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The Inter-American System and Challenges for its Future

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FIFTEENTH ANNUAL GROTIUS LECTURE

THE INTER-AMERICAN SYSTEM AND CHALLENGES FOR ITS FUTURE

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I. INTRODUCTION

Over the last two years, the member States of the OAS and the Commission itself have been engaged in a sweeping review defined as a “strengthening” process. Some of the considerations raised in this exercise have aimed at addressing what could fairly be considered as longstanding difficulties, ambiguities, or gaps in processes. However, other issues brought up relate to changes in the regional political landscape, and the ways in which the Commission, member States, and civil society interact and react to each other in the sphere of human rights.

Some of the matters pertain to the mechanisms the Commission uses to do its work, including: its procedures for reporting on specific countries of concern in its annual report; the precautionary measures it issues in situations of urgent risk of irreparable harm; and the ways that its thematic rapporteurships, such as the Rapporteurship on Freedom of Expression, are organized, are funded, and carry out their work. Other issues that have been put on the table include such

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fundamental questions as whether the Commission should continue to have its headquarters in Washington, D.C., and the way in which this organ Commission should receive and apply the external funding upon which it currently relies for half of its budget.

As part of this “strengthening” process, after extensive consultations, the Commission adopted some significant reforms to its Rules of Procedure and practices.¹ For its part, the OAS convened a Special General Assembly held on March 22 that examined the strengthening process and the reforms adopted by the Commission. The Special General Assembly included a strong debate on the future path of the Commission; I expect that a number of points of debate and contention will continue to remain on the agenda. On the positive side, the declaration adopted by the member States at the close of the Assembly recognizes the importance of the Commission’s role and clears the way for it to move out of the “strengthening” process to concentrate on its promotion and protection work.²

As we come out of this strengthening process, the Commission has very present what it has set as key challenges for the System: universal ratification of regional human rights treaties; greater and more effective access of victims to the System; enhanced compliance by States; and sufficient financing to enable the Commission to fully discharge its mandate in a timely way.

II. BACKGROUND: THE ROLE OF THE COMMISSION IN THE REGION

The Inter-American System was initiated in 1948 with the adoption of the American Declaration of Rights and Duties of Man. The Declaration is a simple and straightforward expression of basic rights. Along with the OAS Charter, the Declaration continues to

1. See Inter-American Commission on Human Rights, Resolution 1/2013, Reform of the Rules of Procedure, Policies and Practices, *available* at <http://www.oas.org/en/iachr/decisions/pdf/Resolution1-2013eng.pdf>.

2. See Organization of American States, Results of the Process of Reflection on the Workings of the Inter-American Commission on Human Rights with a View to Strengthening the Inter-American Human Rights System (Adopted at the plenary session, held on March 22, 2013 and subject to revision by the Style Committee) AG/RES. 1 (XLIV-E/13) corr. 1, *available* at <http://www.oas.org/consejo/GENERAL%20ASSEMBLY/44SGA.asp>.

serve as a common expression of commitment for OAS member States, including the United States.

As the main human rights body of the Organization of American States, the Commission has been promoting and protecting human rights in the Americas for just over fifty years. Its work covers the thirty-five independent countries of the Americas, and has included a wide range of human rights challenges faced by them.

Following the adoption of the American Declaration, the OAS member States established the Inter-American Commission on Human Rights in 1959. The Commission was initially established with vague promotional functions; its mandate as we know it today was constructed step by step, on the basis of the core beliefs and commitments reflected in the key instruments and, very importantly, on the basis of the vision and creativity of the men and women elected to serve as Commissioners.

The Commission began its work with this vision of protection, which has enabled it to act as a key participant in the advances in fundamental human rights in our region over these last fifty years.

Since its inception, the Commission has worked to combat impunity and ensure justice and accountability for human rights violations. For many years, the Commission has been playing an essential role in confronting grave and systematic human rights violations at the hands of dictatorships and authoritarian governments.

