

Inter-American Court of Justice

Reports and Resolutions:

CJI/RES.121 (LXX-O/07)	Some comments on the challenges of the Inter-American Juridical Committee on occasion of its centenary
CJI/RES.134 (LXXI-O/07)	Inter-American Court of Justice (IACJ)
CJI/doc.283/07	Reasoned vote: Inter-American Court of Justice (presented by Dr. Eduardo Vio Grossi)
CJI/doc. 241/07	Inter-American Court of Justice (IACJ): some comments on the challenges of the Inter-American Juridical Committee on occasion of its centenary (presented by Dr. Eduardo Vio Grossi)
CJI/doc. 267/07	Inter-American Court of Justice (IACJ) (presented by Dr. Eduardo Vio Grossi)

At the 70th regular session of the Inter-American Juridical Committee (San Salvador, February-March 2007), Dr. Eduardo Vio presented document CJI/doc. 241/07, "Inter-American Court of Justice (IACJ): some comments on the challenges of the Inter-American Juridical Committee on occasion of its centenary". Introducing the document, Dr. Vio pointed out that in other OAS organs, such as the General Assembly and the Permanent Council, the essentially political views of states are expressed. The Juridical Committee, however, enjoys broad technical autonomy and a solid foundation in juridical science, allowing it to adapt to the times and pose new challenges not just for itself but also for the OAS as a whole. This very process has led to his proposal for the creation of an Inter-American Court of Justice.

He recalled that the Inter-American Juridical Committee played an important role over the years in regard to, *inter alia*, human rights, territorial waters and democracy. He pointed out that those topics needed time to mature, and as they did they helped transform the basic rules of the system. He said that the idea of an Inter-American Court of Justice was not a new one; it had been brought up in the V International Conference of the Americas in 1923, and again in the VIII Conference in 1939. The topic was also discussed by the IAJC itself back in 1993, taking up prior work done in 1990 and 1991. At that time a proposal was put forward to establish a criminal law chamber within the Inter-American Court of Human Rights, but the idea did not prosper. The rapporteur indicated that his initial idea was to create a court that would resolve disputes between American states that could not be resolved by other courts, including questions of interpretation of the Charter of the OAS. This function, he stressed, is not the exclusive domain of the political organs. Such a court would have to be equipped with built-in flexibility so as to be able to adapt according to the function assigned it. If it were asked to interpret the Charter, it could operate on the basis of one or two sessions per year. If an interpretation were needed urgently, it could convene a special session. Thus it need not be a permanent court. The same would go for disputes; it would convene in accordance with what the parties agreed or committed to. Dr. Vio went on to mention two alternatives. One would be the creation of a new organ with its own

infrastructure, if the member States were to so decide. The other solution, which would avoid augmenting the bureaucracy and costs of the OAS, would be to transform the Juridical Committee into an Inter-American Court of Justice – either temporarily or in an ongoing fashion. It would be temporary when asked by the General Assembly or Permanent Council to interpret the Charter. It would be ongoing if States were to ask the Committee to act as a court to resolve a dispute. In the latter case, the states would finance all costs, as is done with courts of arbitration. Said transformation would give the Inter-American Juridical Committee major international relevance with no additional cost to the OAS, and it would result in better use of existing administrative and technical structures.

Dr. Jean-Paul Hubert mentioned that establishing a court was once considered a revolutionary act and perhaps still would be today. To transform the Inter-American Juridical Committee into a court, and its members into judges, is a revolutionary idea on which all should express an opinion.

Dr. Galo Leoro said that it was an interesting idea but would be very difficult to carry out. He recalled other proposals within the OAS involving questions of jurisdiction that never progressed. He stressed that an Inter-American Court with jurisdiction no broader than that of the Court in The Hague would have no real purpose, if that were indeed the idea. He expressed sympathy with the idea of making the Committee into a Court, but he added that he didn't see it as an effective solution as members would have to possess different qualities than is currently the case, otherwise states would be very reluctant to submit cases in the absence of legal guarantees on decisions. He thought that it would be necessary to first have a draft text defining the scope of the attributes of the Juridical Committee in the future, its new organizational structure and the requirements for members. This would form the basis for further discussion on the possible creation of an Inter-American Court.

