committed.
- Withdrawal of nationality of origin from anyone who is naturalized in another country.
- Requirement that original nationality must be relinquished for naturalization procedures to begin.
- Cancellation of Naturalization Certificate.
- Reluctance to allow nationality of origin to be restored.
- Birth, in a country that applies *jus sanguinis*, to foreign parents who are citizens of a country that applies *jus soli*.
- Lack of awareness that parents' nationality can be acquired through registration of birth at a Consulate.
- Extinction or disappearance of the state of one's citizenship.
- Administrative provisions of a state that applies *jus soli* but still denies nationality to children born in its territory to "de facto" immigrants.
- Lack of documents to prove nationality, especially among peasant, illiterate, displaced, and refugee groups.
- Dysfunction in the Civil Registry or lack of national coverage.
- Negligence by local authorities, doctors, midwives, and clinic and hospital staff, who know about a birth but fail to notify the competent authorities.

Observation

Statelessness is an irregular situation that ought to be prevented or corrected by states, since it affects human rights.

Measures recommended for Member States to prevent statelessness

- Accept dual and multiple nationality, a universal trend that seeks to better protect people, without detriment to the state; an individual is more likely to lose his or her only nationality than to lose more than one.
- Broaden the source of nationality, so that *jus soli* and *jus sanguinis* can operate together in every state.
- Abolish penalties that deprive individuals of the bond of nationality, choosing instead other equivalent penalties for similar crimes.
- Eliminate administrative penalties that deprive individuals of their nationality of origin if they become naturalized in another country.
- Do away with the requirement that nationality of origin must be relinquished as a standard requirement before naturalization certificate procedures, since it opens up a temporary opportunity for statelessness and could make it indefinite insofar as a Nationalization Certificate is granted at the discretion of the state.
- Admit that a Naturalization Certificate creates a legal bond for the holder until death, unless he or she decides to expressly relinquish it; naturalization is therefore subject neither to time limits nor administrative conditions; nationality by birth or by naturalization are of equal legal value.

- Repeal Naturalization Certificate cancellation clauses.
- Include members of the immediate family on Naturalization Certificates.
- Shorten periods for granting Naturalization Certificates; there are cases that take years because of the needless formality of requiring the signature of the President of the Republic.
- Facilitate restoration of nationality of origin, because it is a right that never fades away.
- Instruct consular officers to constantly remind fellow nationals within their jurisdiction about the possibility and usefulness of registering the birth of children with a Consulate.
- Address the lack of identification documents by using other proofs of ties, such as witness statements.
- Rebuild ties for refugees and displaced persons with the approval of consular agents of the country of origin.
- Allow people to become naturalized by rendering as unnecessary those conditions that are impossible to meet, such as demanding birth certificates from countries that have no civil registry.
- Modernize and decentralize Civil Registry services, so that those giving birth in indigenous or peasant communities in remote areas do not have to make long and expensive trips.
- Simplify birth registration procedures.
- Get rid of deadlines for births to be registered, so as to avoid incurring penalties that subsequently scare people away.
- Repeal legislative or administrative provisions of a state that applies *jus soli* yet denies nationality to "de facto" immigrants' children born in its territory.
- Make it mandatory for managers of hospitals, clinics, and health centers, as well as doctors, midwives, and administrative authorities to report births that have occurred at their facilities or within their jurisdiction, otherwise face penalties.
- Expedite procedures to get identification documents for the first time or to replace lost, damaged, or stolen ones.

* * *

CJI/doc.488/15 rev.1

INTER-AMERICAN JURIDICAL COMMITTEE REPORT.

GUIDE ON THE PROTECTION OF STATELESS PERSONS

I. INTRODUCTION

1. The General Assembly of the Organization of American States (OAS) asked the Inter-American Juridical Committee (IJC), in the resolution "Avoidance and reduction of statelessness and protection of stateless persons in the Americas", AG/RES. 2826 (XLIV-O/14), to prepare, through consultations with the Member States, a "Guide on the Protection of Stateless Persons, in keeping with the international norms on the matter".

2. The Inter-American Juridical Committee assigned Dr. Carlos Mata Prates as Rapporteur of the theme, during its 85th regular session held in Rio de Janeiro in August 2014.

3. Accordingly, this Rapporteurship meets the requirements of the request made by the General Assembly of the OAS.

II. PURPOSE OF THIS REPORT

4. In accordance with the provisions set forth in the Resolution of the General Assembly of the OAS, what is requested or required is a *Guide on the Protection of Stateless Persons*, in other words, suggestions as to the establishing of some procedures, or even the approving of norms that enhance the efficacy and efficiency – assuming that the paramount principle is to protect such people who are in circumstances that pose a high degree of risk - when concrete measures are taken concerning questions on statelessness presented for the appreciation of the American States.

5. The above remarks do not excuse us from exploring the theoretical study of this problem - statelessness – on which a normative consensus already exists in today's International Law, besides an extensive bibliography in the Americas and elsewhere.

6. Likewise, it is fitting that since the early 50's, when statelessness was recognized as a world problem, the Office of the United Nations High Commissioner for Refugees (UNHCR), also known as the UN Refugee Agency was designated by the General Assembly of the United Nations as an organ entrusted with the avoidance and reduction of statelessness.

7. Accordingly, the following report on the topic is hereby presented.

III. THEORETICAL FRAMEWORK

8. It must be considered that this report assumes the development carried out in respect to norms, with special reference to those contained in the **Universal Declaration of Human Rights (1948)**, the **Convention relating to the Status of the Stateless Persons (1954)** and the **Convention on the Reduction of Statelessness (1961)**.

9. As regards the American juridical instruments, special emphasis was placed on the contents of the **American Declaration of the Rights on Duties of Man (1948)** and the **American Convention on Human Rights (1969)**, where article 20 deals with the question.

10. It is also appropriate to consult the **Model Law for the Protection of Stateless Persons of the United Nations High Commissioner for Refugees (2012)**.

11. Finally, mention must be made of the study presented by the Member of the Inter-American Juridical Committee, Dr. José Luis Moreno Guerra, entitled **Measures Recommended for the States of the Americas to Prevent Statelessness (CJI/doc.482/15)** and the **Support Document on Statelessness (2015)** prepared by the Department of International Law of the OAS.

IV. METHODOLOGY

12. The comments above propose that this study is essentially practical in nature for the purpose of dealing with resolving a problem such as protecting stateless persons in an efficacious and efficient manner.

13. The methodology used was designed to gain familiarity with the panorama of the American States on the issue of the norms and practices they employ on the question related to protecting stateless persons. A *questionnaire* was drawn up and sent to the States in order to survey the situation based on the answers received and consequently carry out an analysis.

V. STATELESS PERSONS

14. A preliminary aspect to be considered refers to the concept of nationality. On this matter, the idea that is usually accepted is that *nationality* is a natural bond between an individual and a State, and that the rights and duties of both subjects are derived from this.

15. This juridical bond is in general regulated by the Constitutional Law of each State, whereas International Law converges with different norms in order to avoid conflicts such as positive or negative nationality.

16. Contemporary International Law recognizes the legitimacy of nationality being attributed by the States, applying the criteria of *jus soli* – acknowledging this bond for individuals born in the territory of the State; *jus sanguine* – acknowledging this bond for individuals who are the offspring of nationals regardless of the place of birth; and *jus labor* –acknowledging nationality based on the place where the individual works.

17. It should be borne in mind that despite the various criteria considered by contemporary International Law as legitimate, what is defined as a negative conflict of nationality, that of persons who possess no nationality and consequently are in a position of extreme vulnerability that calls for international law to intervene in order to prevent such situations or, if such situations become concrete, to find solutions to protect such persons.

18. With regard to the Convention relating to the Status of Stateless Persons (1954), article 1 states that: ***“DEFINITION OF THE TERM “STATELESS” 1. For the purpose of this Convention, the term “stateless person” means a person who is not considered as a national by one State under the operation of its law.”*** This is the definition accepted by doctrine and jurisprudence.

19. The causes of people finding themselves in a situation of statelessness are multiple, for instance *de jure* stateless – those who do not obtain nationality automatically or by individual decision according to the legislation of a State – and *de facto* stateless – individuals who cannot establish their nationality. In turn, among these individuals are those who had a nationality and lost it by a judicial sentence or administrative act in systems that allow this, or else renounce their nationality, and those cases where an individual has been unable to gain any nationality. For the effects of this report, as well as for doctrine and jurisprudence, both situations are considered capable of being assimilated to allow due protection.

20. In this respect and as a guiding criterion on the matter, as regards American international law, it must be remembered what article 20 of the American Convention on Human Rights (1969) prescribes, ***“Right to Nationality. 1. Every person has the right to a nationality. 2. Every person has the right to the nationality of the State in whose territory he was born, if he does not have the right to any other nationality. 3. No one shall be arbitrarily deprived of his nationality or of the right to change it”***.

21. It bears repeating that the American Convention on Human Rights (1969) is a juridical instrument of a conventional nature and – given its high degree of acceptance as well as the passing of time – it must be considered that by now it has acquired the characteristics of common law.

VI. ANALYSIS OF THE ANSWERS TO THE QUESTIONNAIRE SENT OUT

22. A *questionnaire* was sent out to the American States with four questions on the topic under discussion: 1) *Is your country a signatory or has it ratified the Convention on the Reduction of Statelessness dated August 30, 1961?*; 2) *Indicate the practice in your State in statelessness cases*; 3) *Identify the national authority in charge of cases of statelessness*; 4) *Send the domestic legislation in your country on the topic, as well as any other documentation considered relevant*.

23. The following States provided responses to the above questionnaire: Argentina; Colombia; Costa Rica; Ecuador; El Salvador; Honduras; Paraguay; Peru, United States of America and Uruguay.

24. We must also report that the countries that have already ratified the Convention on the reduction of Statelessness (1961): Colombia; Uruguay (2); Argentina; Peru; Costa Rica; Paraguay (2); Ecuador; and Honduras (2). The United States of America and El Salvador are not parties to this Convention (however, El Salvador has ratified the Statute for Stateless Persons).

25. From the analysis of the responses forwarded it is clear that different situations appear regarding the organic aspect when dealing with statelessness cases (the Ministry of Foreign Affairs of Colombia, Costa Rica and Peru; in Argentine and Uruguay, the Commission of Refugees; in the United States of America and Honduras the organ in charge is the Migrations Secretariat, whilst in Ecuador and Paraguay there no specific authority to deal with those situations).

26. All the States that answered the questionnaire report that there is supplementary domestic legislation to the 1961 Convention and that all of them follow different procedures for resolving cases of stateless persons.

27. The responses received allow us to say that at the normative level the trend is to adhere to instruments aimed at avoiding or resolving the problems caused by statelessness. However, if we consider the responses received and the number of States Party to the OAS, this fact refrains us from drawing comprehensive conclusions about the reality of the Continent in this specific issue.

VII. PROPOSED GUIDE ON THE PROTECTION OF STATELESS PERSONS

28. In response to the request of the General Assembly, we suggest that OAS Member States adopt the following *Guide on the Protection of Stateless Persons*:

At the normative level:

Ratifying or adhering to:

- the Convention relating to the Statute of Stateless Persons (1954); and
- the Convention on the Reduction of Statelessness (1961).

Approving the following:

- Model Law on the Protection of Stateless Persons of the United Nations High Commissioner for Refugees (2012);
- Regulation for enforcing the provisions of the Conventions when required by the respective juridical system.

At the procedural and organic level:

- Establishing an accessible procedure for the protection of stateless persons, applying the principle of informality in favor of the stateless person and providing a reasonable time-frame.
- Taking into consideration the vulnerable situation of stateless persons, which calls for addressing the situation by applying the principle of protecting human beings.
- Acknowledging the status of the stateless person must include granting documentation to allow access to basic services (healthcare, and so on).
- Such acknowledgement will enable the stateless person to enjoy access to employment in the State where he/she resides.
- An agency should be set up specialized in attending to situations of the stateless for the purposes of offering a service concerning the protection of the human rights involved.

* * *

CJI/RES. 218 (LXXXVII-O/15)

GUIDE ON THE PROTECTION OF STATELESS PERSONS

THE INTER-AMERICAN JURIDICAL COMMITTEE,

CONSIDERING that through Resolution Prevention and Reduction of Statelessness and Protection of Stateless Persons in the Americas, document AG/RES. 2826 (XLIV-O/14), the Inter-American Juridical Committee was requested “to draft, in consultation with Member States, a “Guide on the Protection of Stateless persons”, in conformity with the international standards on the issue”;

HAVING SEEN the report under the title “Guide on the protection of stateless persons”, document CJI/doc.488/15, presented by Dr. Carlos Mata Prates on August 3, 2015,

RESOLVES:

1. To thank the Rapporteur of the theme, Dr. Carlos Mata Prates, for the presentation of the report “Guide on the protection of stateless persons”, document CJI/doc.488/15 of August 3, 2015.
2. To approve as Report of the Inter-American Juridical Committee, document CJI/doc.488/15 rev.1, attached to this Resolution.
3. To consider that the studies of the Inter-American Juridical Committee on this topic are concluded.

This resolution was approved during the meeting held on August 7, 2015, by the following members: Drs. Gélín Imanès Collot, José Luis Moreno Guerra, João Clemente Baena Soares, Hernán Salinas Burgos, Ana Elizabeth Villalta Vizcarra, Joel Hernández García, Ruth Stella Correa Palacio, Carlos Alberto Mata Prates (Vice President) and David P. Stewart.

* * *

8. Representative Democracy

Document

CJI/doc.473/15 Representative democracy in the Americas: first preliminary report
(presented by Dr. Hernán Salinas Burgos)

During the 85th regular session of the Inter-American Juridical Committee (Rio de Janeiro, August 2014), Dr. Hernán Salinas suggested including “Representative Democracy in the Americas” as a new topic for the Committee’s agenda, in keeping with talks held with the OAS Secretary General, Mr. José Miguel Insulza, at the start of said working meetings. The proposal involves a study to consider the progress achieved by the Organization on this subject matter. Dr. Salinas’ initiative was supported by the plenary, and he was appointed the topic Rapporteur.

During the 86th Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, Brazil, March 2015), the Rapporteur, Dr. Hernán Salinas, presented his report titled “Representative Democracy in the Americas: First preliminary report,” registered as document CJI/doc.473/15. He pointed out that the report is of a preliminary nature and the purpose thereof is to participate in the Inter-American Democratic Charter, based on a suggestion of the Secretary General during his visit to the Committee at the previous meeting in August 2014. He explained that the report is based on two premises: 1) There is no distinction between the principles of the Inter-American Charter and the principle of non-intervention, as it is a fallacious dichotomy; and 2) the topic encompasses both original democracy and comprehensive and substantive democracy.

As for the major challenges posed by the Inter-American Democratic Charter, the Rapporteur highlighted a few challenges of a preventive nature. In this regard, he proposed further empowering the Secretary General through, among other things, the ability to eliminate the consent of the State for the Secretary General to act under Article 110 of the OAS Charter. All of this would enable early warnings or monitoring mechanisms to be put into place. He also mentioned several different proposals, which would include formulating annual reports; general assessments; creating a position of special rapporteur for democracy or a high commissioner; strengthening the support capacity of the Organization; and, preparing a compendium of best practices.

In the view of the Rapporteur, it would be appropriate to institutionalize the mechanism of good offices and more precisely define in what circumstances would democracy be in jeopardy, inasmuch as a lack of precision in the terms fosters subjectivity in decision-making on when the Organization is able to act.

Another challenge pertains to the capacity to accede to the Inter-American Democratic Charter and, in particular, the bodies of government that would be in a position to set the established proceedings into motion. A broad interpretation of the reference to “government” could provide for the ability of other branches of government such as the legislative body or the judiciary to do so.

Additionally, he called into question the use of suspension as a punishment provided for in the Inter-American Democratic Charter, and proposed giving broader leeway to attempt other alternatives before resorting to suspension.

Dr. Baena Soares noted that the topic involves ongoing attention by the Organization, which it has been receiving since approval of resolution AG/RES. 1080 (XXI-O/91), “Representative Democracy.” However, he warned that we must proceed with caution. As an introductory comment, he remarked that despite the importance of the political agreement achieved with the Inter-American Democratic Charter, it has a lower hierarchical rank than the OAS Charter.

Prevention is of the essence and it must emanate from within a country, it cannot be imposed through multilateral instruments. There is no specific recipe to defend democracy. The OAS’s role in

prevention is the support it can offer the States. Prevention is a domestic function of each State and educating new citizens is the way to ensure democracy for the future.

The Chairman agreed that the topic of democracy has consistently been on the Committee's agenda. He also mentioned that the Inter-American Democratic Charter must be analyzed in conjunction with the other instruments in order to have the full picture, including resolutions approved by the Juridical Committee.

Dr. Mata Prates supported Dr. Baena Soares' ideas and points. He disagreed with the use of the phrase "partial cession of sovereignty," in view of the fact that sovereignty is never ceded by the State. Another point of concern is the tendency to increase the powers of the Secretary General, because in his view, the OAS Charter strikes the proper balance in this regard and it is unwise to change it. Lastly, he remarked that the subject of early warning depends on how this legal concept is defined, as it is quite a broad concept *a priori*.

Dr. Villalta also congratulated the Rapporteur and recalled that the Inter-American Democratic Charter was approved at a specific point in time and that the States had been pressured to work fast in light of the September 11 attacks in 2001.

Dr. Joel García noted that Article 110 of the OAS Charter already grants implicit powers to the Secretary General as to peace-keeping in the region and he provided the context of his vision in the context of the impeachment proceedings of President Fernando Lugo of Paraguay. He explained that the Permanent Council did not reach a specific conclusion. However, acting under the implicit powers afforded to him under said Article of the OAS Charter, the Secretary General conducted an *in loco* visit, which gave rise to a compelling report, thus providing for enhanced guarantees to deal with this type of situation.

Dr. Hernán Salinas's comments reflected the opinions of other Members on the need to proceed cautiously and take into consideration other pertinent legal instruments. As for the powers of the Secretary General, he asserted that it is an issue that warrants further clarity and, therefore, he highlighted the different positions expressed during the current theoretical discussions.

When the discussion concluded, the Chairman requested the Rapporteur to take note of the proposals and to present a new version of his document at the next session.

During the 87th Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, Brazil, August 2015), Dr. Hernán Salinas, Rapporteur, recalled that in the previous regular session he had presented a preliminary report "Representative Democracy in the Americas. First Preliminary Report" (CJI/doc.473/15) on the status of the topic throughout the Hemisphere. The debate within the Committee made it possible to ascertain that there is no consensus to amend the OAS Charter or the Inter-American Democratic Charter; and that efforts should be focused on preventive aspects.

As a methodology, he reported that we should be comparing democracy protection norms with other systems, such as UNASUR, the Council of Europe and European Union, in addition to conducting a study on how domestic norms have performed.

He mentioned the need for the Technical Secretariat to provide support in order to carry out this study. Particularly, there is a need to learn how the OAS mechanisms work to verify which norms do the best job in the area of prevention and best help at maintaining the democratic structure.

He further suggested thinking about the role of the Secretary General under Article 110 of the OAS Charter and see if it is possible to assign a more active role for him in these matters. Lastly, he proposed to analyze the system of sanctions that is triggered when disruptions occur to the democratic order.

Dr. Baena Soares noted that the best way to prevent and avoid such disruptions to the democratic order is to enable citizens to express in a timely fashion their disagreement with the system or their situation. Consequently, the study must include topics of domestic order and he suggested reviewing

the institutional mechanisms to prevent assaults on democratic order set forth in the Constitutions of the States.

