THE 50 YEARS OF THE INTER-AMERICAN HUMAN RIGHTS SYSTEM:

A PROPOSED REFLECTION ABOUT NESSESARY STRATEGIC CHANGES

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Anniversaries, particularly those that reach important milestones, are good opportunities to reflect on achieved goals and present challenges. The year 2008 will mark sixty years since the adoption of the American Declaration of Rights and Duties of Man (Declaration) and it was 30 years ago that The American Convention on Human Rights (Convention) came into effect. In the year 2009, the Inter-American Commission for Human Rights (Commission or IACHR) will celebrate 50 years of existence, it will be the 40th. anniversary of the adoption of the Convention, and the 30th. of the installation of the Inter-American Court for Human Rights (Court). Without a doubt, these significant anniversaries invite reflection on the current situation of the Inter-American system for human rights and preparation necessary to confront the next five decades.

A STRATEGIC AND INTEGRAL VIEW OF THE REGIONAL HUMAN RIGHTS SITUATION AND THE INTER-AMERICAN SYSTEM'S NEEDS

The reflection should have the strategic objective of strengthening the Inter-American system by identifying the measures necessary to allow the Commission and the Court to play a more effective role in the promotion and the protection of human rights in the region. A characteristic that distinguishes the Inter-American system from other human rights systems is its adaptive capacity to respond to the needs of different historical moments. The most successful tools of the system such as on-site visits, preparation and publication of country reports, the adoption of precautionary and provisional measures, the Court's judgments, friendly settlements, thematic reports and the jurisprudence on reparations, arose or were strengthened or redefined in specific historical contexts to timely respond to the region's demands.

However, discussions about evaluating, reforming, perfecting or strengthening the Inter-American system[1] generally do not start by analyzing the regional historical context. Nor do they attempt to identify the human rights needs or likely future challenges. On the contrary, these discussions usually limit themselves to proposing changes in the Regulations of the Commission or the Court, affecting for example admissibility, hearings, precautionary measures, role of the Commission in front of the Court, etc. These debates usually refer to but never find a solution for the triad of centrally structural problems that confront the system and that require the utmost attention: the lack of financial resources, compliance with its decisions, and universal ratification of the Inter-American human rights treaties.

[1] Despite the fact, that in many instances, *evaluating, reforming, perfectioning and strengthening* of the Inter-American system are use as interchangeable words, they have different meaning and pursue different goals. These terms are used by people who take different positions on the current situation and the proposed future shape and role of the Inter-American Human Rights System.

In its last Annual Reports the Commission emphasized the structural weaknesses of democratic institutions, the structural shortcomings of judicial powers, the gaps and contrasts in the world's most unequal region and the lack of enjoyment of basic rights by important groups. Given this situation and other diagnostics that could include or exclude certain issues, place more or less emphasis on some of them, what kind of Inter-American System is necessary to address this situation today and in the next five decades? A reflection on the System should not be done exclusively from a *procedural* logic that concentrates on the Inter-American Regulations or the internal processes of the Commission or the Court; instead, the reflection should be conducted principally from a *substantive* logic that concentrates on the regional human rights needs and how the System attends to them.

The weaknesses of many democratic institutions, in conjunction with the presence of democratic governments and vibrant civil societies, make essential that the Inter-American system and the OAS redefine their vision and their role. In the last decade, the emphasis on the "*judicialization*" of the System[2] has not successfully given an adequate answer to the demands of vast sectors of the population, nor has it taken advantage of all the space that democratic governments provide. For this reason, we propose a strategic reflection on the System that identifies the human rights needs in the countries and on the capacity of Commission and the Court to respond to those demands. This reflection should lead to the generation of consensus regarding the importance of re-enforcing those areas of successful work; identifying situations and groups that are weakly attended by the System; and finally, eliminating, modifying, and improving aspects that are dysfunctional to the central objective of protecting human rights.

THE NEED TO CENTRALIZE HUMAN RIGHTS IN THE OAS

The OAS needs to mainstream its work around human rights issues. It is the only possibility for the OAS and its human rights system to strengthen its contribution to the enjoyment of fundamental liberties in the region and to support States to overcome structural problems and institutional weaknesses in the protection of rights. Promissory, the OAS Secretary General has said that "consistent with the demands of the Heads of State and the OAS General Assembly, I have included the area of human rights as one of the four programmatic axis for the hemispheric agenda" However, these and similar manifestations get translated into concrete actions.