The Commission developed its mechanisms and processes gradually, on the basis of the need to confront the serious human rights violations before it. For example, the Commission began carrying out on-site fact-finding activities in the 1960s, as one of the means of addressing denunciations of widespread human rights violations, and was a pioneer in developing this investigative methodology.

During its first decades of work, the Commission played a fundamental role in denouncing grave human rights violations committed by dictatorships. The Commission was sometimes the only means for thousands of people to obtain some kind of response to unlawful arrest, incommunicado detention, torture, extrajudicial execution, and forced disappearance. The on-site visits, press releases, and country reports issued during that time brought such

abuses to light.

The Commission's 1979 on-site visit and report on Argentina provides one example. At the commemoration of that visit thirty years later, Jorge Taiana, then Foreign Minister of Argentina and former Executive Secretary of the Commission, recalled that

despite the fear and amid the campaign wages to discredit and harass the Commission and human rights organizations, the presence of an international organization allowed countless persons to go to the offices of the OAS on the Avenida de Mayo to give their testimony and file complaints concerning the disappearance of their relatives and friends.

In his words, the mission was a "turning point in the restoration of the rule of law" in Argentina.

Over decades of work, the Commission has had a tremendous impact on the situation of human rights in member States through its individual petition system. The decisions of the Commission and of the Inter-American Court have enabled victims to obtain truth, justice, and reparation, and have served to develop human rights standards that have been implemented not only in specific cases, but in broader reforms of law, policy, and practice.

For example, the Inter-American Commission and Court have each played a crucial role in establishing that amnesty laws which prevent the investigation and prosecution of serious human rights violations themselves violate international law. This work has enabled victims of grave human rights violations of dictatorships to obtain truth, justice and reparation in countries throughout the hemisphere, including Argentina, Bolivia, Chile, El Salvador, Guatemala, Paraguay, Peru, Uruguay, and others. The work done in this region to overcome amnesty laws is now taken into account in transitional justice situations in other parts of the world.

The regional human rights system not only serves as the common framework of commitment for OAS member States, it also offers important approaches for confronting some of our hemisphere's most pressing challenges. I also make reference to the legacy of the Commission's work, because it is against this legacy that we have to consider and measure the proposals that have been and will continue to be made to strengthen, change, or diminish the Commission's scope of action.

As the countries of the Americas move forward with consolidating strong democracies, the Commission and the Court are addressing the related human rights challenges. There are a number of shared, priority concerns, and the Inter-American Human Rights System offers approaches that are necessary and have an important impact at the national level.

For example, we could mention the regional consensus on the need to prevent and punish violence against women. All but three of the member States of the OAS have ratified the Inter-American Convention on Violence against Women. This treaty, known as the “Convention of Belem do Para” provides approaches that are necessary to translate the regional consensus into concrete action. We have seen its influence in changes in law, policy and practice throughout the hemisphere. The Convention of Belem do Para, especially when interpreted in relation to the UN Convention on the Elimination of All Forms of Discrimination Against Women, opens new paths forward in understanding the connections between gender-based violence and gender-based discrimination, and the strategies that are necessary to overcome them.

The Commission’s report and recommendations in the case of Maria da Penha helped bring about the issuance of a new and stronger federal law on violence against women in Brazil. The work of the Commission followed by the decision of the Inter-American Court on the “Cotton Field Case” brought against Mexico helped define standards on the investigation of patterns of gender-based violence and the forms of reparation required to remedy it. Although the United States has not ratified the Convention of Belem do Para, the Commission developed standards under the American Declaration concerning the duty of the State to respond to domestic violence when it decided the case of Jessica Lenahan Gonzales in 2011. The Commission’s report in that case focuses on the duty of the State to implement protective orders free from stereotyping and discrimination, as well as concerning its duty to fully investigate situations of domestic violence.