Dr. Moreno Guerra noted that the topic is related to how easy it is for citizens to demonstrate their disagreement with the system or their situation. He believed that speaking about representative democracy is a pleonasm. He also urged the Rapporteur to examine in his study how participatory democracy is addressed. He noted that today democracy is synonymous with voting. However, we must find a space for the common citizen to be able to participate. He recalled that historically the original options in Latin America were either monarchy or presidentialism.

He mentioned that the will of the people must also be able to revoke the term of a President, because those who are eligible to choose a president must also be eligible to recall him or her. Accordingly, we should not speak of disruption of democratic order, when presidents are recalled from office.

He suggested to the Rapporteur to include parameters to review whether a government is democratic and how to maintain or recall the president. He indicated that the topic cannot be limited to the legal authority of the Secretary General.

Dr. Salinas clarified that the mandate is limited to implementation of the Inter-American Democratic Charter. He stressed that the Charter is not only linked to the topic of origin, but also to the exercise of democracy. He recalled that Article 3 of the Inter-American Democratic Charter contains certain elements that make it possible to consider whether a country is truly democratic.

Lastly, the Rapporteur deemed it important to establish that preventive measures must serve to maintain democratic institutions.

The Vice Chair thanked the Rapporteur in advance for the report of the Rapporteurship that he will present at the next session, noting that the Democratic Charter sets forth the minimum structure required for a State to be regarded as democratic. He mentioned that the Democratic Charter is an important instrument, but it does not have as high a rank as the OAS Charter. As to the comparative methodology, he recalled that Inter-American history and doctrine should be taken into account on the topic

A preliminary report of Dr. Salina Burgos follows:

CJI/doc. 473/15

**REPRESENTATIVE DEMOCRACY IN THE AMERICAS:
FIRST PRELIMINARY REPORT**

(presented by Dr. Hernán Salinas Burgos)

I. THE MANDATE AND ITS HISTORY

Since the 2001 approval of the Inter-American Democratic Charter (IDC), the negotiation of which the Inter-American Juridical Committee (CJI) played an important role, the latter has on several occasions examined matters pertaining to the IDC's implementation.

Thus, in 2003, the CJI decided to include the topic of application of the IDC on its agenda and appointed Dr. Eduardo Vio Grossi as Rapporteur. That same year, Dr. Vio Grossi presented his initial report, titled "*Democracy in the Inter-American System: Follow-up Report on applying the Inter-American Democratic Charter*" (CJI/doc.127/03).

In May 2007, the Secretary General of the Organization of American States (OAS) presented to its Permanent Council a report on implementation of the IDC (CP/doc.4184/07). In response to this document, prepared pursuant to specific mandates received from the OAS General

Assembly, in 2007 the CJI considered a special report prepared by one of its members, Antonio Fidel Pérez, titled “Report concerning the Report of the Secretary General of the Organization of American States on the Implementation of the Inter-American Democratic Charter” (CJI/doc.264/07). At the conclusion of the discussion, a resolution was adopted in which the CJI decided to [t]o re-include the “*Follow-up on the application of the Inter-American Democratic Charter*” among its “topics under consideration” and “[t]o conduct an interpretation on the conditions and access routes to the applicability of the *Inter-American Democratic Charter*” [CJI/RES. 132 (LXXI-O/07)].

In keeping with the CJI’s mandates, Rapporteur Jean-Paul Hubert presented two additional reports, the first in 2009 titled “*Follow-up on the application of the Inter-American Democratic Charter*,” where the Rapporteur wrote that “[t]he obligation to respect the Rule of Law does not apply only to government, but also to all sectors of society”(CJI/doc.317/09 corr. 1). The second report, released in 2010 and titled “*Promotion and Strengthening of Democracy*”, plotted new avenues that might be explored with respect to the preventive action taken by the Office of the Secretary General (CJI/doc.355/10 corr. 1). In this 2010 report, Rapporteur Hubert analyzed the situation at the time. Under the first point, he highlighted the preventive aspect of the Inter-American Democratic Charter, i.e., the early warning mechanisms triggered in the event of threatened breakdowns in the democratic regime. He focused on the shortcomings in the preventive actions available to the Permanent Council for remedying such situations and suggested that the powers of the Permanent Council and the Secretary General in defending and supporting democracy be strengthened.

In Rapporteur Hubert’s reports, an important consideration was the Secretary General’s report to the Permanent Council, titled “*The Inter-American Democratic Charter - Report of the Secretary General pursuant to resolutions AG/RES. 2154 (XXXV-O/05) and AG/RES. 2251 (XXXVI-O/06)*,” dated April 4, 2007 (OEA/Ser.G. CP/doc.4184/07). That report recounted how the Inter-American Democratic Charter had been applied and went on to make suggestions the purpose of which was “*to devise proposals for timely, effective, balanced, gradual initiatives for cooperation, as appropriate, in addressing situations that might affect the workings of the political process of democratic institutions or the legitimate exercise of power, in keeping with the provisions of Chapter IV of the Inter-American Democratic Charter, with respect for the principle of nonintervention and the right to self-determination*”. His observations were revisited in a more recent report he submitted to the Permanent Council, dated May 4, 2010, titled “*Report of the Secretary General concerning compliance with operative paragraph 3 of resolution AG/RES. 2480 (XXXIX-O/09) “Promotion and Strengthening of Democracy: Follow-up to the Inter-American Democratic Charter*” (CP/doc.4487/10).

As a consequence of the Secretary General’s 2007 report, in 2009 the Inter-American Juridical Committee discussed and approved a resolution on the topic “*The essential and fundamental elements of representative democracy and their relation to collective action within the framework of the Inter- American Democratic Charter*” [CJI/RES. 159 (LXXV-O/09)].

Another relevant document was the Permanent Council report of December 14, 2011 (CP/doc.4669/11 rev. 3) prepared pursuant to a mandate given by the OAS General Assembly in resolution AG/RES. 2555 (XL-O/10) and repeated in resolution AG/RES. 2694 (XLI-O/11) wherein it instructed the Permanent Council to organize and conduct a dialogue on the effectiveness of the implementation of the Inter-American Democratic Charter and to submit the dialogue’s findings and/or progress during 2011, on the occasion of the 10th anniversary of IDC’s adoption.

During the CJI’s 85th session (Rio de Janeiro, August 2014), the undersigned suggested that “*Representative Democracy in the Americas*” be introduced as a new topic on the Committee’s agenda, given the talks held with the OAS Secretary General, Mr. José Miguel Insulza, at the start of that session. The proposal had the plenary’s support and the undersigned was appointed rapporteur of the topic.

II. PURPOSE OF THE RAPPORTEURSHIP

It is evident from the history outlined here that one of the Inter-American Juridical Committee's abiding concerns has been to follow implementation of the Inter-American Democratic Charter, with a view to analyzing and examining initiatives and proposals the purpose of which is to enhance its implementation and thereby strengthen representative democracy in the Americas.

With this in mind, the goal of this Rapporteurship is as follows: armed with the wealth of information already compiled on this subject in the reports done by the Juridical Committee and other organs of the OAS, to re-examine the application of the Inter-American Democratic Charter in practice and analyze the new developments in democracy in the Americas and the contemporary challenges it faces. The purpose of this study is to prepare a definitive report containing proposals aimed at improving legal implementation of the Inter-American Democratic Charter and thus strengthen representative democracy in the Hemisphere.

The Inter-American Democratic Charter is a central feature of the OAS' identity and purpose and a basic pillar of the system and of Inter-American efforts to promote and defend democracy through multilateralism. It is also the complete legal and policy instrument the OAS now has to promote democratic principles and practices and to inform its decisions and actions in the face of crises and the alteration or interruption of the democratic order. In short, one can now affirm the existence of a "*community of democracies*" in the Americas whose preservation and protection is the IDC's *raison d'être*.

Following this line of thinking, and given the context described above, it must be said from the outset that the sole mandate of this Rapporteurship is to examine the mechanisms for collective action established in Chapter IV of the IDC and come up with proposals intended to reinforce its democratic principles and norms as the mutual and shared responsibility of the American States, the OAS itself, and the Inter-American system as a whole.

Furthermore, the purpose of this first or preliminary report is to describe what the reports and discussions of the CJI and other OAS organs and the literature have regarded as the principal shortcomings, gaps, and even contradictions within the IDC regarding the mechanisms for collective action to preserve and defend democratic institutions. In addition, this preliminary report also briefly describes the proposals suggested on this subject, but will not undertake an exhaustive discussion and assessment of them, as that will be reserved for a later report.

This Rapporteur is mindful that, in general, the OAS Member States have deemed it necessary to preserve the consensuses reached and embodied in the IDC regarding shared values, principles and aspirations. Lest we forget, the adoption of the IDC, an instrument approved by consensus, "*was described as the culmination and synthesis of a long process in which democracy evolved in the region, shaped by several key earlier experiences that lent form and substance to the collective commitment to promote and protect democracy.*"¹

Thus, the option of revising its content and amending its text has been discarded, as it has in the case of the mechanisms for collective action contemplated therein. Accordingly, this Rapporteur's study will explore avenues or ways to strengthen existing mechanisms so as to enhance their implementation and the effectiveness of the collective response, but will stop short of proposing any amendment to the IDC's text, informed by the principle of non-intervention and out of respect for each State's national sovereignty.

III. PRECEPTS TO CONSIDER IN THE REPORT

1. The existence of a collective mechanism to defend democracy is not at odds with the principle of non-intervention

As the Inter-American Juridical Committee wrote in its Resolution CJI/RES. I-3/95 of March 23, 1995,

¹. *Final Report on the Dialogue on the Effectiveness of the Implementation of the Inter-American Democratic Charter* (CP/doc.4669/11 rev. 3).

Every State in the Inter-American System has the obligation to effectively exercise Representative Democracy in its political organization and system. This obligation exists with regard to the Organization of American States, and to comply therewith, every State in the Inter-American System has the right to choose the means and forms that it deems appropriate thereto,

and added that

[t]he principle of non-intervention and the right of each State in the Inter-American System to elect its political, economic and social system with no outside intervention and to organize itself in the manner most convenient thereto may not include any violation of the obligation to effectively exercise Representative Democracy in the above-mentioned system and organization.

In a Declaration issued on the occasion of its Centennial in 2005, the Inter-American Juridical Committee wrote the following: “*Democracy is a right of the peoples of the Americas and an international legal obligation of the respective States in the Inter-American System, a right and obligation that may be called upon and demanded, respectfully, by and before the Organization of American States.*”²

As observed in the Committee’s resolution CJI/RES. 159 (LXXV-O/09) “*The Essential and Fundamental Elements of Representative Democracy and Their Relation to Collective Action within the Framework of the Inter-American Democratic Charter,*” this instrument was conceived as a tool to update, interpret and apply the fundamental Charter of the OAS on the subject of representative democracy and represents the progressive development of international law. It further affirmed the right of every State to choose its political, economic, and social system without any outside interference and to organize itself in the way best suited to it. However, it also stated that this right is limited by the commitment to respect the essential elements of representative democracy and the fundamental components of the exercise thereof, as enumerated in the Inter-American Democratic Charter.

In effect, when they approved the Inter-American Democratic Charter, the Member States did not introduce new principles or purposes into the OAS Charter; quite the contrary, they reaffirmed existing principles and purposes: the recognition that representative democracy is indispensable for the region’s stability, peace, and development and can be promoted and consolidated without violating the principle of non-intervention. Accordingly, Article 1 of the IDC provides that the peoples of the Americas have a right to democracy and their governments an obligation to promote and defend it.

Inasmuch as all the Member States signed the OAS Charter and unanimously approved the IDC in a General Assembly resolution, theirs was a partial cession of sovereignty and, under the general principle of *pacta sunt servanda*, they are thus obliged to honor the commitments undertaken in those instruments. If all the parties have undertaken a mutual commitment to comply with the minimum requisites of democracy, then all parties are bound to comply with and abide by the procedures to which they have agreed. These include the powers given to the OAS to take action in the event of actual or threatened breakdowns of democracy within the Inter-American system.

Hence, as Dr. Baena Soares observed, the conflict between the principle of non-intervention and the enforcement of collective measures was a false dilemma, since the OAS Member States had accepted the conditions whereby this league of nations would perform its duties on behalf of peace and in defense of democracy, as enshrined in the political instruments that make up the Inter-American system.³

². Draft Declaration on the Centennial of the Inter-American Juridical Committee: General Principles of Law Recognized by the Inter-American System (CJI/doc.195/05, 2005).

³. Annual Report of the Inter-American Juridical Committee (IAJC) to the fortieth regular session of the General Assembly (CP/doc. 4547/11).

The key to solving any conflict between the principle of non-intervention and collective measures is the word “*conflict*” since, under the OAS Charter, intervention is prohibited for “Every State.” In the case of the collective measures contemplated in the IDC, no single State adopts such measures; instead, it is the Organization that takes collective action, which it does in accordance with International Law.

This is why the IDC allows the use of the mechanisms for collective action only in cases of serious alterations or interruptions of the democratic order; even in such cases it only authorizes the OAS to engage in diplomatic measures and, in extreme cases, to suspend the Member State in question from the exercise of its right to participate in the OAS, a sanction already provided for under Article 9 of the OAS Charter. As Beatriz M. Ramacciotti points out,

*Apart from being illegal, unilateral intervention serves the particular interests of one or several States. Pro-democracy collective action, on the other hand, serves the interests of all the Member States and of the Inter-American community itself. Accordingly, any State has the right to turn to the OAS to seek pro-democracy collective action when the legitimate exercise of power or the democratic order is in peril.*⁴

In conclusion, this Rapporteur reaffirms that under the circumstances explained above, the mechanism of collective action in defense of democracy is not at odds with the principle of non-intervention. Hence, this report does not regard this issue as a legal obstacle to proper and effective implementation of the IDC.

2. The Inter-American Democratic Charter establishes a comprehensive concept of representative democracy that protects democracy in its genesis and in its practice

The mandate given by the Heads of State and Government at the Third Summit of the Americas, held in Quebec City, Canada, in 2001, makes it self-evident and explicit that serious threats to and interruptions of democratic order extend beyond *coup d'état*.⁵

Indeed, in his 2007 Report, the Secretary General observed that the concept of democracy in the IDC is

both broad and demanding, and includes ‘a priori’ requirements in the very formation of a democratic government, as well as a series of attributes it calls ‘essential’ or ‘fundamental’ for the exercise of democracy, referring to the ‘republican’ form of government, characterized by the effective democratic rule of law, independence among the branches of government, a pluralistic party system, a transparent and accountable government, and subordination to legitimate authority. It also includes respect for the fundamental rights of the citizens (universal suffrage and secret balloting, human rights, freedom of expression, and citizen participation).

Thus, the Inter-American Democratic Charter moves beyond the idea of electoral democracy and unambiguously espouses the concept of democracy as democratic in both origin and practice and that to be regarded as democratic a government must not only be democratically elected but also govern democratically, with full respect for the rights of all. The IDC cannot be regarded as a mechanism for responding solely to the traditional *coup d'état* consisting of the violent usurpation of political power, completely interrupting any and all semblance of democratic

⁴. RAMACCIOTTI, BEATRIZ M. *Democracia y Derecho Internacional en las Américas*, Lerner Ed. S.R.L., Córdoba, Argentina, 2009, p. 290 [translation ours].

⁵. “... The maintenance and strengthening of the rule of law and strict respect for the democratic system are, at the same time, a goal and a shared commitment and are an essential condition of our presence at this and future Summits. Consequently, any unconstitutional alteration or interruption of the democratic order in a state of the Hemisphere constitutes an insurmountable obstacle to the participation of that state's government in the Summit of the Americas process. Having due regard for existing hemispheric, regional and sub-regional mechanisms, we agree to conduct consultations in the event of a disruption of the democratic system of a country that participates in the Summit process.”

order; instead it must also be regarded as a mechanism for responding to abuses of democracy where the democratically elected governments are themselves undermining the institutions of democratic government and violating human rights.

Elaborating on this point, Dr. Jean-Paul Huber makes the following point:

By differentiating between ‘unconstitutional interruptions’ and ‘unconstitutional alterations’, and by considering that both situations can lead to the same serious consequence, it acknowledges that both traditional coups and other forms of impairment of the democratic order – such as ‘backsliding’ on the part of democratically elected leaders – have come to represent equal threats and violations of the basic principles established by the OAS Charter.⁶

As the delegate of Mexico observed during the Dialogue the Permanent Council held concerning the Inter-American Democratic Charter, Chapter IV of the IDC

should serve as the basis for strengthening and preserving democratic order in every respect; in other words, not just by restoring constitutional order in the event of an interruption, but also in the early stages, by strengthening the rule of law and the institutions of democratic government in order to keep them safe from harm and, once constitutional order has been restored in the wake of an interruption, consolidating the institutions so that such a crisis never happens again.⁷

Seen in this light, the evolution of democracy in the Americas and the Hemisphere’s political reality pose challenges like those that the Secretary General highlighted in his 2010 report:

The principal challenges today are to ensure that the elected governments govern democratically and that the citizenry is able to demand for itself the benefits that representative democracy affords, and to do so by way of the system’s political-institutional channels. Then, too, the conflicts caused by the failure to respect the separation of powers and the concentration of power are also issues that need to be addressed, as they lie at the very center of the new political reality emerging in the Hemisphere.

These are the challenges that have to be considered when embarking upon any initiative calculated to improve application of the IDC, and hence the very challenges that this Rapporteur necessarily regards as part of his mandate.

IV. THE INTER-AMERICAN DEMOCRATIC CHARTER AS A PREVENTIVE INSTRUMENT AND ITS DIFFICULTIES IN THIS REGARD

1. Some general thoughts

Chapter IV of the Inter-American Democratic Charter is built around four principles: first, the State’s general consent to the adoption of measures; second, conflict prevention; third, the graduated nature of the measures; and four, adoption of sanctions only as a last resort. Regarding the application of the Charter, Articles 17⁸ and 18⁹ can be construed as “immediately

⁶. Report presented at the March 19, 2004 session of the Inter-American Juridical Committee: “*Follow-up on the application of the Inter-American Democratic Charter.*”

⁷. August 31, 2011 meeting (CP/ACTA 1814/11).

⁸. Article 17 reads as follows: “*When the government of a member state considers that its democratic political institutional process or its legitimate exercise of power is at risk, it may request assistance from the Secretary General or the Permanent Council for the strengthening and preservation of its democratic system.*”

⁹. Article 18 provides that: “*When situations arise in a member state that may affect the development of its democratic political institutional process or the legitimate exercise of power, the Secretary General or the Permanent Council may, with prior consent of the government concerned, arrange for visits or other actions in order to analyze the situation. The Secretary General will submit a report to the Permanent Council, which will undertake a collective assessment of the*

preventative” in nature, calculated to preempt the type of situations contemplated in Articles 19¹⁰ and 20¹¹, in other words, an actual “*interruption of the democratic order*” that automatically becomes “*an insurmountable obstacle*” to a Member State’s participation and triggers a possible “*collective assessment*” and action to remedy the situation.

With this in mind, the assessment of the mechanisms for collective action contemplated in Chapter IV of the IDC must basically focus on two dimensions: the first is preventive in nature and extends as well to those mechanisms intended to monitor compliance with Inter-American norms that promote and strengthen democratic institutions; the second concerns the application of pro-democracy collective action in crisis situations.