Normatively, article 2 of the OAS Charter does not include as one of its "essential purposes" of the Organization the "defense and promotion of human rights". If effectively, the promotion and protection of human rights constitute one of the hemispheric priorities, the OAS Charter should be modified to include the promotion and protection of human rights as one of the essential purposes of the Organization. In addition, given that the System's two central bodies are the Court and the Commission, the Charter should be amended to include the Court to rectify

[2] By *judicialization* I refer to two parallel and complementary processes: an increased emphasis on the case system rather than in the other tools of the System and a more judicially like approach to the processing of cases (particularly in front of the Commission, a quasi-judicial but not judicial body).

the fact that currently only the Commission is recognized. Last but not least, the OAS Charter should guarantee and recognize the independence and autonomy of the Commission and the Court, and their respective Secretariats, as the founding principle of the effectiveness, legitimacy, and credibility of the Inter-American system.

More than just normatively, the OAS should mainstream human rights work. Particularly the OAS budget must show that the defense and promotion of human rights represents more than 5% of the political priorities of the Organization as reflected in the way that the OAS assigns its budgetary resources currently. If as the Secretary General indicates, human rights constitute one of the four OAS thematic priorities, the Inter-American Human Rights System should receive at least 25% of the Organization's budget.

To better protect the human rights of its population, the OAS should encourage and ideally require that the Member States become party to the Convention and accept the jurisdiction of the Court, central axes to the System. The OAS should create sufficient incentives so that all OAS States in a reasonable time ratify the Convention and accept the jurisdiction of the Court. For example, the year 2019, a little more than 10 years from now and the 50th. anniversary of the adoption of the Convention could be the year when universal adhesion to the Convention and acceptance of the Court's jurisdiction will be accomplished. In order to accomplish such an ambitious goal, the Commission and the Secretary General should design a strategy to work in conjunction with the States to encourage and support the ratification process. In the meantime, the States that have not yet ratified the Convention or accepted the jurisdiction of the Court should periodically inform the Permanent Council, the Secretary General and the Commission how their legislation and practice work to respect the rights guaranteed by the Convention. In these reports, the States should also specify the steps taken to ratify the Convention, including the difficulties they face and how they intend to overcame those difficulties. Based on these reports, the Commission should elaborate a plan of action, including technical assistance, to facilitate the State's process of ratification of the Convention and acceptance of the Court's jurisdiction. Perhaps at the end of the proposed time period for universal participation in the human rights system, the OAS should consider whether those States that have not adhered to the central inter-American human rights treaty can continue being members of the Organization or enjoy the same rights as the States that fully participate in the Inter-American system.

THE LINK BETWEEN THE PROTECTION OF DEMOCRACY AND THE DEFENSE OF HUMAN RIGHTS

The Inter-American Democratic Charter highlights the relationship between democracy and human rights. In this sense, it is essential to link the mechanisms at the OAS which have been develop to respond to crises of democratic governance to the mechanisms for the protection of fundamental human rights. Grave and systematic violations of human rights and the repeated failure to comply with the decisions of the Commission and the Court should trigger the mechanisms of protection of democracy included in the Democratic Charter. At the same time, to avoid the deepening of democratic crisis that many times generates political violence, the Democratic Charter should establish some type of early warning system issue by the Commission.

In order to secure the proper link between threats to democracy and lack of enjoyment of fundamental human rights, the Democratic Charter should award the IACHR the capacity to trigger the mechanisms for the institutional protection of democracy (Articles 18 and 20 of the Democratic Charter). That not only will give more credibility and independence to this mechanism, but would also introduce a human rights analytical element to the determination of democratic quality.

THE NECESSITY OF REFORM OF THE CASE SYSTEM: NEW ROLES FOR THE COMMISSION AND FOR THE COURT

The need of reform of the case system

The reform of the Rules of the Commission and the Court in 2001 produced important effects in the case system such as: an increased number of cases referred to the Court; more autonomous participation of victims and their representatives in front of the Court; increase in the number of admissibility decisions by the IACHR, and decrease in the number of final reports published by the Commission. Overall, there is a decreased in the total number of cases decided by the System as a whole. The *judicialization* has not brought an increased production on cases.