Dr. Mauricio Herdocia said that the document introduced a topic long due for in-depth discussion within the Inter-American system – dispute resolution mechanisms and their more frequent and better use - and not simply the possible creation of an Inter-American Court. He recalled that Articles XXI and XXXII of the Pact of Bogotá established recourse (within the Inter-American System) to the International Court of Justice when the parties of a dispute have not agreed to an arbitral procedure. The proposal to grant jurisdictional function to the IAJC implied amending the Charter of the OAS, as well as the dispute resolution mechanisms of the signatory states of the Pact of Bogotá. He expressed agreement with Dr. Leoro's comments on the significance of obligatory jurisdiction of the Court of Justice, which could mean that the jurisdiction of a court in the Inter-American system would not necessarily be accepted. He suggested that before looking for alternatives that could produce jurisdictional discrepancies or fragmentation, more thought was needed on ways to increase the use of the existing Inter-American dispute settlement mechanisms, be they provided for by the Charter or the Pact of Bogotá. He ended by recalling the universal nature of the International Court of Justice.

Dr. Ana Elizabeth Villalta thought it best to take more time for reflection and cited the cases taken before the Court in The Hague in which El Salvador was a party. In those cases, judges with European training were not well versed in certain principles accepted in Latin America. With that in mind, she expressed appreciation for the idea of creating an Inter-American Court. She echoed Dr. Leoro's views on jurisdiction, but expressed concern with the double function that the Juridical Committee would have, which could affect its standing as a main organ of the OAS.

Dr. Freddy Castillo said that the matter raised complex questions of jurisdiction and that he agreed with Dr. Herdocia's statement that an effort should be made to promote the use of existing dispute settlement mechanisms.

Dr. Ricardo Seitenfus posed the question of whether a regional or universal court would provide better results. He pointed out that there are varying perspectives. On the one hand, a regional court would be more familiar with matters coming before it, while a universal court could examine matters with greater distance and be in a better position to rule. He stated that as a member of the Committee, however, his function was not to judge disputes between states, but to act as a consultant. He advised caution to prevent this proposal from being seen as being in the self-interest of the Juridical Committee – namely that it was abrogating for itself powers of jurisdiction which the Charter of the OAS had not granted it. He added that, in his opinion, such a proposal should emanate from the General Assembly, Permanent Council or Secretary General.

Dr. Jorge Palacios Treviño emphasized the importance of strengthening existing dispute settlement mechanisms. He added that in his opinion a body outside of the system was better as a judge operating within the Inter-American system might feel uncomfortable deciding against a country with which s/he maintains good relations.

Dr. Antonio Pérez said that if the Member States think that the International Court of Justice is not the most appropriate instance for solving the problems of the region, it would be better that these States jointly propose amendments to the Statutes of said Court aiming at reserving a room in the Court in which the language used and the judges are representative of the continent.

Dr. Eduardo Vio summed up the debate by pointing out that they were all in agreement that there was a vacuum in the system. He indicated that if on the one hand this was an extremely difficult theme, on the other he considered that no organ of the OAS other than the Inter-American Juridical Committee could perform that function with scientific and more neutral criteria in order to improve the Inter-American system. He pointed out that the core and procedure themes obviously still had to be discussed. This implied reforming the Charter, which can be a little more difficult. He underlined that although dispute-settlement systems exist, it was important to find a different, innovative solution. In order for the Juridical Committee to study the theme, he did not find it necessary to consult the Member States or the Permanent Council; it sufficed to announce that the theme was on the Committee's agenda.

Before closing the discussion of the theme, Dr. Ricardo Seitenfus suggested that a sub-topic of this point could include juridical cooperation on Haitian affairs, and to this end he committed himself to present a document on the matter at the next regular session of the Juridical Committee.

Finally, the Inter.-American Juridical Committee approved resolution CJI/RES.121 (LXX-O/07), "Some Considerations on the Challenges of the Inter-American Juridical Committee on the occasion of its Centenary", which designates Drs. Eduardo Vio and Ricardo Seitenfus as rapporteurs of the theme and assigns them to present at the next regular session a report that, in the light of the exchange of opinions that had taken place, would not only complement and develop the content of Dr. Vio's report, but would also deal with the possibility of cooperating with the efforts of the OAS in juridical matters with the Republic of Haiti.

At the Inter-American Juridical Committee 71st session (Rio de Janeiro, August 2007) the Chairman of the Committee, Dr. Jean-Paul Hubert recalled how this topic was introduced in the Committee: at Dr. Eduardo Vio Grossi's suggestion, it had been included under the item on the challenges facing the Committee as it celebrated its centennial.