The observations made about the IDC, either within the OAS framework or elsewhere, suggest that the arrangement it puts in place poses significant problems where prevention is concerned. The Secretary General brought these problems to light in his 2007 report, where he observed the following: “... *although it has become the hemispheric benchmark for the preservation of democracy, when the Democratic Charter has been put to the test in existing or potential crisis situations, it has revealed some limitations as to its legal, operational, and preventive scope.*” Nowadays, threats to democracy can take a variety of forms, which means that these difficulties and shortcomings in foreseeing, anticipating, and preventing interruptions of the democratic order limit the OAS’ ability to respond effectively and efficiently to assist its Member States when their political process or legitimate exercise of power is threatened.

In fact, Articles 17 and 18 of the IDC merely establish the bases for preventive action. It is in this preventive undertaking, therefore, that the challenges posed by the IDC and the progress that can be achieved with its implementation are perceived. While the IDC establishes what it refers to as the “*necessary diplomatic initiatives*” and “*good offices to foster the restoration of democracy*,” it makes no provision for any procedure to be followed in that regard nor does it empower the Secretary General to take initiatives in this area. This suggests the need for additional opportunities to anticipate coming events, to look for vehicles for dialogue and to avert the interruption, so that the IDC truly becomes a useful and effective instrument by which to prevent further weakening of the democratic system and its eventual collapse.

situation and, where necessary, may adopt decisions for the preservation of the democratic system and its strengthening.”

¹⁰. Article 19 reads as follows: “*Based on the principles of the Charter of the OAS and subject to its norms, and in accordance with the democracy clause contained in the Declaration of Quebec City, an unconstitutional interruption of the democratic order or an unconstitutional alteration of the constitutional regime that seriously impairs the democratic order in a member state, constitutes, while it persists, an insurmountable obstacle to its government’s participation in sessions of the General Assembly, the Meeting of Consultation, the Councils of the Organization, the specialized conferences, the commissions, working groups, and other bodies of the Organization.*”

¹¹. Article 20 provides as follows: “*In the event of an unconstitutional alteration of the constitutional regime that seriously impairs the democratic order in a member state, any member state or the Secretary General may request the immediate convocation of the Permanent Council to undertake a collective assessment of the situation and to take such decisions as it deems appropriate.*

The Permanent Council, depending on the situation, may undertake the necessary diplomatic initiatives, including good offices, to foster the restoration of democracy.

If such diplomatic initiatives prove unsuccessful, or if the urgency of the situation so warrants, the Permanent Council shall immediately convene a special session of the General Assembly. The General Assembly will adopt the decisions it deems appropriate, including the undertaking of diplomatic initiatives, in accordance with the Charter of the Organization, international law, and the provisions of this Democratic Charter.

The necessary diplomatic initiatives, including good offices, to foster the restoration of democracy, will continue during the process.”

On the other hand, as evidenced by its text, the IDC is very explicit regarding the procedure that must be followed to sanction the State in which the interruption of democratic order occurred and regarding the sanction that is to be enforced.

The IDC's defense and punitive mechanisms need not be triggered if there is sustained and effective action on the preventive front and to promote democracy, thus avoiding the costs that an interruption of the democratic order can accrue to the affected States and to the Organization. The idea would be to prioritize international cooperation over complaints or the enforcement of sanctions.

Within the IDC, the "gradual response" component has introduced mechanisms or procedures that allow for a political assessment and analysis of the seriousness of the situation and to gradually develop measures that fit the seriousness of the crisis, all with a view to full restoration of the institutions of democratic government or to prevent their collapse. This graduated response in the application of the mechanisms for collective action that the IDC establishes helps build a climate of greater confidence in which the Organization's work can be more effective and enduring.

Sanctions can be imposed only when diplomatic measures have been exhausted and the breakdown of democratic institutions in a Member State is imminent; even in this case, however, sanctions must be preceded by the diplomatic measures that the Secretary General undertakes at his own initiative (Art. 19) or those decided by the Permanent Council (Art. 20), and can even go as far as convocation of a Special Meeting of Consultation of Ministers of Foreign Affairs.

Thus, Chapter IV of the IDC only applies where democracy is in crisis or faces the looming threat of crisis. There is nothing in the chapter to suggest how, based on the Charter, the progress of the democratic process in the Member countries' is to be monitored, nor are there guidelines for monitoring and fostering the values upheld in this instrument.

2. Strengthening the Secretary General's role

The Secretary General plays a particularly important role in the preventive function of the Inter-American Democratic Charter. As the Secretary General points out in his 2007 report,

In this context, particular importance attaches to the contribution of the OAS General Secretariat as the Organization's source of technical and analytical support for Member countries as they seek to maintain peace and the stability of democratic systems. The same holds for the political work of the OAS Secretary General in support of Member States, and his function as the appropriate political channel for informing and providing support to the Permanent Council in generating initiatives to deal with a crisis that may emerge.

In the preventive area, a more dynamic, proactive, and flexible role for the Secretary General needs to be supported, factoring in the graduated response component. The idea is to better position him to assist the Member States when political-institutional crises are incubating and in the post-crisis period. One criticism of the Democratic Charter is that it does not use the Secretary General's diplomatic potential to full effect. His office is the embodiment of the OAS' principles and objectives. Hence, his overtures can never be regarded as either unfriendly or interventionist. Particular importance attaches to the contribution made by the General Secretariat as a resource that the OAS has at hand to provide, as previously noted, technical and analytical support to Member countries as they seek to maintain peace and the stability of democratic systems. The same importance attaches to the political work that the Secretary General performs in support of the Member States by, for example, dispatching special missions or envoys, setting in motion negotiations and dialogue to reach political agreements, reporting to the Permanent Council on the initiatives, actions, and results accomplished, and so on. A related function that the Secretary General performs within this context is serving as an appropriate political conduit to keep the Permanent Council informed and provide it with support in developing initiatives to deal with any eventual crisis. As previously noted, the ever-present criteria are prevention and a graduated response.

The Secretary General should play a more pro-active role, one that goes beyond the authority to convene the Permanent Council to assess a situation in which democracy in a Member

State is threatened. The argument here is that Article 18 of the IDC limits the action that the Secretary General can take since, under that article, the “prior consent of the government concerned” is needed, which would be a major obstacle for any preventive measures that the Secretary General might be able to take. In effect, the contention is that as matters now stand, without an invitation from a government, the Secretary General is unable to conduct the visit necessary to assess the situation in a country whose democratic system is in peril. This would be particularly critical in cases where the executive in a Member State is the cause of the breakdown of the democratic system or the alteration of the democratic order by controlling and abusing his/her authority in the belief that having won elections he/she is entitled, *inter alia*, to ignore the separation and independence of the branches of government and in the belief that he/she has the authority to restrict fundamental liberties, violate the rule of law, tamper with elections, or disqualify or persecute members of the opposition. There are those who argue that if a government threatened with a crisis fears being perceived as weak for seeking assistance under the principles of the IDC, then it will never ask for assistance. If, on the other hand, it is the government itself that poses the threat to democratic rights, it will be flatly against extending an invitation for an outside assessment.

This is the rationale behind the idea of strengthening the Secretary General’s authorities so as to enable him to act *ex officio*; in other words, even absent the prior consent or authorization of the government in question, the Secretary General would be able to set in motion mechanisms of preventive diplomacy, whether by visiting the member countries or sending envoys on sensitive, friendly, and impartial diplomatic missions. The argument is that this would make the activation of preventive measures more flexible and give the Secretary General more latitude and capacity for action, thereby reinforcing his role as the political actor *par excellence*, who represents the community of States, all for the purpose of establishing contact with all parties interested, on the one hand, in personally apprising themselves of the situation and, on the other, in opening up channels of communication between the parties and the OAS or between/among the parties themselves. A precedent in this regard is the Protocol Additional to the Constitutive Treaty of the Union of South American Nations (UNASUR), which endowed that regional forum with specific tools with which to take action not just in the event of a *coup d’état* but also in the event of concrete threats to the democratic order or simply to democratic institutions, or any situation that puts the democratically elected authority and democratic values and principles in jeopardy. In all such cases, the UNASUR Treaty allows its President *Pro Tempore*, equivalent in some respects to the OAS Secretary General, to take action either on his own initiative or at the request of a Member State.

The opposing argument is that the Secretary General should neither be endowed with additional, enhanced authorities nor be transformed into a kind of high commissioner for peace and preservation of democratic institutions in the Americas since he is said to have all the necessary means and tools if he wishes to act promptly and responsibly to avoid a breakdown of democratic order or, if the breakdown is already a *fait accompli*, to bring it to a halt. This position points to the new authorities that the 1985 Protocol of Amendment to the OAS Charter, the Protocol of Cartagena de Indias, granted to the Secretary General under which he may bring to the attention of the General Assembly or the Permanent Council any matter which in his opinion might threaten the peace and security of the Hemisphere or the development of the Member States.¹² The argument here is that if understood and interpreted in a broader sense, these same authorities, which enable the Secretary General to take preventive action in such areas as international peace and security and the development of the member states, could also serve as the basis for increasing the capacity of the OAS and, in particular, its Secretary General to better anticipate the threats to democracy and to ease any crises that may arise.

¹². Article 110 of the OAS Charter reads as follows: “...*The Secretary General may bring to the attention of the General Assembly or the Permanent Council any matter which in his opinion might threaten the peace and security of the Hemisphere or the development of the Member States...*”

While not discounting the possibility of reinforcing the Secretary General's authorities, another position argues that prior consent from the affected government must be obtained before taking preventive action. This position maintains that the text of the IDC makes provision for the authorities, means, tools and space needed for the Secretary General to be able to take preventive action under the proper circumstances and if the political will is there. Therefore, his authorities need not be either expanded or strengthened, nor is there any need to give him the authority to operate with greater flexibility, thereby avoiding any violation of the principle of non-intervention that this kind of authority might imply.

From the legal standpoint, the simplest way to address this issue would be to amend Article 18 of the IDC, specifically with reference to preventive action, so as to endow the Secretary General or the Permanent Council with tools similar to those contemplated in Article 20 of the IDC for taking action in the wake of a crisis. However, and as previously noted, the option of amending the IDC does not seem to be a viable one at the present time.

Against this backdrop, however, are the many alternatives to amendment of Article 18, salient among them the so-called "early warning" or early detection system and strengthening of the Secretary General's authorities, as discussed above.

Here, the proposal is to strengthen the monitoring mechanisms that the Secretary General has available to him, extending the methods of multilateral assessment to each of the factors that the IDC considers essential for democracy to exist and sustain itself.

3. Introduction of "early warnings" or mechanisms to monitor the evolution of democracy in the Hemisphere

As has been recently suggested, the view is that the assessment of the progress and setbacks as a function of the essential elements of democracy or essential components of the exercise of democracy, established in Articles 3 and 4 of the IDC,¹³ will provide the countries and international organizations with more information that can then be used to identify vulnerable areas that need to be addressed. This would also be useful in establishing the order of priorities in allocating national and international resources to deal with those areas and help avert interruptions of democratic order.

These assessment processes would enable constant interaction with the Member States for periodic monitoring of the strengthening of the institutions of democratic government and for early and timely detection of any problem that has the potential to become a threat to the democratic system. It would also enable the OAS to collaborate with the countries in each of the areas where further work is needed by means of cooperation programs designed to correct the problems and

¹³. RAMACCIOTTI, Beatriz M. makes the following observation: "*Although both the essential elements of democracy and the components of the exercise of democracy must be respected, the essential elements (Article 3) - respect for human rights and fundamental freedoms, access to and the exercise of power in accordance with the rule of law, the holding of periodic, free, and fair elections based on secret balloting and universal suffrage, the pluralistic system of political parties and organizations, and the separation of powers and independence of the branches of government - must be distinguished from the essential components of the exercise of democracy (Article 4) - transparency in government activities, probity, responsible public administration on the part of governments, respect for social rights, and freedom of expression and of the press, the constitutional subordination of all state institutions to the legally constituted civilian authority and respect for the rule of law on the part of all institutions and sectors of society. The distinction is based on the degree of impact that noncompliance with any one of them can have on the democratic system. Hence, their direct bearing on the measures of collective action that the OAS may adopt in the event of violations in a given Member State. The advantage of the distinction drawn is that it provides a means to identify one from the other and to collectively assess, in exercise of the functions of the competent OAS organs, the degree of impact on the democratic order in a given country, so as to then apply or not the gradual measures contemplated in Chapter IV or, if necessary, activate the mechanism for collective action and enforce the corresponding sanction*", *op. cit.*, p. 183-184 [Translation ours].

enable democracy to advance in specific areas, such as: the separation of powers and independence of the branches of government; a legislative branch of government endowed with its own policy-making and technical authority; a professional and fully independent system of justice; strict limits on the exercise of power; clear and established rules within the democratic process, stronger political parties, development of citizen oversight mechanisms, and so forth. Together these would constitute a true barometer of democracy, pointing up how the process of democratic governance in a member state may be threatened or detecting trends, developments, or circumstances that are inimical to the essential elements of democracy.

In short, the monitoring mechanisms used to promote democracy would have the advantage of creating an *ad hoc* space in which to present and discuss the programs that the OAS conducts and to engage in dialogue on the specific problems that arise in various areas: electoral observation missions; early prevention of political crises through the overtures of the Secretary General or OAS Technical Missions; legislation for the political parties and the guarantees necessary to engage in political activities in general; promotion of civic values, and democratic governance, among others. This would not be a mechanism for filing complaints or criticisms; instead it would be a space where “positive” and “negative” experiences can be shared and proposals and possible courses of action debated, thereby helping to expose the strengths and weaknesses of the various practical experiences underway. Furthermore, with the findings of these mechanisms, subregional cooperation programs could be agreed upon to promote democratic values and institutions.

A number of proposals have been put forward for creation of an early warning system, among them the following:

- a. Preparation and delivery of regular, systematized, and updated reports –perhaps on an annual basis- on the status of democracy. These reports should enable early and prompt detection of any threats to the processes of democratic governance in the countries and any trends, developments, and circumstances that are inimical to the essential elements of democracy. The following are cited as examples of this type of monitoring within the OAS system: a) the Inter-American Commission on Human Rights (IACHR) which presents annual reports on various countries as well as an annual report to the OAS General Assembly; b) through its special rapporteurships, the IACHR also examines other aspects of the IDC related to human rights such as freedom of expression, women’s rights, the rights of indigenous peoples, the rights of Afro-descendants, and the status of persons deprived of liberty; c) at its First Meeting, the Committee created by the Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities agreed to monitor the Member countries’ compliance with their obligations under the Convention; d) through its Electoral Observation Missions, conducted in accordance with the provisions of the IDC (Chapter V), the Secretariat for Political Affairs conducts *a posteriori* evaluations of the electoral processes and systems in the Member countries.
- b. Creation of a Permanent Observer Commission that periodically monitors the quality and *status* of democracy in the region, using objective and generic parameters previously agreed upon by the Member States of the OAS. The creation of a Democracy Council has also been proposed, which would be composed of prominent figures from the Hemisphere.
- c. An alternative to a mechanism for global assessment of democracy in the Member States is the performance of specific multilateral assessments, which the States would agree upon, focusing on areas not yet examined. Examples include political parties or judicial systems. There are those who argue that one advantage of a procedure of this type would be to dispel the kinds of suspicions of interventionism that an assessment of democracy in general might engender.
- d. The proposal put forward by the Government of Peru on the occasion of the Fifth Anniversary of the signing of the IDC (2006) to voluntarily create a peer review mechanism like those existing within the OAS, such as MESICIC’s Anticorruption Mechanism or CICAD’s drug control mechanism, the mechanism on violence against women, and so forth. The United Nations, particularly the Human Rights Council, also

has experience in this area with the so-called universal periodic review that has been done for some years now and that spotlights certain countries every four years. Other countries participate in that review, which is called a peer review. This mechanism would better identify any deficiencies, gaps, and deficits and areas in need of strengthening; horizontal and technical cooperation would be the preferred means of addressing any problem areas. In the case of democracy, the peer review mechanism would involve experts nominated by the governments. Contributions from civil society should also be welcomed and the peer review report should be shared with the Permanent Council. In it, recommendations would be made to the governments. Nevertheless, this exercise cannot be construed as a rating of a government or a country's institutions. Quite the contrary, it must be seen as a forum in which participation is voluntary and whose participants jointly identify areas in which national institutions should be reinforced, which would include legal reinforcement as well. The peer review could be a good way to launch the system, a pilot plan of countries that voluntarily agree to have specific elements of their democracy assessed.

- e. Creation of a Special Rapporteurship for Democracy, following the system and practice used within the Inter-American Human Rights system and answerable to the Secretary General. As a variation on this theme, some are suggesting the establishment of a full-time Rapporteurship on the right to democracy, in keeping with Article 1 of the IDC and as part of the Inter-American Commission on Human Rights, similar to the Rapporteurship on the rights to freedom of peaceful assembly and of association and the Rapporteurship on the independence of judges and lawyers, created by the United Nations Human Rights Council.
- f. Creation of an independent Ombudsperson or Special Envoy for Democracy to perform preventive functions and tasks. The ombudsperson or special envoy would also engage in an organized and informed follow-up of the political processes in each country and create opportunities for dialogue and channels of communication with various political, social, and economic actors in each country, with the accent on prevention and the authority to make recommendations to the General Secretariat or the Permanent Council concerning assistance and action. This office's functions could be geared to promoting as well as defending democracy.
- g. Creation of the office of High Commissioner for the Defense of Democracy, along lines similar to those proposed for the independent ombudsperson or special envoy. The principal virtue or characteristic of such an office would be that it would not necessarily engage the Organization as a whole or weaken the Secretary General's authorities.
- h. Another proposal calculated not to weaken the Secretary General's role is the possibility of *ad hoc* appointments rather than having permanent envoys, ombudspersons, or high commissioners. The *ad hoc* appointments would be done by resolution or agreement of the Permanent Council and the persons so appointed would report to the Permanent Council when situations warranting its attention arise. A variation on this idea is to create an Envoy for Democracy under the Office of the Secretary General, who would play an eminently preventive role, relying on discreet dialogue and good offices to stave off institutional crises.

A proposal has been forward to the effect that any of the officials of the kind proposed above should have an open invitation from the Member States to visit their countries at any time, with no prior authorization from the government in power required. This would enable them to meet with government authorities and social actors without impediments of any kind.

4. Bolstering the OAS' capacity to support the promotion and strengthening of democratic institutions

Another proposal in the preventive area is to build up the OAS' capacity to support the promotion and strengthening of democratic institutions when Member States require that kind of assistance. With this in mind, regional cooperation plans would have to be strengthened to shore up democratic institutions by exchanging sound institutional practices. Ideas have been proposed, such as sharing advances, experiences, and best practices in democratic governance and preparation of a

compendium of best practices that triggers an exchange about the progress accomplished, experience gained, and lessons learned in the area of democratic governance.