Another common challenge involves the causes and consequences of human migration. As States deal with the movement of migrants, and the problem of human trafficking, the regional human rights instruments and jurisprudence provide important standards and

guidance. Following intensive on-site visits, the Commission adopted two years ago a comprehensive report on these problems in the United States, and will issue a report on the situation in Mexico soon. Such reports contain specific recommendations designed to assist States in confronting what are becoming increasingly acute and complex challenges.

Due process issues are becoming increasingly prominent in the human rights agenda. In this regard, the Commission and Court have dedicated specific attention to the death penalty over the last fifteen years. While neither the American Convention nor the American Declaration prohibits the death penalty, both are interpreted and applied to impose strict limitations on its imposition and application. Most OAS member States have abolished capital punishment, but it is still retained in a substantial minority of countries.

To take one specific example, the Commission and Court have dealt with the so-called mandatory death penalty in various countries of the Caribbean, in which a conviction for murder carried the mandatory sentence of death with no possibility for a judge to consider mitigating or aggravating circumstances with respect to the perpetrator or the crime.

The work done in the System—in conjunction with that of the Eastern Caribbean Court of Appeal, the Caribbean Court of Justice, the Privy Council and national courts—has been part of an important regional process that has led to significant reforms at the national level in the area of due process and the death penalty. The Commission and Court took closely into account the work being done in the Caribbean courts and the Privy Council; in turn, those bodies paid special attention to the work being done in the Inter-American System, so that the resulting reforms were very much the result of a process of dialogue and complementation among and between the decision-making bodies.

One of the paramount challenges our countries face is that of improving citizen security and fighting crime while respecting and preserving individual rights. Through cases such as *Suarez Rosero* concerning Ecuador, *Loayza Tamayo* concerning Peru, and the Commission's precautionary measures concerning the prisoners held at Guantanamo Bay, or its Report on Terrorism and Human Rights, the System has developed standards on State action in the very

particular contexts of drug trafficking, internal armed conflict, and terrorism.

The Commission and the Court have also paid very close attention to the use and abuse of military jurisdiction to investigate and prosecute human rights violations. The decisions of both organs indicate that, in a democratic system, the use of military jurisdiction must be exceptional in nature and narrow in scope, and solely for the purpose of dealing with legal issues related to the functions that are inherent to the military. In other words, military jurisdiction is not a legitimate forum to investigate and prosecute human rights violations. When a military court assumes jurisdiction over a matter that should be brought before the civilian courts, impartiality and due process are compromised.

In light of these standards, a number of countries have effectuated reforms to significantly restrict military jurisdiction. As part of a friendly settlement reached in the Correa Belisle case before the Commission, Argentina enacted reforms sending virtually all matters arising within the military context to the civilian jurisdiction. In 2011, in compliance with the Inter-American Court's decision in the Rosendo Radilla Case, the Mexican Supreme Court set standards requiring the judiciary to ensure that members of the military accused of violating fundamental rights are tried in civilian courts.

Concerning the rights of indigenous peoples, the Commission and Court have been in the forefront in terms of developing standards concerning their right to hold their traditional territories as collective property, and to prior consultation in decisions that affect their interests. We could also speak of the extensive work of the System in the area of freedom of expression, particularly in terms of combating the laws that made it a criminal offense to criticize public officials.

In this first half century of its life, these cornerstone achievements of the Commission are marked by a singular dignity: that of a body that understands International Human Rights also as a narrative through which we can build a better civilization.

III. THE PRESENT (STRENGTHENING THE COMMISSION)

In June 2011, the Permanent Council of the OAS created the Special Working Group to Reflect on the Workings of the Inter-

American Commission on Human Rights with a View to Strengthening the Inter-American Human Rights System.³ In December 2011, the Working Group adopted its report; and in January 2012, the report was approved by the Permanent Council.

For its part, in March 2012 the International Coalition of Human Rights Organizations in the Americas, representing more than 700 civil society organizations, expressed its opinion on a number of the approved recommendations at a public hearing before the Commission.

