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STRENGTHENING THE INTER-AMERICAN HUMAN RIGHTS SYSTEM: GETTING THE DEBATE ON BACK ON TRACK

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At the June 2000 OAS General Assembly, held in Windsor Canada, the member states of the OAS agreed to a resolution on the evaluation and strengthening of the inter-American human rights system. That resolution marked the latest milestone in a long-standing process of examination, evaluation, strengthening or reform -the name has shifted about- of the Inter-American human rights system, the tribunal mechanisms composed of the Washington D.C. based Inter-American Commission on Human Rights (IACHR), and the Costa Rica based Inter-American Court of Human Rights (the Court).

Because of the importance the human rights system has historically occupied within the greater context of the Inter-American system, there is enough at stake in this process to pause briefly and take stock of the debate itself. This note seeks to give the reader no so much a state of play of that process, but rather to step back from it sufficient to put some new thoughts on the table. And, pointedly, it seeks to place the debate itself under some scrutiny - to understand where it is going, where it is not going, and whether any mid-course corrections are in order to reach a desired end-game.

The debate has for years been something of a kabuki dance slow, sometimes angry, sometimes confrontational, but mostly respectful and deliberate. As in most multilateral debates, this is a contest of coalitions. Different from most, though, here alliances among countries continuously band and disband depending on the specific issue at hand, not ideology or history, making it difficult to reliably predict where and how consensus will be reached on any given issue. And, the states are far from the only players. Added to the mix are an organized and highly specialized group on non-governmental organizations, and, of course, the IACHR and Court themselves.

The ongoing strengthening or reform effort, to its credit, has also benefited from input from many sources. The IACHR hosted a seminal meeting in late 1996 which set much of the groundwork for today's work. The Santiago Summit also, at the same time that it defended and supported the human rights system, called on all of us to look for "concrete measures" for its improvement. The OAS Secretary General contributed as well with a study called *Toward a*

new Vision of the Inter-American Human Rights System, a paper which sought to enrich, catalyze and stir the debate into places it had not been before. Today's dialogue on strengthening human rights seeks to update much of that debate.

The relevant year 2000 OAS resolution is by far the most extensive to date in the reform process, containing a laundry list of recommendations which, some more than others, actually do get to the heart of a number of difficulties states have had in dealing with the Commission and Court. They range from: questions regarding admissibility decisions (the procedure by which this system admits a case); defining criteria for sending cases to the Court, need for clear deadlines, clarity on precautionary measures, and a host of other procedural matters essential to litigating confidently in a tribunal system. Regarding the Court, the states gave the nod to increasing participation of victims in the process -a significant forward step- and to efforts to streamline evidentiary matters shared between Commission and Court.

Curiously, a few year's earlier, a pitched battle was fought among some states on issuing precisely such a list. At the time, some states fought tooth and nail to eventual defeat any suggestion of telling the independent organs how to do their business. This time, with a palliative chapeau to introduce the far more extensive list of recommendations, the same states and, importantly, the organs themselves, let it go.

Depending on where you sit, this is either progress or a defeat in a war of attrition. I think it is progress. The recommendations themselves are serious and, importantly, appear by and large motivated by a desire to improve the workings of the system. In any case, it is said that when an issue appears in a resolution, it is no longer hot, controversial, or cutting edge. The system itself is probably way ahead of the game and already implementing the measures.

WHERE ARE WE GOING?

Whereas in matters of diplomacy, one can usually find the real debate in the subtext of the public deliberations, here the real issue is elsewhere. It is not in the details at all. The answer lies in a much greater debate that has not yet occurred. Indeed, since a 1995 pioneering single paragraph on reform, offered by Peru, the initiatives and the resolutions that memorialize them have grown in both scope and length, but not in their ability to zero in either on the real problems, nor on the real solutions of the *problematique* facing this hemisphere's mechanism of human rights protection.

Some of this can be explained with the advent of democracy in the region. Quite simply, democracy has been rough on this region's human rights protection mechanism. There was clarity in the black and white world of dictatorships. Today's democratic administrations, faced with a grievous human rights violation for which they or their agents are responsible, will plead with the system that they are doing the best they can (often true) and should

be given a break. The break comes, but only sometimes, giving rise to animosities and short-sighted responses from governments not unlike those seen in the days of black and white.

For many of the same reasons, there is also a sense in this hemisphere that human rights is yesterday's issue. Breaking from the past, today the discussion of human rights is met with a certain discomfort, a sense that the issue is in our history, not in our present or future. And yet a cursory glance at any of the various recent publication that yearly catalogue the condition of the region's human rights speaks volumes on the urgent need today for a strong human rights protection mechanism.

Of course the need for the system -our system- is not really at issue or in dispute. But the debate we are having has lost the forest for the trees. Finding our way back is not impossible. But it will take something of a jump. Here's how.

ASSUME FOR A MOMENT...

Assume for a moment that we have no human rights protection mechanism, and we call upon a group of government representatives and their experts to sit down with a mandate to create, on paper, a regional human rights protection mechanism for our hemisphere. Chances are there would be a good deal of consensus on its key characteristics. It would likely possess some or all of the following.