5. Institutionalization and strengthening of political missions to offer good offices

Another proposal in the preventive area is to institutionalize and strengthen the political missions to offer good offices. In effect, Rubén M. Perini¹⁴ writes that when a government requests assistance from the OAS and from the General Secretariat because it believes its democratic institutions or its right to the “legitimate exercise of power” (Art. 18) are threatened, normally the system instructs the Secretary General to dispatch a political mission to assess the situation and offer its good offices for the purpose of strengthening and preserving democratic institutions. The purpose of these missions is to act as a deterrent that keeps the rival political forces from becoming even more polarized, and to promote and facilitate dialogue, negotiation, consensus-building, and agreements. Thereafter, the mission should monitor compliance with those agreements in order to preserve or restore the democratic order. Dr. Perina observes that the purpose of these missions cannot be simply to “put out fires”; instead, they must become long-term observation and political facilitation missions to be able to build trust with the protagonists and generate a legitimate negotiation process. Thus far, these missions have been short-term. As a general rule, their success depends upon significant changes in the protagonists’ political practices, not something achieved overnight. A number of conditions are necessary: permanence *in situ*, perseverance, and a team of experts with technical-political expertise in negotiation and mediation, knowledge of the nature and history of the inter-American system, and genuine leadership.

V. A PRECISE DEFINITION OF SITUATIONS “THAT MAY AFFECT THE DEVELOPMENT OF [A MEMBER STATE’S] INSTITUTIONAL PROCESS OR THE LEGITIMATE EXERCISE OF POWER” AND THE “UNCONSTITUTIONAL INTERRUPTION OF THE DEMOCRATIC ORDER OR AN UNCONSTITUTIONAL ALTERATION OF THE CONSTITUTIONAL REGIME THAT SERIOUSLY IMPAIRS THE DEMOCRATIC ORDER IN A MEMBER STATE”

The criticisms most frequently leveled against Chapter IV of the IDC speak of “vagueness” in its terminology and a lack of “precision” in the criteria for defining when and to what extent a country’s democratic institutions have been altered. According to the Declaration of Quebec City, cited earlier, threats to democracy take “many” forms and require an “*active defense*”. Some threats are unmistakable, such as a proven case of massive election fraud, the unconstitutional dissolution of a branch of government, massive human rights violations, or the closing of a considerable number of media outlets. In such cases, inaction on the part of the OAS can have disastrous consequences for democracy in the country concerned and for the Organization itself. In effect, *coup d’état* or self-coups are drastic, dramatic events that become media spectacles, relatively easy to identify and even anticipate. Even so, an alteration of the constitutional regime brought about, for example, as a result of the gradual weakening and decline of democratic institutions is, in practice, much more difficult to clearly and categorically identify. The Inter-American Democratic Charter does not offer many clues as to how to discern situations of this type in practice, or what the OAS could do to “intervene” to stop them or prevent them. One issue to discuss in this regard is the need for a more precise definition of what constitute “situations that may affect the development of [a Member State’s] institutional process or the legitimate exercise of power” and the “unconstitutional interruption of the democratic order or an unconstitutional alteration of the constitutional regime that seriously impairs the democratic order in a member state”, all as a function of the essential elements of representative democracy and the essential components of the exercise of democracy, as defined in the IDC.

Having clearer guidelines, definitions, and common criteria as to what circumstances constitute an alteration of the constitutional regime that seriously impairs the democratic order would more accurately define the circumstances in which the Organization is expected to act to

¹⁴. PERINA, RUBEN M. *Los desafíos de la Carta Democrática Interamericana*, Estudios Internacionales 173 (2012), Instituto de Estudios Internacionales, Universidad de Chile.

protect democracy. This would enable the Secretary General and the member states to invoke the IDC and convene the Permanent Council for a collective assessment of those cases that, at first sight, appear to fit the definition of a constitutional alteration. Absent guidelines, the Permanent Council has to rely on the political resolve of the Member States to raise these matters and on specific discussions, which could lead to charges of a lack of objectivity or selective targeting.

That, in turn, would enhance the effectiveness of the Organization's preventive actions, by serving as an early warning system and the basis for collective actions that could avert a breakdown of constitutional order. For example, one of the essential elements of democracy listed in Article 3 of the IDC is the separation of powers and independence of the branches of government. But it is on the borderline, when someone has doubts as to whether that independence is threatened, that the mechanisms or relatively objective criteria that a shared instrument affords are needed. As the Secretary General observed in his 2007 report: *"If the principal asset to be safeguarded is democracy, how can we do so without clearly defining when and how it is imperiled?"* Hence the proposal to reach a formal political consensus in the form of a General Assembly resolution spelling out which situations can be deemed to be serious alterations or interruptions of the democratic process.

The democratic crises that some countries in the Hemisphere have experienced are a guide to how the integrity of democratic institutions and the authorities of the branches of government can be affected. There is a long list of issues that need to be addressed for a more precise definition of these concepts. Proposals to this effect have been put forward, such as those introduced by former United States President Jimmy Carter, on the occasion of the inauguration of the Lecture Series of the Americas in January 2005, as recounted in the Secretary General's 2007 report. There, working with the basic criteria developed by political scientist Robert Dahl when developing the notion of "polyarchy" the former President proposed a definition of the concept of "unconstitutional alteration or interruption" of the democratic order, which in his judgment ought to include the following: a) Violation of the integrity of central institutions of the State, including the weakening or inaction of reciprocal checks and balances governing the separation of powers; b) Elections that do not meet minimal international standards; c) Failure to hold periodic elections or to abide by electoral outcomes; d) Systematic violations of basic freedoms, including freedom of expression, freedom of association, or respect for minority rights; e) Unlawful termination of the term in office of any democratically elected official by another official, elected or not; f) Arbitrary or unlawful appointment of, removal of, or interference in, the service or deliberations of members of the judiciary or electoral bodies; g) Interference by nonelected officials, such as military officers, in the jurisdiction of elected officials; and 8) Use of public office to silence, harass, or disrupt the normal and legal activities of members of the political opposition, the press, or civil society.¹⁵ The Secretary General has proposed a set of criteria similar to those listed above, which include massive election

¹⁵. As the Secretary General's 2007 report points out, these definitions follow very closely those contained in the Declaration of Santiago of 1959 on the attributes of representative democracy: "1) The principle of the rule of law should be assured by the separation of powers, and by the control of the legality of governmental acts by competent organs of the state; 2) The governments of the American republics should be the result of free elections; 3) Perpetuation in power, or the exercise of power without a fixed term and with the manifest intent of perpetuation, is incompatible with the effective exercise of democracy; 4) The governments of the American states should maintain a system of freedom for the individual and of social justice based on respect for fundamental human rights; 5) The human rights incorporated into the legislation of the American states should be protected by effective judicial procedures; 6) The systematic use of political proscription is contrary to American democratic order; 7) Freedom of the press, radio, and television, and, in general, freedom of information and expression, are essential conditions for the existence of a democratic regime, and 8) The American states, in order to strengthen democratic institutions, should cooperate among themselves within the limits of their resources and the framework of their laws so as to strengthen and develop their economic structure, and achieve just and humane living conditions for their peoples."

fraud, dissolution of Congress, intervention in the judicial branch, shutdown of the principal media outlets, and systematic violations of human rights.

VI. ACCORDING THE RIGHT TO INVOKE THE IDC TO OTHER ORGANS OF THE STATE BEYOND THE GOVERNMENT OR EXECUTIVE BRANCH, AND EVENTUALLY TO CIVIL SOCIETY

The Inter-American Democratic Charter limits the opportunities for collective action by making it contingent upon the resolve of the governments in all cases. Under Article 17, recourse to the OAS is left to the government that considers “*that its democratic political institutional process or its legitimate exercise of power is at risk...*” Under Article 18, for the Secretary General or the Permanent Council to take action, they must have the “*prior consent of the government concerned.*” Only in Articles 20 *et seq.*, which concern situations in which “*the alteration of the constitutional regime*” is already a *fait accompli*, can any Member State request that the Permanent Council be convoked to set in motion a mechanism for defense.

In other words, so long as the constitutional regime is intact, only a government can invoke the IDC. However, when the democratic regime has already been altered, any State can invoke the IDC and the decision will rest with the OAS Permanent Council and General Assembly.

In effect, there are only three avenues by which to access the Inter-American Democratic Charter: “when the government of a Member State considers that its democratic political institutional process or its legitimate exercise of power is at risk ...” (Article 17); (ii) when the Secretary General or the Permanent Council considers that situations have arisen in a Member State that may affect the development of its democratic political institutional process or the legitimate exercise of power (Article 18), or (iii) when in the event of an alteration of constitutional order in a member state, any member state or the Secretary General requests the immediate convocation of the Permanent Council (Article 20). These three avenues lead to the Permanent Council, which will ultimately decide whether the situation merits some declaration or even convoke the Meeting of Consultation of Ministers of Foreign Affairs.

In practice, despite the fact that, as Rapporteur Hubert points out in his 2009 report, *by expanding beyond the notion of ‘coup d’état’ the Democratic Charter acknowledges that any of the powers of government can in fact be the victim*” of an unconstitutional alteration “*that seriously impairs the democratic order in a member State,*” only the Executive Branch can actually invoke the IDC to put a stop to an interruption or alteration of democratic order. Civil society organizations are even less able to do so. This raises the issue of the IDC’s invocation when risks or threats arise and who is authorized to do so. All branches of government should be able to invoke the IDC, which would have the effect of opening up the area in which the OAS can exercise preventive and diplomatic action. This is particularly true in situations where it is the Executive that is threatening the democratic institutional process or the legitimate exercise of power. Here it has been proposed that institutionalized channels be opened to civil society, so that they are able to keep the Permanent Council informed of potential threats to the democratic order. This would allow for more rapid action, especially when one considers that other regional mechanisms have at times been quicker and more effective than the OAS; it would also better safeguard democracy.

Hence, the proposal made by the Secretary General in his 2007 report, which is to open up the meaning of the word “government” so that it refers to all branches of State government and not just the executive branch.¹⁶ In this way, other branches of a country’s government could turn to the OAS, invoking the IDC to denounce an “unconstitutional interruption of the democratic order or an unconstitutional alteration of the constitutional regime”; it would be the Permanent Council that ultimately determines whether the complaint is a valid one. Some even suggest that the term “government” be expanded to include the electoral organs and election oversight bodies that each

¹⁶. The “government” consent requirement does not apply in the case of Articles 20 and 21, which explicitly allow for OAS collective action, through its competent organs, without the prior consent of the “government” of a Member State in which an interruption of the democratic order has occurred.

country establishes in accordance with its laws. On the other hand, yet another position holds that the term “government” used in the IDC should refer solely to the Executive Branch based not just on Inter-American practice (the national constitutions and Member States’ participation in the organs of the OAS), but also on the fact that the States’ international relations and foreign policy are the purview of the Executive Branch. However, if the term “government” refers exclusively to the executive branch, then the question becomes the following: what recourse do the other branches of government and organs of the State have in the event of threats posed by an executive power that, if it deviates from its role within the system, can jeopardize the democratic political process or the legitimate exercise of power by the other branches or organs of the State?

VII. ESTABLISHMENT OF MORE FLEXIBLE OPTIONS IN THE EVENT OF A BREAKDOWN OF DEMOCRATIC INSTITUTIONS

In his 2010 Report, the Secretary General praised the IDC’s “graduated response” component. But he also observed that when an interruption of the democratic order occurs in a State, the Secretary General should have more flexible options available to him for taking action and finding middle roads to avert the offending State’s immediate suspension. This would narrow the margin for discretion in the application of collective measures, especially to distinguish between constitutional crises and *de facto* institutional crises. In effect, the Inter-American Democratic Charter provides that once it has been established that an unconstitutional interruption of the democratic order of a member state has occurred and diplomatic initiatives have failed, the member state concerned is to be immediately and automatically suspended. Because a sudden interruption becomes an *insurmountable* obstacle to participation, the text implies that there can be no participation until the obstacle has been removed. The foregoing is confirmed in Article 14 of the IDC. The OAS Charter, on the other hand, calls for prior diplomatic initiatives to be taken to restore democracy and leaves suspension of the Member State up to the General Assembly.¹⁷ In effect, while the Charter of the Organization holds that the Ministers and the General Assembly shall have discretionary authority as to what they will do in the event of a *coup d’état* against a democratically elected government, the IDC appears to do away with any discretionary authority. When any of the entities finds, by a two-thirds vote, that there has been a “sudden interruption”, Article 14 of the IDC stipulates that suspension shall be automatic.

VIII CONCLUSIONS

The Inter-American Democratic Charter entered into force more than a decade ago and has since been put to the test with the evolution of democracy in the Hemisphere. What this preliminary report finds, however, is that even today, the IDC’s shortcomings and gaps make proper and full protection and defense of democracy in the Americas difficult.

These shortcomings and gaps are particularly apparent in the preventive area, although they extend to other subjects as well, as previously observed. Indicative of the problem are the many proposals that have come from within the Organization of American States and outside it, which as this report has endeavored to describe, have been offered in the hope of strengthening the Inter-American Democratic Charter and ultimately representative democracy in the OAS Member States.

This preliminary report was prepared for the precise purpose of spotlighting the shortcomings and gaps in the Inter-American Democratic Charter. Once the proposals described herein have been evaluated, a subsequent report will be presented that draws upon those suggestions to come up with a set of measures for improving implementation of the mechanisms for collective action contemplated in Chapter IV of the IDC.

¹⁷ Article 9(a) of the OAS Charter provides that “*The power to suspend shall be exercised only when such diplomatic initiatives undertaken by the Organization ... have been unsuccessful*”.

OTHER TOPICS

1. Guide for the application of the principle of conventionality

Document

CJI/doc.492/15 rev.1 Guide for the application of the principle of conventionality. (Preliminary presentation)
(presented by Dr. Ruth Correa Palacio)

During the 87th regular session of the Inter-American Juridical Committee (Rio de Janeiro, August 2015), Dr. Ruth Correa Palacio introduced the document titled “Guide for the application of the principle of conventionality. (Preliminary presentation)” (CJI/doc. 492/15) in order to include it as a new agenda item of the Committee.

From the methodological standpoint, she suggested the following action items: sending the States a questionnaire to gain insight into the status of the issue from the States’ point of view; and, an analysis of the decisions adopted by the Inter-American Court of Human Rights, as well as rulings of national courts.

She suggested the following questions for the *questionnaire*:

1. What is the mechanism used to incorporate the following conventions into domestic law?

The American Convention on Human Rights or Pact of San Jose, Costa Rica, adopted in November 1969;

The Convention to Prevent and Punish Torture, adopted on December 9, 1985; and

The Convention on the Forced Disappearance of Persons, adopted on June 9, 1994.

2. Under what type of regulations have you incorporated into the domestic law of your country the American Convention on Human Rights, the Convention to Prevent and Punish Torture and the Convention on the Forced Disappearance of Persons?

3. As provided for under Article 2 of the American Convention on Human Rights, does domestic law in your country include guidance or a prescribed way for judges to apply the aforementioned conventions?

4. Is there any legal or constitutional provision in domestic law aimed at administrative and judicial operators of justice to reconcile conflicts between the provisions of the conventions and constitutional or statutory provisions?

5. Do both judicial and administrative operators of justice in your country apply the American Convention on Human Rights, the Convention to Prevent and Punish Torture, and the Convention on the Forced Disappearance of Persons?

6. What is the practice of operators of justice in applying the American Convention on Human Rights, the Convention to Prevent and Punish Torture, and the Convention on the Forced Disappearance of Persons?

7. Have any provisions of domestic law been repealed in order to bring it in line with the American Convention on Human Rights, the Convention to Prevent and Punish Torture, and the Convention on the Forced Disappearance of Persons?

8. Have any legal provisions been enacted in the body of domestic law to make it compatible with the American Convention on Human Rights, the Convention to Prevent and Punish Torture, and the Convention on the Forced Disappearance of Persons?

9. Has the judiciary of your country handed down decisions enforcing the provisions of conventions?

10. Have other authorities issued decisions enforcing the conventions?

11. Are the decisions of the Inter-American Court of Human Rights considered by your country's judges only when the decisions affects your State, or do they take into account the interpretive criteria set forth in all judgments of that Court?

Dr. Baena Soares congratulated Dr. Correa Palacio for her work, and expressed concern over the recurring problem of States' failure to respond to the *questionnaires* of the Committee.

Dr. Salinas commented on application of the Human Rights conventions, which cannot be automatically applied because of their nature; there are matters of respect for national sovereignty involved, which must be taken into consideration. He put on the record the fundamental value of this doctrine and recalled the topic of the Protocol of San Salvador and the distinction drawn between the application thereof and the principle of conventionality. Lastly, he mentioned that the topic of the *questionnaires* is important, but he noted that many States are reluctant to engage in such exercises. He suggested shortening the questionnaire.

Dr. Moreno Guerra voiced his enthusiasm for the proposal and congratulated the Rapporteur for departing from the premise that the Constitution cannot be above the conventions. Should a State have constitutional issues regarding a particular convention, it should not accede to it. He acknowledged the relevance of the proposed questions, including references to the conventions on torture and forced disappearance.

Dr. Stewart commended Dr. Correa Palacio for her proposal. He mentioned that all OAS Member States must take into account implementation of conventions. As a second point, he urged being sensitive to the particular situation of each State because the objective of the study is not to report whether or not any State has ratified a convention or whether it is in breach of its international obligations. His last point was that in the Common Law System, international treaties are not directly applicable and need legislation or a written rule to enable implementation.

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

Dr. Mata Prates, acting as Chairman, noted that an initial issue that must be discussed pertains to the principle of conventionality. It involves considering the relevance of norms in the area of international treaties and conventions and implementation of the decisions of the Inter-American Court of Human Rights. Therefore, it is necessary to determine whether the 'whereas clauses' of a judgment of the Court impose further obligations.

Dr. Correa Palacio expressed gratitude for how well received the topic was and for the valuable input of the Members. She noted that this is a paper that has no ideological bent and is aimed at shedding light on the status of the topic; moreover, the questions are not designed to deliberate about the scope of national obligations. Additionally, she noted her intention to shorten the *questionnaire* and clarify questions that have triggered inquiries from respondents. She stressed that her study does not reflect social and economic rights, because in her country mechanisms other than Human Rights instruments are involved in incorporating them, because of their distinct nature.

Putting on the record the consensus reached among the members, the Chairman proposed approving inclusion of said topic on the agenda of the Inter-American Juridical Committee, and in appointing Dr. Correa as the Rapporteur, he invited her to work within the scope of its respective obligations agreed upon by the States.

On October 2, 2015, the Secretariat of the Juridical Committee sent out the *questionnaire* to the Member States of the Organization, as requested by the Committee, document (CJI/doc.492/15 rev.1).

A transcript of the preliminary document submitted by the rapporteur, Dr. Ruth Correa Palacio, follows:

CJI/doc.492/15 rev.1**GUIDE FOR THE APPLICATION OF THE PRINCIPLE OF CONVENTIONALITY
(PRELIMINARY PRESENTATION)**

(presented by Dr. Ruth Stella Correa Palacio)

PRESENTATION

The Inter-American Juridical Committee has the responsibility to carry out, on its own initiative, the preparatory studies and work that it deems appropriate (article 12 c of the Statutes), all of this within the framework of its objective to foster the progressive development and codification of international law and to study the legal problems related to the integration of developing countries of the continent and enabling its legislations to standardize whenever convenient.

This 87th Regular Session has been analyzing a catalogue of themes linked to this objective which should afford the Committee work for the mid-term without jeopardizing the assignments that it comes to receive from the organs that consult it.

One such theme is the application of the principle of conventionality, which corresponds to the obligation on the part of Member States to incorporate into their internal systems the signed Conventions, that is to say by (i) abolishing the norms contrary to them, (ii) expediting norms to develop them, or (iii) applying the conventional norms together with those in conformity with the internal system, and (iv) applying the interpretation that the IACH gives to conventional norms, both in decisions and considerations.