At the same time and due in part to these changes, the Inter-American system in its actual configuration appears dysfunctional in two fundamental areas. The first refers to the questions of admissibility decisions that, in many instances, are examined anew by the Court in the preliminary objections phase. The second aspect refers to duplication in the production of evidence and in the legal and factual determinations. All the evidence, documents and testimonies are produced, debated, and analyzed before the IACHR and then again before the Court. In fact, the Court in some occasions makes factual determinations anew even when the State has accepted the facts as presented by the IACHR. These duplications generate unnecessary financial, human and time cost burden in a system lacking all these resources. This problem has been reproducing since the first contentious case in the Court more than 20 years ago, but was aggravated by the regulatory reforms of 2001, given the increased number of cases, the appearance of the victims as an autonomous party and the renewed emphasis that the Court places on the evidentiary stage.

The Proposal

To overcome this dysfunctional System and to give the Commission more resources and time to work hand in hand with Governments and civil society in solving structural human rights problems, it is required to reform certain aspects of the Convention, without opening the debate about the contents of the recognized rights. The reformed Convention should clearly establish a division of work between the Commission and the Court and the direct access of victims to the Court once the IACHR has concluded the process.

In this new conventional model, the Commission would be exclusively an organ of admissibility and friendly settlement and the Court a tribunal that receives the evidence and makes final determinations of facts and law. The Commission, in addition to its prerogatives

outside the case system, would limit its involvement in individual petitions to the consideration and adoption of admissibility reports and friendly settlement solutions. The production of evidence in front of the IACHR would be limited purely and exclusively to the aspects of admissibility. The Commission's decisions on admissibility would be final and not subject to appeal or review by the Court. The friendly settlement stage would have a pre-determined time limit, for example, six months that could be extended solely by agreement between the petitioners and the respective State. If a friendly settlement is reached, the Commission would draw up a report as is currently done the process.

If a settlement is not reached, the case would automatically pass to the Court without the preparation of an application (*demanda)* by the Commission, neither transforming the IACHR into a litigant or plaintiff. What is more important, the Commission will refer the case to the Court without any determination on the merits of the case. Once the case reaches the Court, the dispute would be between the victim and her representatives and the respective State. The Commission would not play the role of litigant or plaintiff, but will act only as an organ of the Organization that represents all of the States of the Organization (articles 35 of the Convention and 2 of the IACHR's Statute) and as an assistant in the search for justice. In this aspect, the Commission should be able to question the two parties (States and the victims) as well as witnesses and experts and then present its view, legal opinion, and a proposed solution for the consideration of the Court.

- The benefits of the proposal

By eliminating its involvement in the merits stage, the Commission could count with more time to make more detailed decisions on admissibility. Additionally, by eliminating its role as an adjudicatory body on the merits and a plaintiff in front of the Court, the Commission could play a more active and impartial role in the friendly settlement process. The possibility that, if a friendly solution is not reached, the case passes automatically to the Court, would be an incentive for the State to carry out all the possible efforts to reach a solution before being confronted with a judicial proceeding. The production of admissibility decisions where the Commission states that the case involves a potential human rights violation opening the door for the automatic intervention of the Court if the friendly settlement process fails, should act as an incentive *per se*.

The Court would transform itself in a more fully judicial tribunal that both receive the evidence and determines the facts. The only difference from the current system would be that the Court would not count with the evidence produced in front of the IACHR or with the Commission's factual determination. The Court has repeated on numerous occasions that in exercising its authority, the Court is not bound by what the Commission may have previously decided, but rather is empowered to freely adjudicate, in accordance with its own appraisal. Thus, given the little or null weight that the Court gives to the Commission determinations, there would not be an intense increase in the work of the Court.

The implementation of this proposal would require, as a complement, the creation of a fund to assist the victims, given the complexities and the major cost of the litigation before the Court. In addition, until the Inter-American system does not achieve universality, the IACHR

should maintain its case adjudication faculties in relation to the States that have not ratified the Convention or accepted the jurisdiction of the Court.