At the same session, Dr. Eduardo Vio Grossi presented a new report, CJI/doc. 267/07, titled "Inter-American Court of Justice (IACJ)", wherein he again made the point that his goal was that the Inter-American Juridical Committee's work should more closely parallel the issues that the Organization as a whole was pursuing. He pointed to the vacuum within the inter-American system: the OAS did not have an inter-American court, whereas the United Nations system had the International Court of Justice. Dr. Vio Grossi was of the view that the Inter-American Juridical Committee should revisit the idea of creating an inter-American court of justice. It would figure in the OAS Charter as an autonomous body whose purpose would be to settle disputes and issue advisory opinions. In the opinion of Dr. Vio Grossi, the Inter-American Juridical Committee could take on the role of a court serving both functions. The Committee's advisory opinions would be its legal interpretation of the questions put to it. Advisory opinions would have greater force than the reports or studies the Committee prepares. Dr. Vio Grossi acknowledged that the issue of the inter-American court's jurisdictional role was more problematic, as evidenced by the reluctance to accept the compulsory jurisdiction of the Inter-American Court of Human Rights or even the terms of the Pact of Bogotá, which refers disputes between American States to the International Court of Justice for adjudication. Dr. Vio Grossi opined that no amendment of the Charter would be needed to establish an inter-American court to perform this function. Instead, the Inter-American Juridical Committee need only be empowered to serve as a court in disputes between member States of the OAS. He also said that the time was right, since legal certainty and juridical security was one of the major concerns in relations between and among the countries of the Americas. Mechanisms, he said, were needed to settle differences. The rapporteur went on to say that this was a function that the Committee ought not to back away from; taking on this role would keep the Committee in step with the times and give it a modern dimension and a practical sense of the hemisphere.

Dr. Galo Leoro Franco thanked the rapporteur for his effort to make the case for establishing a jurisdictional or quasi-jurisdictional body within the inter-American system. Other such attempts in the past had met with no success. He reminded the members of the States' reluctance to accept the compulsory jurisdiction of the International Court of Justice at The Hague, or of the Inter-American Court of Human Rights, or even when the Permanent Council was given the authority to use its good offices to settle disputes. His view was that given the history, this issue did not have the support of the States.

Dr. Jorge Palacios Treviño supported Dr. Eduardo Vio Grossi's proposals for the reasons that the rapporteur had already explained. He agreed with that reasoning, and considered the motion to be very realistic and timely, calculated to fill a void within the inter-American system. In Dr. Palacios' view, the proposal was also an attempt to give the Inter-American Juridical Committee a more relevant role. By extending the authorities given to the Committee under the Charter, the proposal would also obviate the need to create another body to fill the jurisdictional void. Dr. Palacios was also in favor of the OAS having a court of this kind, composed of judges closer to the parties, although he still feared that no country would ultimately turn to the court, as had happened with other international courts. He also suggested that if Dr. Vio Grossi's proposal prospered, some thought should be given to a provision allowing the judges to recuse themselves should a case involve any issues that might affect their impartiality.

Dr. Freddy Castillo Castellanos was also favorably inclined toward Dr. Vio Grossi's proposal, as he believed it would lend added weight to the Juridical Committee's advisory function within a jurisdictional or quasi-jurisdictional framework, and because he felt it would afford something else that he believed to be vitally important, which was a mechanism for settling disputes where, at the parties' request, it would act as an arbitration tribunal.

Dr. Jean-Paul Hubert expressed the view that it was not very likely that the member States would be amenable to the idea of creating an inter-American court, and even less amenable to the idea of making the Juridical Committee an *ad hoc* court. The differing opinions notwithstanding, he suggested that the next step in the project would be to advise the other OAS organs of the proposal that the Juridical Committee had under discussion.

Dr. Mauricio Herdocia Sacasa congratulated Dr. Eduardo Vio Grossi for having introduced this new dimension to the Juridical Committee, with a view to revitalizing and strengthening it. He felt that these were important proposals, first because their purpose was to strengthen the Committee's authority to answer inquiries and also to serve as an arbitration tribunal. He was of the view that the proposal was legally sound, although some additional time would be needed for the proposal to materialize, since it touched upon issues of a political nature. Dr. Herdocia Sacasa remarked that even if the Committee was unable to work in that direction, it should still do something to strengthen its advisory function, even if indirectly. In his view, the avenue to follow for the Juridical Committee to begin receiving inquiries on points of law went through the Secretary General's door.