The proposition to decide to address the study of this theme is supported by the repeated decisions of the Inter-American Court of Human Rights through its sentences, consultative opinions and provisional measures, which have emphasized the role of internal judges as the principal actors responsible for monitoring conventionality and obliging the Party States to harmonize their internal systems with the Conventions on Human Rights, namely, on Human Rights, to Prevent and Punish Torture, and on Forced Disappearance of Persons.

Furthermore, enforcement of the sentences passed by this Court interpreting conventional norms with *erga omnes* effects, or providing normative changes, even of a constitutional nature, is a theme of interest to the analysis of the principle of conventionality.

CONVENTIONAL FRAMEWORK

Article 2 of the Inter-American Convention on Human Rights, which establishes the obligation to adopt provisions in internal law deemed necessary to enforce the rights and freedoms included in this Convention.

Article 1-d of the Inter-American Convention on Forced Disappearance of Persons, which imposes on States the obligation to take measures of a legislative, administrative, judicial or any other nature necessary for enforcement of the commitments assumed in this Convention.

Article 6 of the Inter-American Convention for Prevention and Punishment of Torture.

EVOLUTION

The doctrine has identified several stages in the evolution of this institute, supporting the content of decisions of the Inter-American Court of Human Rights, in terms of the judge responsible for monitoring conventionality, whether in respect to any juridical operation – including the administrative authorities – or solely the judges or court organizations

The analysis of the binding effect of the sentences of the IACHR is also relevant. That is to say, if the effect of the decision impacts only the Party State in the process, or if it presents an

erga omnes effect (i.e. towards everyone), regarding the interpretation of the conventional norms of the “Whereas statements” section.

JURISPRUDENCE

The jurisprudence of the Inter-American Court of Human Rights on the application of this principle is really abundant, as is the jurisprudence of the domestic Courts.

The Inter-American Court, as well as the other domestic Courts, must therefore be consulted in order to establish the current status of the matter. After such a consultation a guide must be proposed, which should be instrumental in terms of the effects of the conventional norms when these norms are enforced in each State.

METHODOLOGY

I. Determination of the current status regarding the enforcement of the principle of conventionality in each one of the States. In this regard, the Secretariat is being asked to send the following questionnaire to the Party States:

1. What mechanism is there in domestic law to incorporate the following conventions?
 - The American Convention on Human Rights or Pact of San José de Costa Rica, signed in November 1969;
 - The Convention to Prevent and Punish Torture, adopted on December 9, 1985; and
 - The Convention on Forced Disappearance of Persons, adopted on June 9, 1994.
2. Under what kind of established rules in your country have the American Convention on Human Rights, the Convention to Prevent and Punish Torture, and the Convention on Forced Disappearance of Persons been incorporated into domestic law?
3. In keeping with Article 2 of the American Convention on Human Rights, do your country's domestic laws have a guide or resolution for judges to apply the aforementioned conventions?
4. Does the domestic system have a legal or constitutional provision for justice operators – administrative and judicial – to resolve discrepancies between convention rules and the constitutional or legal system?
5. In your country, do legal operators – judicial as well as administrative – apply the American Convention on Human Rights, the Convention to Prevent and Punish Torture, and the Convention on Forced Disappearance of Persons?
6. What practice do legal operators follow for applying the American Convention on Human Rights, the Convention to Prevent and Punish Torture, and the Convention on Forced Disappearance of Persons?
7. Have rules been repealed in order to harmonize the domestic system with the American Convention on Human Rights, the Convention to Prevent and Punish Torture, and the Convention on Forced Disappearance of Persons?
8. Have rules been introduced in order to harmonize the domestic system with the American Convention on Human Rights, the Convention to Prevent and Punish Torture, and the Convention on Forced Disappearance of Persons?
9. Has your country's judicial body handed down decisions in which it applies conventionality control?
10. Are there other authorities that hand down decisions in which conventionality control is applied?
11. Do judges in your country take the decisions of the Inter-American Court of Human Rights into consideration only when said decision affects your state, or are interpretative criteria taken into account instead in all of that Court's rulings?

II. Analysis of the decisions of the Inter-American Court of Human Rights through their sentences, consultative decisions and provisional measures, *vis-à-vis* the enforcement of the principle of conventionality.

III. Analysis of the decisions of the domestic Courts in each State.

IV. Consultation with experts on the issue.

The information compiled will be useful in drafting a “Guide for the enforcement of the principle of conventionality.”

* * *

2. Considerations Reflection on the work of the Inter-American Juridical Committee: compilation of topics of Public and Private International Law

During the 86th regular session of the Inter-American Juridical Committee (Rio de Janeiro, March 2015), the Members of the Juridical Committee decided to begin a process of reflection with a view to improving its performance for the Organization and the States. It asked Dr. Correa Palacio to compile a list of topics suggested by members to serve as a basis for the drafting of the multiyear agenda, taking into consideration the needs of the Organization and the States as a whole.

During the 87th regular session of the Inter-American Juridical Committee (Rio de Janeiro, August 2015), the space for reflection that began at the previous session carried on. On that occasion, Dr. Correa Palacio introduced document CJI/doc.484/15, “Considerations on the Work of the Inter-American Juridical Committee: compilation of topics of interest,” which covers three focuses of work: 1) procedural work; 2) substantive work; and 3) topics suggested by other Committee Members. The first group includes considerations of a procedural nature of the Inter-American Human Rights Protection System, which emerge from dialogue held with the President of the Inter-American Court of Human Rights. She also encouraged inclusion of concerns expressed by Secretary General Luis Almagro regarding the issue of access to justice and equity.

Dr. Hernández García mentioned that this is an initial step to provide an agenda with topics that involve at least 4 years of advance work. The Committee is responsible for producing useful documents for the Organization, the States and the international community. He established that many of the proposed topics could be addressed by the Inter-American Court itself and, therefore, we must respect the purview of other bodies and avoid meddling in the affairs they are supposed to deal with on their own autonomously.

Additionally, he suggested that the Juridical Committee choose topics about which it has sufficient legal experience to produce useful and quality documents. In this context, she noted that she felt more comfortable with issues of a substantive nature as opposed to procedural ones. We could work on topics linked to the work of the Court, but we must make sure that the attributions of said body are respected. For example, the topic of criteria for reparation of damages could be addressed from the perspective of “criteria of International Law or practices of international bodies.”

As to the treatment of the rights of indigenous peoples, he recalled that the discussion in the UN took decades to come up with a non-binding instrument and the OAS is still negotiating a declaration on their rights and, therefore, she would have doubts about the scope of any actions on the subject matter taken by the Committee.

With regard to public purchases, he pointed out that many international bodies have already addressed the topic, which makes it difficult for the Committee to make any contribution in this area.

Dr. Baena Soares found that the proposed plan was not a work plan, but rather a list of challenges. He recalled the Committee adopting a report on the promotion of the OAS Human Rights System, which among other things established that many of the adopted Human Rights treaties have not been ratified by the States. As for the other topics, he asked Dr. Villalta for further explanations on the proposal to create an Inter-American Court of Justice, in addition to specifically describing what the purpose is in creating it and how would it be created. Just as Dr. Hernández had done, she said she was not sure about the Committee’s treatment of topics pertaining to indigenous peoples, particularly, as to their scope and applicability.

Dr. Salinas urged the Committee to establish topics that are politically in sync with the requests of the Organization and the States. He noted that the agenda should be discussed with other bodies of the Organization in terms of topics of common interest and should avoid trespassing into the purview of other bodies of the Organization. He was pleased with the proposal on legal entities

(juridical persons), an area of practical interest about which the Committee Members have the knowledge to address it.

Dr. Mata Prates, acting as Chairman, suggested that the topics the Secretary General had mentioned should be included in Dr. Correa's document, and also suggested creating an abstract of topics relating to labor and the mandates of the Juridical Committee from the document on the "Strategic Vision" presented by the Secretary General.

Dr. Salinas proposed drafting a preliminary work plan to bring to the meeting in Washington, D.C. and that it be one of the topics to consider with the political bodies of the Organization, which could subsequently give rise to a formal and finalized plan.

Dr. Hernández García supported the proposal presented by Dr. Salinas as to showing the draft multiyear plan to the political bodies. He proposed that Dr. Correa Palacio should be appointed as the Committee's Special Rapporteur for the Agenda, and asked her to draft one paragraph to explain each item of the agenda.

Dr. Baena Soares agreed with both suggestions, clarifying the idea of holding a dialogue with the Council and not asking for its approval regarding everything the Committee decides to do.

The Chairman summarized the topics agreed upon: 1) drafting a preliminary plan for the next session (April 2016); 2) presenting to the political bodies of the OAS a list of topics that are expected to be addressed in the long term; and 3) appointment of Dr. Correa Palacio as Rapporteur for the Topic.

CHAPTER III

OTHER ACTIVITIES

ACTIVITIES CARRIED OUT BY THE INTER-AMERICAN JURIDICAL COMMITTEE DURING 2015

A. Presentation of the Members of Committee in other *fora*

Documents

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|----------------|---|
| CJI/doc.476/15 | Presentation of the Annual Report of the Inter-American Juridical Committee for the year 2014 to the Committee on Juridical and Political Affairs of the Organization of American States – (Washington, D.C., February 24, 2015)
(presented by Dr. David P. Stewart) |
| CJI/doc.485/15 | Report on the thirty-fifth anniversary of the United Nations Convention on contracts for the International sale of goods (August 2015, Vienna, Austria)
(presented by Dr. Ana Elizabeth Villalta Vizcarra) |

During the 86th regular session of the Inter-American Juridical Committee (Rio de Janeiro, Brazil, March, 2015), Dr. David P. Stewart gave a presentation on his participation at the OAS Committee on Juridical and Political Affairs, where he presented a summary of the substantive work conducted by the Committee over the past year, as well as of administrative aspects. On this opportunity, he mentioned the two regular sessions held by the Committee in 2014, he explained the reports it adopted and the studies currently underway. Additionally, he reported on the activities of the Inter-American Juridical Committee over the past months, including holding the 41st Course on International Law, 2014, see document CJI/doc.476/15.

Then, during the 87th regular session of the Inter-American Juridical Committee (Rio de Janeiro, Brazil, August 2015), Dr. Mata Prates (Vice Chairman of the Committee) provided the details of his visit to the UN International Law Commission on behalf of the Committee. He underscored the interest of the members of said Commission in learning about the work of the Inter-American Juridical Committee, by a Commission member attending the next August Committee meeting, which is the same month when the Commission holds its sessions. He mentioned that jurisdictional immunity from prosecution was one of the topics that stirred the most interest. In particular, questions were asked on the use of the Commission's results regarding the UN Convention on Jurisdictional Immunity of States and Their Property, which had been introduced by the Commission Members. There was also interest on the topic of combating terrorism in the Inter-American System.

For her part, Dr. Villalta reported participating in a Seminar celebrating the 35 year anniversary of the UN Convention on Contracts for the International Sales of Goods, organized by the United Nations Commission on International Trade Law (UNCITRAL), document CJI/doc.485/15. In this regard, she mentioned the development of uniform jurisprudence in the countries of the Hemisphere, whose system encompasses 18 States of the Americas, which are parties to said Convention. She underscored the relationship of said Convention to the Inter-American process of the CIDIP's and the information sharing and exchange and complementarity between both bodies. Additionally, she cited some conclusions reached at the Seminar, such as the need to have a forum of wider dissemination and the ability to make changes to instruments without interfering in future ratifications.

The texts of the reports by Dr. David P. Stewart to the Committee on Juridical and Political Affairs of OAS (CJI/doc.476/15); and by Dr. Ana Elizabeth Villata (CJI/doc.485/15) during the 35 years of the United Nations Convention on the International Sales of Goods (CISG) are as follows:

CJI/doc. 476/15

**PRESENTATION OF THE ANNUAL REPORT OF THE
INTER-AMERICAN JURIDICAL COMMITTEE FOR THE YEAR 2014
TO THE COMMITTEE ON JURIDICAL AND POLITICAL AFFAIRS
OF THE ORGANIZATION OF AMERICAN STATES
(Washington, D.C., February 5, 2015)**

(presented by Dr. David P. Stewart)

Thank you, Mr. Chairman.

It is an honor to present the Annual Report of the Inter-American Juridical Committee for the year 2014.

At the outset, I have the great pleasure to convey to you the very warm greetings of our Committee's Chairman, Professor Fabián Novak Talavera of Peru, and our Vice-Chairman, Dr. Carlos Mata Prates of Uruguay. Both have asked me to express their best wishes to you and to all the members of this Committee, as well as their sincere regret at not being able to attend this meeting in person. They have also asked me to assure you that the Inter-American Juridical Committee has once again had a very active and productive year, working on an agenda of timely and relevant subjects of particular importance to our hemisphere.

This Committee has before it the comprehensive report of our work during the past year, as adopted in document CJI/doc.472/14 dated September 25, 2014 and circulated to you as document CP/doc. 5094/15 dated January 21, 2015. It is quite a long and detailed document, Mr. Chairman, and this afternoon I will summarize only a few topics. It will be my pleasure, of course, to respond to any questions the members of this Committee may have about our work.

To begin, it is important to note that the Inter-American Juridical Committee gives first priority to the tasks assigned to it by the OAS General Assembly, as well as to other projects which are aimed at supporting the work carried out by other organs of the OAS. As you are well aware, we also have the ability to propose substantive topics which, in our collective judgment, merit our time and attention. As a result, at any particular time, our agenda includes a diverse list of subjects, most of considerable urgency and complexity. Thanks in large part to the support given by this Committee, through its endorsement of an increased budget, we have been successful in addressing many of these topics in a timely and effective manner over the past year.

Membership and Meetings

During 2014, the Committee included the following members: Fabián Novak Talavera (Peru) (Chairman); Carlos Alberto Mata Prates (Peru) (Vice-Chairman); Amb. João Clemente Baena Soares (Brazil); Hyacinth Evadne Lindsay (Jamaica); Fernando Gómez Mont Urueta (Mexico); José Luis Moreno Guerra (Ecuador); Gélin Imanès Collot (Haiti); Ana Elizabeth Villalta Vizcarra (El Salvador); Miguel Aníbal Pichardo Olivier (Dominican Republic); Hernán Salinas Burgos (Chile); and myself (United States of America).

In June, at the 44th regular session of the OAS General Assembly in Asuncion, Ambassador João Clemente Baena Soares was re-elected for a four-year term of office. Two new members were also elected: Ambassador Joel Antonio Hernández García (Mexico) and Dr. Ruth Stella Correa Palacio (Colombia). They will take the place of Hyacinth Evadne Lindsay (Jamaica) and Fernando Gómez Mont Urueta (Mexico), whose terms expired at the end of 2014.

The Committee held two working sessions in 2014, for a total of ten working days. The first – its 84th regular session – was held from March 10 to 14. The second - its 85th regular session - was from August 4 to 8. Both took place at its headquarters in Rio de Janeiro, Brazil.

During the August session, the new officers of the Committee were elected: Dr. Fabián Novak Talavera as Chair and Dr. Carlos Mata Prates as Vice-Chairman. Both positions have a two-year term, in accordance with Article 10 of the Statute of the Committee.

Substantive Agenda

During the past year, the Inter-American Juridical Committee adopted four substantive reports.

- One concerned a topic that had been referred to us by the General Assembly in 2011, namely, Sexual Orientation and Gender Identity and Expression. Our report on this topic (contained in CJI/doc.447/14, adopted by CJI/RES. 207 (LXXXIV-O/14) referred to the Inter-American Convention on the Elimination of All Forms of Discrimination and Intolerance and to AG/RES. 2807 (XLIII-O/13), as well as submissions from a number of OAS Member States and relevant instruments adopted by other international bodies. It concluded that, in light of these developments, the basic principle of non-discrimination can certainly be considered to extend to the basic rights of persons with a given sexual orientation.

The other three correspond to mandates established by the Committee itself.

- One addressed the important issue of “Corporate Social Responsibility in the Field of Human Rights and the Environment in the Americas” (see CJI/doc. 449/14 rev.1, adopted by CJI/RES. 205 (LXXXIV-O/14). This was the Committee’s second report on the topic. It reviewed relevant regional initiatives, surveyed differences among domestic laws, and presented an analysis of corporate practice. Additionally, it recommended that the General Assembly consider taking note of proposed “Guiding Principles on Corporate Social Responsibility.” These Principles have already been the subject of discussions during the recent Special Meeting on the Promotion and Protection on Human Rights in Business, where they were presented by our President and rapporteur on the subject, Dr. Fabián Novak Talavera.

- Another concerned “Border or Neighboring District Integration” (see CJI/doc.433/13 rev.1, adopted by CJI/RES. 206 (LXXXIV-O/14). This report adopted a number of specific guidelines and recommendations to Member States on implementing and achieving border integration.

- The final report concerned certain “Alternatives for the Regulation of the Use of Psychotropic Substances, as well as for the Prevention of Drug Dependency, especially as regards Marijuana or Cannabis Sativa” (CJI/doc.470/14 rev. 1). On the basis of a review of relevant developments, this report recommended that Member States consider certain changes in their regulatory approach to these issues, along specified lines.

Mr. Chairman, we are quite proud of reports and recommendations such as these, in which the Committee is able to provide Member States with concrete proposals for dealing with real problems based on a careful analysis of contemporary trends and relevant legal texts and principles. This is not a new practice for us. In past years, we have developed and adopted model laws and guiding principles in a variety of fields. In addition to those I have just mentioned, I would recall for the Committee three other themes on which we have recently been able to make concrete proposals for the consideration of Member States:

- In March 2013, the Committee adopted “Model Legislation on Protection of Cultural Property in Case of Armed Conflict” – CJI/doc.403/12 rev.5. Our report on that topic proposed, among other things, concrete measures concerning signaling, identifying and listing cultural property, as well as presenting ways of promoting skill-building and diffusion of policies in this area. The document also addressed how to determine responsibility and aspects related to monitoring and enforcing obligations. Our Rapporteur on the subject, Dr. Ana Elizabeth Villalta Vizcarra, presented the Model Legislation on two opportunities before this Committee on Juridical

and Political Affairs, first at a session held on October 24, 2013, and second on January 31, 2014, during the “Special Session on International Humanitarian Law.”

□ The previous year, in March 2012, the Committee adopted a “Proposed Model Act on Simplified Stock Companies” – (CJI/doc.380/11 corr.1) that contemplates a hybrid form of corporate organization that can reduce the costs and formalities for incorporation of companies at the level of micro- and small-businesses, making use of Colombia’s successful experiences in this area. In the view of our Committee, the adoption of this Model Law, and the inclusion of these corporate models in domestic law, can help to promote economic and social development within our Member States. I have made presentations on this topic to this Committee on several occasions, most recently on December 4, 2014, when I urged its favorable consideration by this Committee. Moreover, in all of our presentations regarding this issue we have benefited from the presence and the expertise of Professor Francisco Reyes, the author of the Colombian Law on this matter.

□ Also in 2012, in response to a request from the General Assembly, the Committee adopted a “Proposed Statement of Principles for Privacy and Personal Data Protection in the Americas” CJI/RES. 186 (LXXX-O/12). As directed by the General Assembly, we continue to work on proposals for the different ways in which the protection of privacy and personal data can be regulated within Member States, including through a possible model law or other legislative guidance, taking into account relevant international standards in this area.

All of these projects have addressed real issues of significance to our Member States. They have generated reports with concrete proposals and recommendations. Our Committee remains dedicated to addressing practical problems and offering practical solutions that have the potential to make significant contributions to Member States and their citizens.