This proposition, in addition to reducing the duplication of procedures, maintains intact the two levels of decisions with the highest level of compliance currently. These are the Commission's decisions on friendly settlement and the Court's final judgments on the merits. In addition, it eliminates the current tension between the role of the Commission as an impartial decision maker in the petitions process before the IACHR and then as a plaintiff before the Court. Also the proposal solves the situation of State's apparent disadvantage before the Court caused by the need to respond simultaneously to the arguments of the Commission and of the victims. Finally, this proposition will significantly reduce the volume of work of the Commission and ideally, as a result, reduce the duration of the procedure before the system. By liberating some of the Commission's time the IACHR will be able to more effectively fulfill its promotional functions and increase its technical cooperation with the States.

THE NEED TO CHANGE THE PROFILE OF WORK OF THE INTER-AMERUCAN COMMISSION ON HUMAN RIGHTS

Given the human rights situation in the Americas, there is a need to reform the profile of the Commission's work. The proposed new assignment of responsibilities in the individual petitions system will ostensibly permit the Commission liberate human and financial resources. These resources will permit the IACHR to increase its work on promotion, technical cooperation, general monitoring, interaction and dialogue with governments and civil societies and its capacity of reaction in the face of urgent situations and humanitarian crises.

The persistence of structural problems that limit the effective enjoyment of rights and the spaces opened by the presence of democratic governments demand a strengthening of the IACHR's capacity to provide technical assistance to assist democratic governments. The increased *judicialization* of the Inter-American system has limited the Commission's capacity to play a more important role in the design and adoption of public policies. The high concentration of resources in the processing of cases, has not allow the Commission to effectively utilize opportunities that democratic Governments offer and the fact that important governmental sectors are genuinely interested in overcoming human rights problems and improving the current situation.

The Commission should strengthen its technical cooperation with governments as well as create and develop strategic alliances with relevant key governmental actors in each Member State of the OAS. For example, in those countries where there exist independent and effective national human rights institutions (Ombudspersons, National Human Rights Commission, etc.) they can be strategic and fundamental allies. Supreme and Constitutional Courts, for their central institutional position in a rule of law system, should also be another strategic partner of the IACHR. The same could be said in relation to state (provincial) and local governments. However, the work that the Commission has done with these sectors thus far is scarce or null.

Based on a diagnosis elaborated with the contributions of Governments (including those mentioned in the preceding paragraph) and civil society, the Commission should develop a

thematic agenda identifying the key areas of work in each State and the region. This mapping process would allow the Commission to carry out more focused and effective work. This redefined profile would require reordering of the activities of the IACHR. The tools that help the Commission obtain a better picture of the human rights situation and the needs of the different countries such as on-site visits, general thematic hearings, or the elaboration of general reports should be strengthened.

The new proposed role of the Commission in the case system is complementary with this reinforced role of technical assistance. Through more active involvement and efforts to reach friendly settlements, the Commission will be able to promote the adoption of the public policies that are not only tied to solving specific cases but also to addressing the root causes or structural problems that gave rise to the case. Furthermore, by not being a plaintiff or a litigant in front of the Court, the Commission will be able to play a more active role in the facilitation of compliance with the Commission's recommendations as well as with the judicial decisions of the Court, trying to influence the adoption and modification of public policies.

In order to facilitate compliance with the decisions of the Inter-American system, each State should establish a national mechanism charged with the coordination, impulse and implementation of the Commission and Court decisions. This mechanism should include the participation of the most relevant institutions and ministries like Justice, Foreign Relations, Interior and Government, Defense, Treasury, Attorney General, Public Defender, Ombudsman or similar institutions. The Commission should be a permanent member of this body and participate periodically in the meetings, lending its technical capacity, and sharing its regional experience and history and knowledge of comparative best practices. This national mechanism and the Commission should report biannually to the OAS Permanent Council about their work in complying with the Inter-American system's decisions. Victims should be invited to participate in the meetings where their cases are discussed.

This political and promotional role for the Commission cannot affect or diminish the autonomy, independence or impartiality of the Commission. Consequently, the Commission will need to balance the need for close cooperation with Governments with its capacity to carry out independent and critical analysis of the human rights situation in different States.