The Commission initiated a broad and inclusive process of consultation on its mechanisms, with particular focus on individual petitions and cases; precautionary measures; monitoring of the human rights situation in countries; promotion; and universality. The consultations had an online component and included five subregional forums, as well as meetings organized by non-governmental organizations and universities. After issuing its report on the process, in February 2013 the Commission published a set of draft reforms and announced a new open consultation process.

The proposals for the reform of the Rules, policies, and practices of the Commission resulted from very careful consideration of all the comments received. A thorough analysis of the workings of the Inter-American Human Rights System, was again carried out by the Commission during its March 2013 sessions, after which it announced the corresponding reforms.

There are four main changes reflected in the reform:

First, the Commission has adopted certain changes concerning the process for deciding on precautionary measures. The principal change is that starting on August 1, 2013, decisions on granting, modifying, and lifting precautionary measures will be adopted by means of reasoned resolutions, which will set forth the basis for the decision and the scope of the measures.

The Commission has been following the practice of publishing

3. On October 23, 2012 the IACHR presented to the Permanent Council of the Organization of American States (OAS) a response to the recommendations contained in the Report of the Special Working Group to Reflect on the Workings of the IACHR with a view to the Strengthening of the Inter-American Human Rights System.

only a very brief summary when granting or modifying a precautionary measure. The evaluation done by the Commission to decide on a precautionary measure has been recorded in internal working documents, not published or made available to the parties. The information the parties did have—and will continue to have—are the submissions contained in the file of the respective precautionary measure. Under the reformed Rules, the parties will have access to the reasoned resolutions that contain the basis for the decision; this additional information will allow them to understand the Commission’s assessment of the three elements necessary to adopt a precautionary measure: urgency, seriousness, and risk of irreparable harm. Consequently, the parties will know what they need to demonstrate for the measures to be kept in place, modified, or lifted. In sum, the purpose of the reform is to make the process more certain, clear and transparent.

A second reform concerns the individual petition system. The most significant change in this regard has to do with the way the Commission reviews incoming petitions. I have to note here that one of the most problematic consequences of the chronically insufficient funding available to the Commission is an increasing backlog given the ever-growing number of new petitions filed, and the consequent increasing delay in the ability to decide whether new petitions meet the requirements for processing. The Commission has historically processed about twelve percent of the petitions it receives. At present, petitioners may have to wait up to four years to receive an answer as to whether their petition meets the requirements to be processed.

The Commission has historically proceeded to examine new petitions based on chronology, “first in, first out.” Over the past several years, however, the Commission has begun to define certain categories of petitions that may require expedited review, such as those concerning persons sentenced to death; persons deprived of liberty; young children; matters the passage of time could render an eventual resolution ineffective; carriers of terminal diseases; and persons over seventy years of age. The principal reform adopted is to codify these special categories to provide clarity to the process and to make it more transparent for all users of the System.

The third change has to do with the criteria the Commission

applies to determine which countries—if any—should be included in the section traditionally known as chapter IV of its annual report. The reforms adopted include adjustments and refinements in these criteria, providing member States and users in general with further information about the considerations that will be taken into account in making this determination. The reforms also provide further definition about the circumstances under which a State may move from chapter IV to a special country report, and under what circumstances a State may receive follow up attention in the context of chapter V.

The fourth change is that the reforms call for a restructuring of the Commission's Annual Report. While this is relevant in terms of making information more transparent and accessible, it is not a broad, deep, or substantive change.

On March 22, 2013 the member States of the OAS held a Special General Assembly, the overall outcome of which was to take note of the measures adopted by the Commission, and that these measures must now be implemented. This was an important milestone for the Commission, as it enables us to understand that the process of adopting reforms has been completed, and that we must now turn to their implementation and to retaking the Commission's substantive mandate with renewed focus.