In this context, Mr. Chairman, we would respectfully suggest that Member States consider the possibility of examining both the cited Model Laws submitted by the Committee (one on the protection of cultural property in case of armed conflict and the other on simplified stock companies), and if they meet with approval, to adopt them through a resolution approved by the General Assembly of the OAS.

Additionally, we would hope that the General Assembly will consider taking note of the “Guiding Principles on Corporate Social responsibility.”

Other Topics

Turning to the remainder of our agenda, for the current year, the following topics are under consideration by the Committee:

- Guidelines on protection of stateless persons, responding to a mandate from the General Assembly requesting the Committee to contribute to a mechanism that establishes international standards.
- The immunity of States and international organizations, involving a study of national laws, practice, and treatment in determining immunity.
- Electronic warehouse receipts for agricultural commodities, aiming at a mechanism to facilitate harmonization of data in a secure computerized system to enable the creation of negotiable receipts.
- Migration management in bilateral relations: we are preparing a model for integrating foreign nationals seeking to settle in neighboring countries.
- The law applicable to international contracts: an initiative aimed at promoting instruments in this area, in light of a questionnaire to be sent to Member States, and
- Representative democracy, involving a study to build on the progress achieved by the Organization in this field.

From this very brief description of our agenda, Mr. Chairman, you can see that the Committee continues to be engaged -- actively and productively engaged -- in a broad range of issues of practical significance for the Member States of the OAS. All Members of our Committee

are committed to carrying out the mandates given to us by the General Assembly, as well as those we decide to undertake on our own initiative. Our overall goal is to promote the rule of law, to foster economic development, and to advance efforts to harmonize and unify the law throughout our Hemisphere in ways that will have a direct and positive impact on the peoples of the Americas.

For all these projects, we have reached out to Member States for information, and we have in fact received some information and acknowledgements of representatives of some Member States. Member States should understand how valuable their responses are for the Committee, and we invite them to continue to support our initiatives through *questionnaires* and enquiries we submit from time to time.

Our Rapporteur on the theme relating to stateless persons is expecting your responses by February 20. All pertinent information provided by Member States will help to elaborate our study on the "Protection of Stateless Persons," pursuant to the mandate in resolution AG/RES. 2826 (XLIV-O/14).

Of course, we hope, and respectfully request, that Member States give the most serious and careful consideration to all our requests for information as well as to our final proposals.

As Members of this Committee know, we often ask for reactions and suggestions or other information in order to get a more accurate understanding of the situation on a particular issue and to ensure that our proposals will be useful and serve their purpose. Normally we do get some responses, and we are grateful for the information. But we need more. In too many instances the Committee never hears from missions or capitals. The lack of response makes it more difficult for our Rapporteurs to work with up-to-date, accurate information and to make proposals that reflect the interests and experiences of Member States.

Promotion of International Law

As you know, Mr. Chairman, the Committee also continues to promote International Law throughout the region. As part of those efforts, the Committee again held meetings with members of the International Law Commission of the United Nations in Geneva, as it has been done for the past several years. Efforts to establish closer relations through both secretariats

In the past year, the Committee Members received at their headquarters members of two International Courts, namely Judge Ronny Abraham from the International Court of Justice and Chairman Sang-Hyun Song of the International Criminal Court, who explained the operation, mandates and relevant jurisprudence of each institution.

In the area of expertise concerning stateless persons, the Committee received visits from Juan Carlos Murillo and Juan Ignacio Mondelli from the Office of the United Nations High Commissioner for Refugees (UNHCR), who explained the initiatives taken to celebrate the Cartagena Declaration on Refugees, and expressed their willingness to cooperate with the Committee in drafting the Guide on the Protection of Stateless Persons.

In matters related to International Private Law, the Committee welcomed two Brazilian academics, professors Nadia de Araujo and Lauro Gama.

From the African Union Commission, the Committee counted with the presence of the Secretary of the African Law Commission, Mr. Mourad Ben Dhiab, who reaffirmed interest in putting forward a series of proposed joint actions involving both the organs and their secretariats, including, in particular, exchanges of information and training in archive management and document organization; setting up technical training courses and seminars; and exchanges of publications.

The presence of the Organization's Secretary General, Mr. José Miguel Insulza during the August session of the Committee should also be highlighted. Mr. Insulza reviewed with the members a variety of legal topics of interest to the organization. His visit to our headquarters strengthened the relations of the Juridical Committee with the General Secretariat.

Course on International Law

In conjunction with the Department of International Law of the Secretariat for Legal Affairs, the Committee again held its traditional International Law Course during August in Rio de Janeiro. As you know, the Course has taken place annually since 1973. In its current form, the Course lasts three weeks, and it aims at providing participants with the opportunity to reflect, discuss, and receive updates on different topics in the area of International Public and Private Law. The main topic for 2014 was the settlement of disputes in International Law.

The OAS offers annually scholarships for young professionals from all OAS Member States with a degree on International Law or International Relations. In particular, we invite Member States to encourage their young diplomats and other members of their Ministries of Foreign Affairs as well as Professors of International Law to participate, so we may have a strong group of highly qualified and diversified students. The announcement to apply for scholarships is published every year before the beginning of the Course. The requirements are included in the announcement.

This year the XLII Course on International Law will address “The Current Inter-American Legal Agenda,” and it will be held from August 3 to 21, 2015. Applicants should send their information to the Department of Fellowship of the OAS earlier in the year.

Budgetary and Administrative Matters

I want to acknowledge all Member States’ efforts in facilitating the adoption of a budget that will allow the Committee to celebrate two working sessions during the current year, without any need for reinforcement. The new funding will also allow the Committee to have a full time lawyer in its headquarters, as it has in the past. In this regard, special recognition should be given to the leadership of the Permanent Missions of Brazil and Peru.

Conclusion

It should be apparent that the Committee continues to work actively, intensively and positively on a wide range of highly relevant topics of current importance to the Member States. The Committee has made, and continues to make, very substantial contributions to political, economic and legal progress in the hemisphere as well as to the work of this Organization. It continues to be, in my personal opinion, an essential resource for the Member States and an activity of which all OAS Members can justifiably be proud.

I want to stress the outstanding work of our small secretariat, including those in Rio de Janeiro as well as those in the Department of International Law here at headquarters. This Committee should be aware of the superb support provided by the Department of International Law, in particular its Director, Dr. Dante Negro and his colleague Dr. Luis Toro, under the direction of the Organization’s Secretary for Legal Affairs Dr. Jean Michel Arrighi. The Organization has much to be proud of in these professionals and the work they do.

Thank you very much. I am prepared to respond to any comments or questions. Our Committee’s next meeting will take place in just a few weeks, during the week of March 23, and I will be happy to convey any messages this Committee may have for my colleagues.

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CJI/doc.485/15

**REPORT ON THE THIRTY-FIFTH ANNIVERSARY OF THE
UNITED NATIONS CONVENTION ON CONTRACTS
FOR THE INTERNATIONAL SALE OF GOODS**

(presented by Dr. Ana Elizabeth Villalta Vizcarra)

I. MANDATE

At the eighty-sixth regular meeting of the Inter-American Juridical Committee, held from March 23 to 27, 2015, the undersigned, as rapporteur for the topic “Law Applicable to International Contracts,” advised the members of the Committee of the invitation that she had received from the Secretariat of the United Nations Commission on International Trade Law (UNCITRAL) to attend as an expert a *colloquium* that would be held on July 6 this year at the United Nations Office in Vienna, as part of the celebrations to mark the 35th anniversary of the United Nations Convention on Contracts for the International Sale of Goods, also known as the Vienna Convention of 1980.

The invitation was extended on account of the undersigned being the Rapporteur of the Inter-American Juridical Committee for the topic “Law Applicable to International Contracts.” At that regular meeting, the Chair and Members of the Committee endorsed the participation of the undersigned in the colloquium.

II. CONSIDERATIONS

The *Colloquium* was held on the afternoon of July 6, 2015, at the United Nations Office in Vienna, Austria, during the 48th session of UNCITRAL and was attended by Mr. Renaud Sorieul, Secretary of the United Nations Commission on International Trade Law; Mr. Luca Castellani, Legal Officer in the Secretariat of the United Nations Commission on International Trade Law, and Mr. Janos Martonyi, former Minister of Foreign Affairs of Hungary, as moderator.

The panel comprised the following: Mr. Quentin Loh from Singapore, Mr. Rui Moura Ramos from Portugal, Mrs. Ana Elizabeth Villalta Vizcarra from El Salvador, and Mr. Wang Liming from China. Each expert was given 20 minutes to speak. The meeting started at 2:30 p.m. local time and ended at 5:00 p.m.

The meeting was attended by delegates from Member States of the United Nations Commission on International Trade Law, international organizations involved with such matters, and observers. Several delegations offered comments at the end of the presentations, including Canada, United States, Singapore, China, Portugal, Hungary, Chile, and Honduras, among others, as did representatives of international organizations.

In their remarks, they noted the advisability of more broadly disseminating the United Nations Convention on Contracts for the International Sale of Goods, so that States may benefit from the advantages that it offers, especially for buyers, sellers, exporters, and importers, and that, therefore, more states should be encouraged to become party to it; at present, there are 83 States Parties to the Convention.

They also said that considerable prudence should be exercised when considering changes to the Convention lest its amendment reduce the number of ratifications, given that this is one of the best conventions in the area of International Trade Law, with a uniform text that is very acceptable to states from all the legal traditions as well as social and economic systems. The reason for this was that representatives of all such states were involved in its drafting. They also noted that day as a momentous one, given that it marked the 35th anniversary of the Convention.

The undersigned delivered the following presentation as a member of the Inter-American Juridical Committee and its Rapporteur on Law Applicable to International Contracts:

**THE UNITED NATIONS CONVENTION ON
CONTRACTS FOR THE
INTERNATIONAL SALE OF GOODS**

Ana Elizabeth Villalta Vizcarra

- (Member of the CJI; career ambassador in the Diplomatic Service of El Salvador; member of ASADIP; member of IHLADI; Professor of Public and Private International Law; Master of International Trade)

Contents

I Background. II Current Situation. III Scope of Application. IV. Structure. V Outlook for the Americas. VI. Final Considerations.

I. Background

The United Nations Convention on Contracts for the International Sale of Goods, also known as the Vienna Convention of 1980, was signed on April 11, 1980. Accordingly, this year marks the 35th anniversary of its adoption, although it entered into force on January 1, 1988. At present, there are 83 States Parties to the Convention, of which 18 are among the 35 Member States of the Organization of American States (OAS).

The Convention traces its roots back to the work begun in 1930 by the International Institute for the Unification of Private Law (UNIDROIT), which led to the adoption in 1964 of two Hague conventions: one on the international sale of goods, the other on the formation of contracts for the international sale of goods. However, as they were not drafted by countries from all the world's regions, they failed to curry global acceptance and were criticized for predominantly reflecting the legal traditions and economic realities of Western Europe.

Therefore, the United Nations tasked its Commission on International Trade Law (UNCITRAL) with drafting a convention that would elicit global consensus. Accordingly, a working group was established to analyze all of these precedents and conduct a comprehensive review in collaboration with eminent jurists on these matters. As a result, a consolidated draft convention was produced in 1978. Dubbed the Draft Convention on Contracts for the International Sale of Goods, it elicited greater acceptance on the part of countries with different legal, social, and economic systems.

The United Nations General Assembly convened a diplomatic conference in Vienna, Austria, in April 1980 to examine the draft convention, which the states at the conference unanimously adopted on April 11. Drafted in all six official languages of the United Nations, the Convention on Contracts for the International Sale of Goods or Vienna Convention of 1980, as it was called, ultimately entered into force on January 1, 1988.

The purpose of the Convention was to introduce a modern, uniform, and fair regime for contracts on the international sale of goods, as well as to afford legal certainty in trade, given that a large variety of countries from all world regions participated in its drafting.

It is the product of a major legislative effort, as its text seeks carefully to reconcile and balance the interests of the seller and the buyer, providing states that adopt it with a modern and uniform law that governs the international sale of goods and applies to all sales contracts between parties that have places of business in one of the Contracting States, making it directly applicable without the need to resort to provisions of International Private Law to determine the law applicable to the contract.

In that sense, it is considered a key instrument of international trade that should be adopted by every state in the world, regardless of their legal tradition or level of economic development, as well as one that maintain an equilibrium between the interests of buyers and sellers.

The Convention's application over its 35 years of existence has been a genuine success, given that it has been adopted by more than two thirds of UN member states, which, therefore, have accepted its unifying provisions as regulating the most important area of their international trade.

II. Current Situation

At present there are 83 States Parties to the United Nations Convention on Contracts for the International Sale of Goods. Moreover, it has the benefit of having been ratified by States whose combined economies account for more than two thirds of global GDP, representing countries from all the world's geographic regions, at every stage of development, and from every legal tradition.

The Convention governs the formation and performance of contracts on the international sale of goods worldwide, thus replacing domestic regulations and becoming the most successful treaty in unifying provisions of this type.

The purpose of the Convention is to foster legal certainty in the sale of international goods by establishing a text containing uniform laws for all the world's countries, moving away, as previously mentioned, from domestic regulations, thereby offering a series of advantages to exporters and manufacturers for the sale of their products. It is beneficial to industrialized nations and developing economies in equal measure, given that its provisions are favorable to the interests of member states and their trade relations, as well as to their imports and exports.

The aim of the Convention is to provide a uniform body of rules that harmonizes the principles of international trade and provides directly applicable rules that recognize the importance of trade usages and practices. As a result it has become a model to be emulated in the harmonization of International Trade Law.

The Convention also establishes a modern, uniform and fair regime for contracts for the international sale of goods, thus helping to introduce certainty in commercial exchanges and decreasing transaction costs. It is, therefore, considered one of the core international trade law conventions.

The Convention only applies to international operations and not to contracts governed by Private International Law or contracts on sales exclusively within countries, which are governed by domestic law; nor does it apply to contracts in which parties have agreed to apply another law, in which case the Convention would not affect them.

It is important to bear in mind that the Convention only applies to sales contracts concerning international transactions and that contracts for domestic transactions lie outside its scope. Hence the need for the places of business of the contracting parties (buyer and seller) to be located in different states.

With this Convention, the international goods trade has a suitable legal instrument to facilitate commercial transactions among the countries of the world, as well as a set of rules on international sales that governs the contract overall, regardless of any national laws. The rules contained in the Convention are also compatible with the most diverse legal systems in the world, be they from the Romano-Germanic or Anglo-Saxon traditions.

As to the Convention's interpretation, bearing in mind its international nature, as well as the need to promote uniformity in its application and ensure observance of good faith in international trade, the parties in a contract for the international sale of goods governed by the Convention agree to use its rules of interpretation.

III. Sphere of Application

This Convention applies to all buying and selling operations undertaken between parties with a place of business in the contracting states. In these cases, it applies directly, avoiding recourse to rules of Private International Law to determine the law applicable to the contract. The Convention may also apply to a contract for international sale of goods when the rules of private international law point at the law of a contracting state as the applicable one, or by virtue of the choice

of the contractual parties, regardless of whether their places of business are located in a contracting state.

In that regard, one condition on the Convention's territorial scope of application is that the places of business of the contracting parties be located in different States. Moreover, if they are both contracting parties the Convention would be directly applicable. If one of the States is not a contracting party, or neither of them are, the rules of Private International Law may lead to the application of the law of one of the contracting States, in which case the Convention would be indirectly applicable. For the purposes of the Convention, "place of business" means the permanent or habitual place where the contracting party pursues their business. If a party has more than one place of business, the place of business is that which has the closest relationship to the contract and its performance.

By the same token, the Convention's application is based on the notion of internationality; that is, that the parties' places of business are in different States and if one or both have several places of business, the one most closely linked shall be considered the place of business. For these purposes, neither the nationality of the parties, nor the nature of the contract—be it civil or commercial—is relevant.

The Convention does not apply to the following: consumer sales (goods bought for personal, family or household use); sales by auction, on execution or otherwise by law; sales based on the nature of the goods; sales of negotiable securities or instruments, money, vessels and aircraft; contracts for the supply of goods to be manufactured or produced in which the party who orders the goods undertakes to supply a substantial part of the materials necessary for their manufacture or production; contracts in which the preponderant part of the obligations of the party who furnishes the goods consists in the supply of labor or other services; liability of the seller for death or personal injury caused by the goods to any person; the validity of the contract or any of its stipulations; or liability for the effect which the contract may have on the property in the goods sold, unless there is an express provision to the contrary in the Convention.

The provisions of the Convention are purely dispositive in nature, based on the importance of the principle of party autonomy. As such, it may cease to apply either entirely or partially should the parties in a contract so decide. The basic principle of contractual freedom in the international sale of goods is recognized by a provision that allows contracting parties to exclude the Convention's application or vary the effects of any of its provisions.

Likewise, observance of the principle of good faith in international trade is important as it helps not only in the interpretation of the Convention's provisions, but also to ensure discipline in the conduct of the parties.

Its interpretation must be international in nature and strive for uniformity in its application; in other words, the Convention must be interpreted in a manner that is consistent with all legal systems. International trade usages and customs will be used with the tacit or express consent of the parties and be applied if they are widely known and used in international trade. Moreover, those usages and customs keep a balance between industrialized and developing states that is not established by domestic laws.

Thus, for example, Article 6 of the Convention recognizes the principle of party autonomy in choosing the applicable law and that if legal gaps or *lacunae* exist they may be filled by *lex mercatoria*.

Thus, this article allows parties to adopt contractual provisions outside the Convention. This does not indicate a lack of confidence in the Convention's rules; rather, it is an express recognition of the principle of the free will of the parties to choose the applicable law.

Article 7 of the Convention sets out the principles of interpretation, which are founded on its international character and the need to promote uniformity in its application and the observance of good faith in international trade. Therefore, any dispute that arises over a sale contract is settled in accordance with the general principles on which the Convention is based or, in the absence of those principles, in conformity with the law applicable by virtue of the rules of Private International Law.

In other words, it sets out the criteria for interpreting the Convention, which must have regard to its international nature, the need to promote uniformity, and observance of good faith in international treaties. Accordingly, any aspect not governed by the Convention is regulated by the applicable law in accordance with the rules of Private International Law.

As to the Convention's interpretation, it must be done taking into account its international character, autonomously, and in a way that promotes uniformity in its application, which necessitates familiarity with jurisprudence in the area of international trade.

The rules of interpretation are a core part of the Convention. The parties in a contract governed by it may not decide that the Convention shall be interpreted according to rules other than those that it provides in the relevant articles.

Article 9 of the Convention speaks to the complementarity that must exist between the Convention and *lex mercatoria* by establishing the preeminence of commercial usages, given that the Convention is a manifestation of international trade customs, and it puts them at the same level of importance as the principle of contractual autonomy. Therefore, it establishes trade usages and contractual autonomy as the main source of law in contracts on the international sale of goods.