Dr. Antonio Fidel Pérez shared the opinion expressed by Dr. Jean-Paul Hubert. He was of the view that however relevant the proposal, the OAS Member States were unlikely to be very receptive. He therefore asked Dr. Vio Grossi to draft a page summarizing the proposal, and attaching the reports that the Committee adopts on the subject. Dr. Pérez also believed that it might be good to request the Secretary General's opinion on the matter and find out whether the political mechanisms could be used to carry this idea forward.

Dr. Eduardo Vio Grossi recalled that the first time he raised this topic was on the occasion of the Inter-American Juridical Committee's one hundredth anniversary. He said that however utopian the proposal might seem, its objective was achievable, since the Inter-American Juridical Committee's *raison d'être* was to contribute to the progressive development of law. He observed that while an inter-American court of justice's time may not have come and the difficulties within the inter-American system notwithstanding, this boiled down to a question of using the talent and expertise of the members of the Juridical Committee. He went on to say that the Committee already had advisory authority. As for the matter of adjudicating disputes and serving as an arbitration tribunal, the message to be conveyed to the member States would be that the Committee was available to serve those functions. On the matter of political viability, he said that, indeed, the proposal might not prosper. But he went on to point out that the process would have to be set in motion within the framework of the OAS; in other words, the issue would have to be raised with either the Permanent Council or the General Assembly. He therefore suggested a resolution welcoming the proposal; that resolution would then be transmitted to the political bodies, to apprise them of the fact that the Juridical Committee had this topic under study.

Dr. Hyacinth Evadne Lindsay acknowledged that the proposal had merit. As to the question raised by Dr. Palacios concerning the impartiality of the judges, Dr. Lindsay

was of the view that it was not necessarily true that a judge who was a national of a member State could not objectively adjudicate a case in which his or her country was involved. If the proposal moved forward, she believed that a clause should be included to allow a judge to recuse himself or herself, but that recusal should not be mandatory. She observed that this was the practice in the Caribbean Court of Justice; in that case, no clause had ever been adopted requiring judges to recuse themselves if a case was brought in which either party was a country of which they were nationals. The expertise of the judges and observance of the principle of judicial independence, she said, ensured full faith and confidence in the judgments.

Dr. Ana Elizabeth Villalta Vizcarra emphasized how important it was for the hemisphere to have its own court of justice, composed of judges versed in the principles of law current in the Americas. This would avoid expense and be very advantageous to the States. However, in order for the Juridical Committee to set itself up as a judicial body, its Statutes would have to be amended to give it that jurisdiction. Dr. Villalta said that she was not opposed to the idea of the Committee becoming a court, but she was of the view that the draft amended Statute did not fully reflect that proposal.

Dr. Antonio Fidel Pérez pointed out that the problem with the International Court of Justice, in his view, was that some of its procedures were improper and the Court itself had little knowledge of substantive inter-American laws, no insult to the Court intended. One solution to the problem, he believed, would be to explore the possibility of amending the International Court's "Rules of Procedure". However, creating an inter-American court to settle disputes between American States that have already recognized the compulsory jurisdiction of the International Court of Justice, he pointed out, would create another problem: i.e., the possibility of multiple judgments issued by different courts on the same subject, thereby complicating matters and undermining juridical certainty. Given this fact, he emphasized that any decision the Committee would adopt at this session should explicitly state that it was preliminary in nature, since the issues and concepts this topic involves needed to be explored at length; the political bodies should be advised that for now, the Committee regarded the proposal as a possibility, not inevitability.

Dr. Galo Leoro Franco remarked that the OAS already has a judicial body, and it is global in nature. The scope of its jurisdiction notwithstanding, that jurisdiction is only compulsory if the States Parties recognize it as such through an express declaration that is legally binding. Dr. Galo Leoro Franco went on to observe that the Juridical Committee did not have the authority to expand its own jurisdiction; were that the case, any organ could endow itself with that kind of jurisdiction. He pointed out that were the Juridical Committee to send this proposal to the Permanent Council and, through it, to the General Assembly, it could be said that the Juridical Committee was endowing itself with greater authority than the OAS Charter had vested in it.

Based on these discussions, the Inter-American Juridical Committee approved resolution CJI/RES.134 (LXXI-O/07), "Inter-American Court of Justice (IACJ)", wherein it takes note of the report prepared by Dr. Eduardo Vio Grossi and decides to continue to study this topic, taking into account the reasoning developed in the documents already presented. If he deemed it advisable, the rapporteur for the topic was also asked to present another report prior to December 31, 2007, without prejudice to any other reports that the co-rapporteurs might choose to present. Dr. Eduardo Vio Grossi submitted an explanation of his vote on this resolution.