IV. PROSPECTIVE (CONCLUSION)

The Commission faces three central ongoing challenges:

First, the System is designed so that the member States accept certain commitments, either under the OAS Charter and the American Declaration, or under the American Convention and the other regional human rights treaties. Once the member States accept these commitments, there must necessarily be a process to ensure that those protections that are not already reflected in law and practice at the national level are incorporated in legislative and other means.

One of the main deficiencies reflected across all of the Commission's mechanisms is that large sectors of the population in many countries lack access to available and effective judicial protection at the domestic level. This is especially so in the case of persons who by reason of gender, race, ethnicity, poverty, or a

multiplicity of such factors, have suffered historical discrimination and exclusion. While numerous advances have taken place in the System, as well as reforms of law, policy, and practice, we continue to see gaps and deficiencies in due process at the national level. The regional human rights system is necessarily a complementary source of redress and protection for victims. The cases before the System point out the considerable challenges at the national level and make their resolution an urgent priority, as in many cases in the United States.

A second basic challenge concerns compliance with the decisions of the Inter-American Commission and Court. While there are many examples of positive measures adopted to implement recommendations, our Annual Report is full of examples where compliance with Commission decisions remains pending. A few States have adopted legislation or other measures to facilitate compliance with decisions and with friendly settlement agreements and these are important. Over the last five years, the OAS General Assembly has adopted a number of resolutions in which it has underscored the importance of compliance with the Commission's recommendations. Nonetheless, the Commission considers that many measures have yet to be taken, including by the political bodies of the OAS, to bring about effective response at the level required by the System.

Finally, the efficacy of the regional human rights system is directly linked to the availability of resources that enable it to operate in accordance with the requirements of the mandate. The capacity of the Commission to respond to the need requires a corresponding commitment on the part of the member States, and an organizational structure that can handle the challenges.

Whereas ten or fifteen years ago the Commission received some 500 cases a year, that annual number is now close to 2000. The number of petitions has risen steadily, as well as the requests for precautionary measures, which exceeded 450 last year. The demand is clear, the challenges are defined, but the resources are insufficient. The Commission has a strategic plan that maps out an integral plan to respond to these demands, and maps out the resources necessary to implement it.

In this reality, the strengthening of the regional systems becomes a

great challenge. The Americas are going through a new and different context, where the unipolar world is left behind. What is required now, ever increasingly, is the example and congruence in the local application of international human rights standards to assume regional and global leadership.

We are living a new time, where economic and political blocs, as well as institutions are being created. We have NAFTA and MERCOSUR; UNASUR, CELAC, or ALBA. Other examples are the Caribbean Court or Central American mechanisms. All of these regional initiatives generate a challenge for the OAS, and for the way of building international law standards.

This context makes it a duty to strengthen human rights mechanisms such as the Inter-American Commission. It becomes essential to seek greater coherence between the discourse and the economic contributions, as well as to solidify compliance with the recommendations and judgments of the organs of the System.

Just like the Commission has developed throughout its history the mechanisms and instruments to respond to each given situation, the signs of these times must be read to give better responses and to advance toward a new stage in International Human Rights Law.

Some examples are the strengthening of the work of Rapporteurships and Units; the advancement in areas such as economic, social, cultural, and environmental rights; the improvement of international standards to address the situation of the most disadvantaged persons in the continent, among them, human rights defenders, journalists, persons deprived of liberty, women, communities, indigenous peoples, lesbians, gays and trans, bisexual and intersex persons, migrants, afrodescendants, and children.

The Inter-American Human Rights System was built by many persons, including victims, State representatives, members of civil society organizations, Commissioners, and countless others, each of whom contributed their special vision, wisdom, pain, hope, and consistency. This is one example of how to build international law in a multipolar world.

We have many challenges before us; however, we must not forget our past, the legacy received from those who came before us. When considering the Commission's strength, capacities, tradition, and the fact that it is considered by the international community at large as

the common heritage of the peoples of the Americas, I place my bet, once again, in the civilizing process of human rights.