IV. Structure

The United Nations Convention on Contracts for the International Sale of Goods is divided into four parts:

Part one deals with the scope of application of the Convention and general provisions on sale contracts. It also defines what constitutes a fundamental breach of contract, and establishes the forms of communication to be observed between the parties. Likewise, it provides that the contract may be amended by the mere agreement of the parties and sets out the cases in which the performance of specific obligations may be required, among other aspects. Part two contains the rules governing the formation of contracts for the international sale of goods. Part three deals with the obligations of the seller, including the content of the obligation to deliver the goods; that is, the place, time, and manner for doing so. It also prescribes that the seller is responsible for the quality of the goods and for any third-party rights or claims on them, especially those based on intellectual property. It also establishes the remedies to which the buyer has recourse in the event of a breach of contract by the seller. Part three also refers to the buyer's obligations, in particular the content of its obligations to pay the price for the goods and take delivery of them. In addition, it sets out the remedies to which the seller has recourse in the event of breach of contract by the buyer, the provisions common to the obligations of seller and the buyer, the criteria with respect to damages and interest, exemptions to liability for nonperformance, and the effects of avoidance. Part four contains the final provisions of the Convention, including its entry into force, reservations, and declarations, among others.

In that regard, a contract for the sale of goods is formed first with the offer, namely a proposal from the seller to conclude a contract addressed to one or more specific persons that is sufficiently definite and indicates the intention of the offeror to be bound in case of acceptance.

Therefore, an offer must include the following elements: (a) identification of the person or persons to which it is addressed; (b) a precise offer; (c) acceptance within the time fixed for doing so. A contract is made when the indication of assent reaches the offeror.

Thus, the formation of a contract is concluded by means of an offer and its acceptance with regard to the obligations of the parties (the seller and the buyer) in the contract. As previously noted, the predominant obligations of the seller include delivery of the goods in the quantity and quality stipulated in the contract, handing over any documents relating to them, and transferring the property in the goods. For its part, the buyer is required pay the price stipulated for the goods and take delivery of them as required by the contract and the Convention.

In addition, the Convention contains remedies to which the parties (seller and buyer) have recourse in the event of a breach of contract, so that the aggrieved party may demand performance of the contract, claim damages, and even declare the contract avoided in the event of a fundamental breach.

Finally, part four contains the final provisions, including the clauses usually found in international conventions of this type, such as deposit, with the Secretary-General of the United Nations identified as the depositary; the fact that the convention was opened for signature on September 13, 1981, that it is subject to ratification, acceptance or approval by the signatory States, that it is open for accession by all States which are not signatory States, and that instruments of ratification, acceptance, approval and accession are to be deposited with the Secretary-General of the United Nations.

The Convention permits declarations on the Convention, which are to be made as specified in Convention and by formal notification in writing addressed to the depositary. States may withdraw their declarations at any time by formal notification in writing addressed to the depositary. Reservations are only permitted as expressly authorized in the Convention.

V. The Convention's Outlook in the Americas

To date, 18 states in the Americas have adopted the United Nations Convention on Contracts for the International Sale of Goods: Argentina, Brazil, Canada, Chile, Colombia, Cuba, Dominican Republic, Ecuador, El Salvador, Guyana, Honduras, Mexico, Paraguay, Peru, St. Vincent and the Grenadines, United States, Uruguay, and Venezuela (only a signatory). Thus, it has been taken up by States in the Americas with different legal traditions: countries with systems based on *civil law* and common law. This is because the Convention harmonizes the two.

In the Americas, the Convention has been widely applied and built into the American States' domestic laws on contracts for the international sale of goods. Its application unquestionably grew with the advent of free trade agreements and the association agreements that most sub-regions in the Americas have with the European Union, as trade among those countries has expanded.

The Convention has also allowed the development of uniform jurisprudence in the Americas, offering an additional advantage from its implementation. In that respect, it has become one of the most important achievements in the area of international trade and represents another step toward the harmonization of the laws of the states of the Americas on the international sale of goods.

The Convention is important for the States of the Americas because of its popularity's among firms involved in international trade, and many of its States Parties also have trade relations with the countries of the Americas region, helping to lure greater foreign investment by creating a favorable climate for international trade.

The Convention's application has entailed adapting domestic legislations in the Americas to the trade demands of a globalized world so as to be abreast of international trends and developments.

The international nature of the Convention has also brought practical benefits to lawyers in States Parties that hail from the Americas Region because, by becoming experts on it, they have been able to advise exporters and all manner of buyers and sellers on the guidelines and principles that the Convention embodies.

Striking a fair balance between the interests of sellers and buyers has made the Convention attractive to states in the Americas since such a balance does not exist when transactions are governed exclusively by the rules of private law of the countries concerned, a situation that can also give rise to injustices between industrialized and underdeveloped countries.

The Convention has also proved particularly advantageous for States in Latin America since, quite apart from its success in its own right, it offers a series of opportunities for exporters and manufacturers in the Americas to sell their goods to industrialized nations, thereby benefiting developing economies

The countries of the Americas have also benefited from the international character of the Convention which thus precludes the need for a domestic law to govern international transactions; from the clarity and simplicity with which the principle of autonomy and will of the parties is expressed in the convention; and from its introduction of a neutral regime that provides parties with a prearranged solution in the event of a dispute of which everyone is aware in advance, which also saves time and money.

The fact that the Convention was also drafted in Spanish, as one of the six official languages of the United Nations, facilitates its interpretation in Latin American countries—most of them Spanish-speaking—as well as generating a uniform jurisprudence which the countries of the Americas that have not yet adopted the Convention are unable to enjoy.

The Convention is important to Latin American countries in that it enables them to adapt to a uniform set of substantive rules on foreign trade operations, in addition to guaranteeing operators advance knowledge of the legal regime to which their international sales of goods will be subject, which will assist foreign trade by giving greater legal certainty to international trade transactions. The reason for this is that they will be able to rely on a suitable legal instrument to facilitate those operations, given that it governs the whole contract irrespective of any national laws, to which it will not be necessary to resort in any circumstances because the Convention's own rules make it self-sufficient.

According to Article 7 of the Convention, in its interpretation the domestic tribunals of the countries of the Americas must have regard to its international character and to the need to promote uniformity in its application. Therefore, on interpreting and applying the Convention, national courts must leave aside their domestic laws and apply International Law autonomously, adhering to both its letter and its spirit and basing their decisions on the general principles enshrined in the convention, which include good faith, reasonableness, and contractual freedom of the parties.

The domestic courts of many of the States Parties to the Convention in the Americas usually refer expressly to the Convention in their decisions on contracts for the international sale of goods and apply it in settling disputes brought to their attention.

The above confirms the Convention's acceptance by all the States of the Americas that are party to it, which is due to the fact that it is beneficial to the

interests of the State Parties as well as to their trade relations and imports and exports.

For the countries of the Americas, becoming parties to the convention has entailed adapting their domestic laws to the trade demands of a globalized world in order to keep up with international trends and developments.

For the most part, the national constitutions of the States of Latin America that are parties to the Convention rank treaties above secondary laws. Thus, the hierarchy of legal norms is topped by the Constitution, which is followed by international treaties and secondary legislation in that order. As result, the Convention takes precedence over secondary laws where international sales of goods are concerned and only aspects for which it makes no provision are governed by domestic laws.

Under the Inter-American System, the progressive development and codification of Private International Law takes place in the framework of the Inter-American Specialized Conference on Private International Law (known as the CIDIP process) of the Organization of American States (OAS). To date, the Conference has convened on seven occasions, the first in Panama, in January 1975, and most recently in Washington, D.C., in October 2009, where it considered the model registry regulations under the Model Inter-American Law on Secured Transactions.

The CIDIP process has yielded 27 international instruments, including 21 conventions, 2 additional protocols, 2 uniform documents, 1 model law and 1 set of model regulations, making a substantial contribution to the codification and unification of Private International Law in the Americas, as well as to its modernization.

Many of these documents are based and modeled on instruments drawn up in the UNCITRAL framework. For example, the text of the Inter-American Convention on the Law Applicable to International Contracts, signed in Mexico City on March 17, 1994, at the Fifth Inter-American Specialized Conference on Private International Law, took as precedents the United Nations Convention on Contracts for the International Sale of Goods, the work of UNIDROIT on the principles that govern international trade contracts, the Convention on the Law Applicable to Contractual Obligations 1980 (Rome Convention), the Hague Convention on the Law Applicable to Contracts for the International Sale of Goods 1986, the Treaties of Montevideo (1889 and 1940), and the Bustamante Code (1928), among others.

The Inter-American Convention on the Law Applicable to International Contracts, or Mexico Convention, takes those instruments into account and is based on the principle of party autonomy and contractual freedom as well as modern tendencies, since the contract is governed by the law chosen by the parties.

Just as the principle of party autonomy is hugely important in the United Nations Convention on Contracts for the International Sale of Goods, the freedom to determine the applicable law under the Mexico Convention constitutes the broadest application of the principle of party autonomy—its Article 7 provides that “[t]he contract shall be governed by the law chosen by the parties.” This principle, therefore, is the cornerstone of the Mexico Convention and allows the parties themselves to assess and determine which law shall be applicable to them, since no judge or legislator will do it for them.

Similarly, like the United Nations Convention on Contracts for the International Sale of Goods, the Mexico Convention is based on the application of *lex mercatoria*, given that its Article 10 provides for the application, where appropriate, of the guidelines, customs, and principles of International Commercial Law as well as generally accepted commercial usages and practices in order to

discharge the requirements of justice and equity in the particular case. Thus, *lex mercatoria* is essentially considered the new law of international trade operators.

In addition, the United Nations Convention on Contracts for the International Sale of Goods and the Mexico Convention, represented a significant stride forward in the harmonization of the different legal systems of their States Parties, helping to facilitate and strengthen the harmonious coexistence of those systems.

One important point that concerns both conventions is the need for an adequate effort to increase awareness and understanding of them, so that Member States are conscious of the benefits that the conventions offer for international contracts and trade in today's world.

Another significant point for both conventions is that this year will see two important anniversaries for the codification and progressive development of international law: the 35th anniversary of the United Nations Convention on Contracts for the International Sale of Goods in the framework of the United Nations system, a product of the United Nations Commission on International Trade Law, the UN's unifying forum for international trade rules; and the 40th anniversary of the Inter-American Specialized Conference on Private International Law within the inter-American system of the OAS, the regional codifying forum for Private International Law norms of the Member Countries of the Organization of American States.

VI. Final Considerations

The importance today of the United Nations Convention on Contracts for the International Sale of Goods, which comprises 101 articles, is that it provides a uniform body of standards that harmonizes international trade rules and does away with the legal uncertainty that affects merchants who engage in cross-border sales. As result, the Convention's provisions govern most of the world's trade, earning it wide international acceptance on the part of states.

The Convention provides its States Parties with greater legal certainty for their international trade transactions, directly benefits exporters and importers, and affords countries a set of uniform substantive regulations on foreign trade operations, as well as ensuring that operators know in advance about the legal regime to which their international sales will be subject.

The Convention represents the greatest and most comprehensive effort seen in the history of international trade to unify the laws of States on international sales of goods, brilliantly reconciling the world's legal and economic systems. Therefore, the success of the Convention has less to do with the number of its States Parties than with the variety of geographical regions that they represent and the importance of many of them to international trade.

As previously noted, the Convention has been accepted by countries from every legal tradition—from the Roman civil law systems to ones founded on Anglo-Saxon common law—and adopted by countries of all economic systems. Accordingly, as a uniform legal document compatible with various legal systems, the Convention constitutes the legal framework for the international sale of goods.

The Convention also enables the facilitation of such contracts through the use of electronic data exchange systems and helps to reduce unfair competition in such transactions.

In spite of all the advantages and benefits that the Convention has brought to trade and international contracts, and despite enjoying widespread international validity and being the most widely used convention in international trade thanks to the certainty, security, and flexibility it offers, greater awareness of it needs to be encouraged so that all States can realize its benefits in international transactions.

Therefore, it would be advisable to disseminate it appropriately and for nonparty States to share in the benefits that it affords.

In that regard, we commend the United Nations Commission on International Trade Law for its important role as the world's unifying forum on international trade and for celebrating the 35th anniversary of the adoption of the United Nations Convention on Contracts for the International Sale of Goods at this *colloquium* of landmark significance for international trade, where we have come to paying tribute to the Convention, which has become the world's foremost uniform legal instrument on international sales of goods.

III. CONCLUSION

As we have seen, the presentation provided an account of the outlook for the United Nations Convention on Contracts for the International Sale of Goods in the Americas, as well as a comparison of that convention with the Inter-American Convention on the Law Applicable to International Contracts.

Comparisons were also drawn between UNCITRAL and the Inter-American Specialized Conference on Private International Law (CIDIP) as codifying forums for international law, one at the United Nations, the other in the framework of the Organization of American States.

In conclusion, the presentation mentioned the advisability of raising awareness about the conventions of both forums, particularly in the contexts their anniversary celebrations; namely, the 35th anniversary of the United Nations Convention on Contracts for the International Sale of Goods and the 40th anniversary of the Inter-American Specialized Conference on Private International Law.

This report is hereby presented at the eighty-seventh regular meeting of the Inter-American Juridical Committee held in Rio de Janeiro, Brazil, from August 3 to 12, 2015.

ABBREVIATIONS AND ACRONYMS

ASADIP	American Association of Private International Law
CIDIP	Inter-American Specialized Conference on Private International Law
CJI	Inter-American Juridical Committee
IHLADI	Hispano-Luso-American Institute of International Law
OAS	Organization of American States
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT	International Institute for the Unification of Private Law

BIBLIOGRAPHICAL SOURCES

- Cajo Escudero, Herbert.** *La Convención de Viena sobre Contratos de Compraventa Internacional de Mercaderías.*
- CJI.** Reports of the rapporteurs of the Inter-American Juridical Committee on the Law Applicable to International Contracts.
- Galán Barrera, Diego Ricardo.** *La Convención de las Naciones Unidas sobre los Contratos de Compraventa Internacional de Mercaderías.*
- Garro, Alejandro y Zuppi, Alberto.** *La Convención de las Naciones Unidas sobre los Contratos de Compraventa Internacional de Mercaderías*, Institute of International Commercial Law, Pace University School of Law.
- Jenkins, Alma del Carmen.** *Panamá y la CISG: ¿Facilitador del Comercio Internacional?* Legalinfo, Panama.

Jurisprudence: Judiciary of El Salvador.

Quezada, Kim: *Convención sobre la Compraventa Internacional de Mercaderías*, Instituto Mexicano de Contadores Públicos de Baja California.

Ramacciotti, Novak y Negro. *Derecho Internacional Económico*, Editorial PUC, Lima, Peru, 1993.

Sánchez Alcantar, Alfonso. *La Convención de las Naciones Unidas sobre Contratos de Compraventa Internacional y su relación con el Tratado de Libre Comercio para América del Norte*, on-line magazine *Ex-lege*.

Sierralta, Aníbal. *Contratos de Comercio Internacional*, Editorial PUC, Lima, Peru, 1990.

United Nations. Text of the United Nations Convention on Contracts for the International Sale of Goods, New York 2011.

Van Alstine, Michael P. *An Analysis of the United Nations Convention on Contracts for the International Sale of Goods and Its Significance for Latin America*, 2 *Derechos y Valores* [Colombia] 116 (1999) (translated into Spanish).

Web sites: United Nations Commission on International Trade Law
(<http://www.uncitral.org/uncitral/en/index.html>)

Private International Law

(https://www.oas.org/dil/private_international_law.htm), Department of International Law, Secretariat for Legal Affairs, Organization of American States

The Inter-American Juridical Committee annual Reports are available on the Internet at the following link:

http://www.oas.org/cji/informes_cji.htm (en español)

http://www.oas.org/cji/eng/reports_annualreport_iajc.htm (in English)

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B. Course on International Law

The XLII Course on International Law was held in Rio de Janeiro, Brazil, from August 3 – 21, 2014. The core topic was the “The Current Inter-American Juridical Agenda.” The purpose of this course is to ponder, debate, and update various issues pertaining to Public and Private International Law. Panelists included distinguished Professors from the Hemisphere and from Europe, legal advisors in the Ministries of Foreign Affairs of a number of Member States, and staff members of International Organizations and the OAS. Of particular note was the presence of the Secretary General of the Organization of American States, Dr. Luis Almagro, and the Juridical Consultant of Brazil, Dr. Antonio P. Cachapuz de Medeiros, who made speeches during the opening ceremony. It should also mention the participation of the Justices Dr. Antonio Augusto Cançado Trindade from the International Court of Justice and Dr. Vio Grossi from the Inter-American Court of Human Rights. The course was attended by 20 scholarship holders from a number of countries in the Hemisphere, financed by the OAS and 11 participants, both Brazilian and foreign, who paid to participate in the course.

The Course Program was as follows:

PROGRAM

XLII Course on International Law

“The Current Inter-American Juridical Agenda”

Río de Janeiro, Brazil

August 3-21, 2015

**Organized by the Inter-American Juridical Committee and the Department of
International Law of the Secretariat for Legal Affairs of the Organization of American
States**

First week

Monday 3

9:30 – 10:00

REGISTRATION

10:00 – 12:00

INAUGURATION

Carlos Mata Prates, Vice Chairman of the Inter-American Juridical Committee

Luis Almagro, Secretary General of Organization of American States (OAS)

Antonio Paulo Cachapuz de Medeiros, Legal Consultant for the Minister of Foreign Affairs of Brazil

Jean Michel Arrighi, Secretary for Legal Affairs (OAS)

Tuesday 4

11:10 – 1:30

Julissa Reynoso/ Marc Suskin, Lawyers at Chadbourne & Parke LLP
International Development, Investment and Arbitration in Latin America and the Caribbean

3:00 – 5:00

Carlos Mata, Member of the Inter-American Juridical Committee
La Contribución del Comité Jurídico Interamericano al Desarrollo del Derecho Internacional en sus 110 Años de Existencia

Wednesday 5

8:30 – 10:50

Julissa Reynoso

11:10 – 1:00

Pierre-Olivier Sur, Member of the the Paris Bar Association (Bâtonnier de l'Ordre des Avocats de Paris)

The Terrorism, the Laws of Exception and the Professional Secrecy

2:30 – 4:30

Joel Hernández, Member of the Inter-American Juridical Committee

Régimen Jurídico para Combatir la Trata de Personas y el Tráfico Ilícito de Migrantes

Thursday 6

9:00 – 10:50

Edison Lanza, Special Rapporteur for Freedom of Expression (IACHR)

El Alcance de la Libertad de Expresión en Internet

11:10 – 1:00

Eduardo Vio Grossi, Judge at the Inter-American Court of Human Rights

Corte Interamericana de Derechos Humanos: ¿Tribunal Internacional o Supranacional?"

2:30 – 4:30

David Stewart, Member of the Inter-American Juridical Committee

Privacy and Personal Data Protection – The New OAS Principles

Friday 7

9:00 – 10:50

Edison Lanza

El Alcance de la Libertad de Expresión y la Vigilancia de las Comunicaciones Digitales

11:10 – 1:00

Eduardo Vio Grossi

2:30 – 4:30

Hernán Salinas, Member of the Inter-American Juridical Committee

Fortalecimiento de la Democracia en las Américas

Second Week**Monday 10**

- 9:00 – 10:50 **Jean-Michel Arrighi**, Secretary for Legal Affairs (OAS)
Introducción al Sistema Interamericano
- 11:10 – 1:00 **Maria del Pilar Bonilla**, Professor at the Francisco Marroquín University and Rafael Landívar University
Principios Rectores del Régimen de Garantías Mobiliarias
- 2:30 – 4:30 **Antônio Augusto Cançado Trindade**, Judge at the International Court of Justice
La Responsabilidad del Estado bajo la Convención contra el Genocidio

Tuesday 11

- 9:00 – 10:50 **Elizabeth Villalta**, Member of the Inter-American Juridical Committee
Los Mecanismos de Protección de Derechos Humanos
- 11:10 – 1:00 **Maria del Pilar Bonilla**
Las Garantías Mobiliarias en América Latina (Análisis Comparativo)
- 2:30 – 4:30 **Antônio Augusto Cançado Trindade**

Wednesday 12

- 9:00 – 10:50 **Verónica Ruiz**, Professor at the University of Edinburgh
Orígenes, Fundamentos y Evolución del Fórum Non Conveniens
- 11:10 – 1:00 **Maria del Pilar Bonilla**
Análisis Práctico del Régimen de Garantías Mobiliarias, Algunos Casos de Interés
- 2:30 – 4:30 **Luis Toro Utrillano**, Senior Legal Officer of the Department of International Law (OAS)
La Negociación en Torno al Proyecto de Declaración Americana sobre los Derechos de los Pueblos Indígenas: Proceso y Aspectos Sustantivos

Thursday 13

- 9:00 – 10:50 **Verónica Ruiz**
Análisis Comparativo de la Aplicación del Fórum Non Conveniens, Recepción e Implicancias en los Países de Tradición Jurídica Civilista
- 11:10 – 1:00 **Verónica Ruiz**
Forum Arresti y Fórum Non Conveniens con Relación al Arresto de Buques
- 2:30 – 4:30 **Juan Carlos Murillo**, Regional Legal Advisor for the UNHCR, Costa Rica
La Protección Internacional de los Refugiados en el Continente Americano al Conmemorarse el 30 Aniversario de la Declaración de Cartagena sobre los Refugiados

Friday 14

- 9:00 – 10:50 **Juan Ignacio Mondelli**, Regional Protection Officer (Statelessness) (UNHCR)
El Derecho Humano a una Nacionalidad y el Problema Humanitario de la Apatridia
- 11:10 – 1:00 **Juan Carlos Murillo**
Plan de Acción de Brasil para Fortalecer la Protección y Promover Soluciones Duraderas Sostenibles para las Personas Refugiadas, Desplazadas y Apátridas en América Latina y el Caribe dentro de un Marco de Cooperación y Solidaridad
- 2:30 – 4:30 **Latin-American Meeting of International Law** (organized by the Latin-American Society of International Law - LASIL)

Third Week**Monday 17**

9:00 – 10:50 **Patricio Rubio**, Profesor de la Pontificia Universidad Católica del Perú
Tendencias Recientes en el Sistema Interamericano de Derechos Humanos: La Corte Interamericana de Derechos Humanos

11:10 – 1:00 **Roberto Rojas**, Oficial Jurídico del Departamento de Derecho Internacional de la OEA
Afrodescendientes en el Derecho Internacional de los Derechos Humanos: Una Mirada desde las Américas

2:30 – 4:30 **Roberto Rojas**
La Convención Interamericana para la Protección de los Derechos Humanos de las Personas Mayores: Un Aporte Jurídico de las Américas al Mundo

Tuesday 18

9:00 – 10:50 **Patricio Rubio**

11:10 – 1:00 **Patricio Rubio**

2:30 – 4:30 **Dante Negro**, Director del Departamento de Derecho Internacional de la OEA
Los Avances más Recientes en la Protección de los Derechos Humanos del Grupo LGBTI en el Ámbito Interamericano

Wednesday 19

9:00 – 10:50 **Mónica Pinto**, Decana de la Facultad de Derecho de la Universidad de Buenos Aires
El Tratamiento de las Violaciones Sistemáticas de Derechos Humanos del Pasado Reciente. El Derecho y la Experiencia de América Latina.

11:10 – 1:00 **Gabriel Pablo Valladares**, Asesor Jurídico de la Delegación Regional del CICR para Argentina, Brasil, Chile, Paraguay y Uruguay
Introducción al Derecho Internacional Humanitario

2:30 – 4:30 **Gabriel Pablo Valladares**
Las Medidas Nacionales de Aplicación de Derecho Internacional Humanitario, con Especial Referencia a América Latina

Thursday 20

9:00 – 10:00 **Mónica Pinto**

11:10 – 1:00 **Paulo Borba Casella**, Head of the International and Comparative Law Department of the University of Sao Paulo Law School
BRICS - Present Status and Perspectives for the Future

2:30 – 4:30 **Paulo Borba Casella**

Friday 21

10:00 **CLOSING CEREMONY**

Roberto Rojas Legal Officer of the Department of International Law of the OAS

Christian Perrone Legal Officer of the Secretariat of the Inter-American Juridical Committee

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C. Relations and Cooperation with other Inter-American bodies and with Regional and Global Organizations

1. Participation of Members of the Inter-American Juridical Committee as Observers to or Guests of different organizations and conferences in 2015

Political and Juridical Affairs Committee

Washington D.C., United States, February 20, 2015

Dr. David P. Stewart (CJI/doc.476/15)

United Nations Commission on International Law

Geneva, Switzerland, July 7, 2015

Participation by Dr. Carlos Mata Prates

United Nations Commission on International Trade Law (UNCITRAL)

Vienna, Austria, July, 2015

Participation by Dr. Ana Elizabeth Villalta Vizcarra – CJI/doc.485/15

2. Meetings sponsored by the Inter-American Juridical Committee

The Inter-American Juridical Committee welcomed the following persons as guests and visitors at its sessions during 2015:

During the 86th regular session, held in Rio de Janeiro, Brazil:

There were no visits during this regular session.

During the 87th regular session, held in Rio de Janeiro, Brazil:

1) August 3 and 4, 2015: Visit of the Secretary General of the OAS, Dr. Luis Almagro.

At the meeting with the Secretary General, he presented his vision of the future of the OAS and the preeminent position of the Juridical Committee therein. The Members thanked him for his presence and exchanged ideas with Mr. Almagro about the topics on the agenda of the Juridical Committee and better ways to support implementation of the vision of the Secretary General for the Organization. The plan to draft the multiyear agenda for the Committee was also discussed, as well as the Committee's budget constraints, particularly, with regards to grants for the Course on International Law.

2) August 3, 2015, at 15:00: Visit of Dr. Antonio P. Cachapuz de Medeiros (Legal Counsel to the Ministry of Foreign Relations).

Brazil's Legal Counsel to the Ministry of Foreign Relations participated in the opening session of the Committee, where he underscored how pleased his country is in welcoming and hosting the Inter-American Juridical Committee, whose contributions and efforts are of great interest. He highlighted the Organization's responsibility with regard to developing and learning about the issues in the sphere of International Law.

3) August 4, 2014, at 9:30 AM: Visit of Professor Pierre Olivier Sur (President of the Paris' Bar Association)

The Professor spoke about the far-reaching role of the Ordre des Avocats de Paris (Paris' Bar Association) and the work it carries out both inside and outside France. There was also a space devoted to topics of International Criminal Law, its influence on several countries; in addition to efforts to combat terrorism and drug trafficking.

4) August 5, 2015, at 12:00 PM: Visit of the Secretary of the Commission of the African Union at the Office of Legal Counsel, Mr. Mourad Ben Dhiab.

The Secretary of the Commission of the African Union reiterated the interest in entering into a cooperation agreement with the juridical and he put forth several action proposals, which could be jointly conducted, incorporating both bodies and their secretariats, which include but are not limited to: information sharing; training on case file and document management; creating technical training courses and seminars; and, publication exchange. The Vice Chair took note of the possibility of adopting an agreement or signing a letter of intent to serve as a basis for a cooperation agreement.

5) August 6, 2015, at 09:30 AM: Visit of Professor Eduardo Vio Grossi (Judge of the Inter-American Court of Human Rights)

Judge Vio Grossi, who was also a Member of the Inter-American Juridical Committee, referred to the importance of strengthening relations between the Inter-American Court of Human Rights and the Committee, illustrating various issues that the two bodies have in common. In this regard, he proposed to formalize a bilateral cooperation agreement to include: 1) formalize a procedure that allows the Court to request legal opinions to the CJI; 2) institutionalize the participation of a member of the Court in the course; and 3) facilitate the exchange of information. At the end of his presentation, Judge Vio Grossi mentioned the most significant elements of his class in the Inter-American Course. In addition, he answered questions about the recent jurisprudence of the Court.

6) August 6, 2015, at 10:30 AM: Visit of Professor Edison Lanza (IACHR Special Rapporteur for Freedom of Expression)

The Rapporteur for Freedom of Expression specifically addressed the topic of new media, such as the social media networks, which have enabled freedom of expression to expand its reach, but which could also have the opposite effect, when they lead to loss of privacy or misuse of personal information. He congratulated the Juridical Committee for approving the Guiding Principles on Protection of Privacy and Personal Data, and invited the Committee Rapporteur to a meeting to discuss developments on the topic in the Inter-American System.

7) August 10, 2015, at 9:30 AM: Visit of Dr. María del Pilar Bonilla (Professor of the Universidad Francisco Marroquín of Guatemala).

The Professor explained the development of the topic of secured transactions in the Americas. She illustrated practical aspects of the success of the Model Law on Secured Transactions in countries of Central America, particularly Guatemala. She also noted the relevance of its nature as a model law, inasmuch as it can be tailored to fit the particular circumstances of every country.

8) August 10, 2015, at 10:30 AM: Visit of Drs. Anton Camen (Regional Legal Advisor for Latin America and the Caribbean) and Gabriel Valladares (Legal Counsel of the Regional office for Latin America and the Caribbean) of the International Committee of the Red Cross (ICRC).

The ICRC members reported on the recent developments in the field of International Humanitarian Law, emphasizing the United Nations Arms Trade Treaty. They also discussed the importance of studies on interpreting existing international treaties, to which OAS Member States are parties.

9) August 11, 2015, at 12:30 PM: Visit of Professor Antonio Augusto Cançado Trindade (Judge of the International Court of Justice).

The Members of the Committee requested explanations on the doctrine of conformity control (“*control de convencionalidad*”), in addition to learning his position on recent developments in International Law by the International Court of Justice. Judge Cançado Trindade suggested that an examination on conformity control must not approach the topic in such a way as to narrow Human Rights protection. He stated that one of the major challenges of International Law is access to justice. Furthermore, he noted that the existence of different international tribunals important as fosters protection.

10) August 12, 2015, at 12:30 PM: Visit of Drs. Juan Carlos Murillo and Juan Ignacio Mondelli of the Regional Legal Unit for the Americas of the United Nations High Commissioner for Refugees (UNHCR).

Dr. Juan Carlos Murillo, Director of the aforementioned Unit, reported to the Committee Members on recent developments regarding refugees in the Hemisphere, and specifically referred to implementation of the Brasilia Plan, which is designed to protect refugees in the Americas and bring the Cartagena principles up to date. Dr. Juan Ignacio Mondelli, Regional Protection Officer, for his part, gave a presentation on aspects of the Brasilia Plan linked to statelessness and possible ways to address it. The Members informed them about the approval of a Committee report on stateless persons.

11) Meeting on Private International Law

On August 7, 2015, the Inter-American Juridical Committee held the First Meeting on Private International Law, a joint initiative with the American Association of Private International Law (ASADIP).

The meeting brought together eight ASADIP members as presenters along with the Inter-American Juridical Committee Members. There were three working panels: the first panel discussed the Inter-American Convention on the Law Applicable to International Contracts (hereafter the Convention of Mexico City), adopted by the Inter-American Specialized Conference on Private International Law (CIDIP), in Mexico City, in 1994; the second panel covered consumer protection and the codification of International Law; and, lastly, the third panel discussed topics of interest in the area of Private International Law in the Inter-American System.

For the first panel, Dr. Nádia de Araujo (Professor at Pontifical Catholic University of Rio de Janeiro) explained the essential features of the Inter-American Convention on the Law Applicable to International Contracts, noting among others the rule on connection, party autonomy, the possibility of choosing a neutral law between parties; *renvoi* exclusion; and public policy exceptions. In terms of shortcomings, she lamented the fact that no distinction was made between B2B (Business to Business) and B2C (Business to Consumer) contracts. She also identified areas of overlap between rules proposed under the Convention of Mexico City and the principles of the Hague Conference, and suggested that as a next step the Convention of Mexico City should be enacted through a Protocol; and that new rules on contractual aspects should include issues relating to consumer contracts. After finishing her presentation, Dr. de Araujo praised the organizers for holding meetings of this kind. She noted as well that it was important for international organizations and academia to joint their efforts.

Meanwhile, Dr. Elizabeth Villalta (CJI Rapporteur for the subject), spoke about the work done in relation to the Convention of Mexico City since it was drafted. In her presentation, Dr. Villalta also described the Convention of Mexico City as innovative, noting its impact on the

harmonization of the States' legal systems by way of efficient solutions to allow, among others, autonomy for parties to choose an applicable law. She said she agreed with the proposal to relaunch the Convention of Mexico City through a protocol to clarify certain interpretations that may have contributed to the ratifications being few in number. She proposed such alternatives as the inclusion of language from a model law, by way of a reference, as has been done with certain domestic laws; or even adopting guiding principles.

Dr. D'Andrea Ramos (Professor at the Federal University of Rio Grande do Sul) pointed to some of the difficulties in federal regulatory systems when the central body is engaged in international negotiation and tries to implement and enforce rules at the domestic level, without considering domestic rules and practices.

Dr. Claudia Lima Marques (Professor at Federal University of Rio Grande do Sul) welcomed the idea of resuming the study of the Inter-American Conferences (CIDIPs). As regards international contracts, she proposed that creative mechanisms should be put in place to relaunch the Convention on the Law Applicable to International Contracts.

Dr. Juan Cerdera (Professor at the University of Buenos Aires) proposed that ASADIP should promote the topic of implementation of international contracts, and form a study group so that its findings may serve the Juridical Committee with a view to drafting a model law.

Dr. Joel Hernández García (Member of the Committee) said he sensed that all the participants agreed that uniform standards for international contracts needed to be put in place. As regards the Convention of Mexico City, he proposed to carry out a study to verify the best way forward: either for promoting greater adherence to the Convention or for drafting and endorsing other international instruments in this field, such as the Hague Principles on International Contracts.

Dr. Hernán Salinas (Member of the Committee) said he doubted that the number of ratifications or accessions to the Convention of Mexico City could be increased, considering how much time had passed since its adoption, and the type of issues the Convention covers. With regard to international trade, regional specificities can influence trade flows and, hence, how contracts are made and implemented. He proposed that international instruments that are in fact applied should be verified, particularly the Hague Principles, which appeared to be the most important.

Endorsing this argument, Dr. Elizabeth Villalta proposed to conduct a study to check the current hemispheric and international rules on international contracts.

The second panel discussed consumer protection in the Americas. Dr. Claudia Lima Marques recalled the negotiations at CIDIP-VII, which reached consensus on an instrument for consumer protection in the Americas. In view of the ongoing impasse about crafting a convention on the rights of consumers in the Americas, she recommended to draft model rules to deal with distance contracting.

Dr. Jean-Michel Arrighi (Secretary for Legal Affairs of the OAS) spoke about developments and challenges in the codification of Private International Law. He expressed an interest in seeing the system of CIDIPs relaunched by making every effort to include all stakeholders of the system – those coming from civil law as well as the common law.

The experts made a variety of comments and recommendations urging the OAS to work on consumer rights. Dr. Juan Cerdera proposed, for instance, to draft a model instrument; while Dr. Callabaci (Professor at the Federal University of Rio de Janeiro) suggested that the Committee should include this topic on its agenda. For his part, Dr. Klausner (Professor at the Catholic University of Petrópolis) called for law applicable to consumers to be included in instruments on international contracts.

The third panel discussed future issues on Private International Law. During that discussion, the Department of International Law screened a video featuring the implementation of the Model

Law on Secured Transactions in El Salvador. Dr. Dante Negro (Director of the Department of International Law of the OAS) explained how this Model Law had directly impacted the citizens of the Americas. He mentioned in particular the effect on access to loans for small and medium-size enterprises (which contributes directly to GDP growth in every State), thereby affecting a significant proportion of women. Hence, the OAS instrument has influenced the member countries' economic, social, and legislative development by providing opportunity for sectors that were hitherto not part of the formal economy; and had contributed to the harmonization of laws in the Hemisphere.

Dr. David P. Stewart (Member of the Committee and Vice President of ASADIP) thanked the guests for coming and for participating in the event which was an opportunity to share information with members of other segments of academia, especially ASADIP.

Regarding the Committee's work, Dr. Stewart gave a brief overview of current agenda issues in Private International Law, including the law applicable to international contracts, as well as electronic warehouse receipts for agricultural products. He further recalled certain reports delivered over the last few years, relating privacy and data protection and simplified joint stock companies, culminating in the adoption of a model law, for the latter.

He spoke next about modalities of studies undertaken by the Committee, the support they lend to other OAS organs and Member States, and how its work can impact life for individuals.

In terms of methodology, he reaffirmed that certain international instruments do have advantages that afford States more flexibility in implementing them – mindful of the constraints that come with binding instruments, through ratification and implementation processes.

In concluding his presentation, he touched on issues that could be the focus of future studies by the Committee, and urged the participants to put forward ideas, including as regards mediation and conciliation; intellectual property, particularly trademarks and patents; and law on special categories of persons like students, patients, doctors, etc.

Dr. Araujo asked the Committee to send its reports and studies to the academic community and to maintain regular contact. In terms of substantive issues, she suggested working on family law-related issues, taking into account the interaction of global and regional international instruments. In response to a comment from Prof. d'Andrea, she explained certain practical issues she had had to handle as a result of conflicts between domestic laws and International Law, and the work of central agencies.

Dr. Torres (Professor at the Federal University of Rio de Janeiro) suggested that the Committee should work on issues related to access to justice and family law (e.g., marriage, birth certificates, and dissolution of civil partnerships).

Dr. Joel Hernández García described the day as productive, noting it coincided as well with the reflections that the Committee has had with regard to drafting a multi-year guide to issues. In terms of substance, he called for a special forum devoted to domestic application and implementation of International Law. He noted the situation of Mexico and other federal States whose central agencies have to work closely with state courts to explain how international rules function. In this context, he suggested preparing a legal guide for the application of conventions adopted by the CIDIPs and by the Hague, particularly in the area of the international return of minors.

Using the Argentinean experience as his basis, Dr. Juan Cerdera argued for the creation of a guide or a system for monitoring conventions. This would include illustrations of best practices, as occurred with the conventions of the Hague Conferences. Dr. Ruth Stella Correa Palacio (Member of the Committee), noting the importance of these meetings with academia, commented on developments in the area of mediation and arbitration.

Dr. Lima Marques suggested regularizing this type of meetings, as that would also provide an avenue for raising awareness about the work of the Inter-American Juridical Committee among

academics and experts. In that connection, Dr. d'Andrea Ramos urged the Committee to cooperate with other international organizations.

For his part, Dr. Augusto Jaeger (Professor at the Federal University of Rio Grande do Sul) expressed his appreciation for the meeting, which discussed a variety of issues of interest in terms of the future of Private International Law.

At the end of the meeting, the Vice Chairman of the Committee, thanked the presence of the guests and welcomed the quality of the presentations in the field of Private International Law, and expressed his resolve to celebrate events of the same nature in the future.

3. Cooperation through bilateral agreements signed in 2015

Over the course of the year, the Inter-American Juridical Committee signed two cooperation agreements with academic institutions in Brazil aimed at promoting international law and the inter-American system.

- Memorandum of understanding with the General Secretariat of the Organization of American States and the School of Law of the University of São Paulo (USP), Brazil.
- Memorandum of understanding between the General Secretariat of the Organization of American States and the University of the State of Rio de Janeiro (UERJ), Brazil.

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