- Adherence and Compliance: The system would be subscribed or adhered to by all states in the region in the same way. And it would command such respect that crossing it would exact an immediate, unequivocal and perhaps even passionate response and sanction from the rest of its membership. Weakness and smallness of any protection system begets a more insidious, chicken-egg problem. Countries will stand up to a weak system if they predict little response. If the system is strong, it projects a priori a palpable sense of the consequences of such actions, probably preventing the action in the first place.
- A Strong Case System Known to All: It would possess a case system with the capacity to handle a significant and changing case load; move matters quickly (since justice delayed is justice denied); be widely available and relatively within reach of every citizen of the hemisphere. Related to the latter, the system would be known to all citizens under its purview: "I'll take my grievance to the OAS," would be quick on the tongue of all our hemisphere's citizens. Built into the case system would surely be a friendly settlement recourse, the kind of non-judicial conciliation device helpful to lower the volume in confrontations with states. Assuming it is a two-tiered system like ours, one would wish for fluid and efficient relations and operation between them.

- Monitoring Capacity: An independent and autonomous regional human rights system should possess a full range of human rights monitoring abilities separate from its case functions, including an "early warning" capacity. This is critical, and would contain both reactive and proactive dimensions. It would need to get its message out quickly, forcefully and with impact internationally regarding what we might call incipient and/or apparent breakdowns in the human rights environment of a member state. A second, operational dimension, it should be able to mount human rights missions of various kinds at its own initiative or at the request of a member state or the OAS as a whole. The Monitoring component might be institutionally separate and distinct from the case-adjudication component.
- Promotion and Education: The system would possess a dissemination and education component that could be called on by member states to help them set up ombudsman offices, to help stock the region's libraries, to develop human rights curricula for universities, government agencies, military training, etc. It would also additionally promote education relating to itself and access to its enforcement function. Here too, a separate and distinct institutional component might be advisable to minimize conflicts with its adjudicatory functions.
- Regional-Local Links: It would have a rational and operational relationship with a varied set of players, including but not limited to other regional and international human rights enforcement bodies. And, given the comparative advantage of its regional character, it needs a working relationship with local/domestic human rights enforcement mechanisms and judicial mechanisms.
- It would be Permanent: given the magnitude of the challenge and a growing workload, most scholars today agree that an enforcement mechanism needs to be permanent. Enough said.
- And finally, money. It is fairly obvious to say that all of this requires proper funding. The money issue is the final barometer of the true support the system enjoys, and must be treated as such in any budget exercise. But the funding issue is particularly knotty here for the structural reason that the system operates in confrontation with its natural funding sources. The resulting problems are considerable, and usually boil down, in one form or another, to the distortion that funding limits and/or drives the human rights agenda, rather than the other way round. If we were to concentrate on a single initiative that would effectively begin to solve many of the system's problems, it would be to find it a funding mechanisms that effectively gives it the necessary latitude. And these would also likely have to emanate from the member states themselves. No state is happy to have the book thrown at them, but they are even less so when someone from outside is paying for it.

The list is not exhaustive, but it goes some way toward identifying a series of fundamental characteristics we would wish for our own system. Now look to the system we have. If

we were to superimpose the general characteristics of our existing Inter-American system over this one, we would have some overlap. But on some very basic issues, we would have a clear miss.

That should not be terribly surprising. No system is strong in every category we have outlined. The lesson, then, is not that we should discard our system because it apparently isn't the human rights system we want. The real lesson to draw here is one of the methodology of the fix.

WHERE SHOULD WE GO NOW?

The debate we have had for several years departs from the system we have, not from the system we want. The recurrent reform effort, therefore, has essentially been an open-ended tinkering with a system that -however heroic- is underfunded, understaffed, not well known to the average citizen of the Americas, and not subscribed to by all the countries of the hemisphere. We are debating furiously about an Inter-American Court that has four -yes, that's four- staff lawyers. Or a Commission with 13 staff lawyers. To cover a region with a population of roughly 800 million citizens.

The debate itself needs a new center a recognition that giving the IACtHR and Court two more lawyers each may begin to solve the problems of the system we have, but not of the system we want. The debate also needs attention and interest from a new and different set of actors who are in a position to implement a fix.

Recast the Debate.

First, we should recast this debate to define what we want, compare this to what we have, and set out a blueprint for action based on where we fall short. That analysis, I believe, will take us inexorably to a discussion not of form or function (that discussion will come later) but of the scope of our system - and major funding changes. We should be prepared to peer down a vast chasm that may exist between our rhetorical support for human rights as a goal, and the actual commitment our protection mechanism receives from us. This needs to be bridged.

Who Debates What

Second, if that discussion is to have any impact and move to concrete solution, it must, by its nature, be had at the highest possible political level. For example, it appears this exercise has gone as far as it will go at the OAS whose diplomatic missions are comfortable and appropriate to manage the procedural concerns and fit them into the relevant OAS statutory structure. But in that forum, the subject today rarely even brings to the meeting room more than a handful of Member state Ambassadors to say nothing of the sea of empty seats from those missions for whom this is of even less consequence.

Even assuming a renewed interest from OAS missions, the recasting exercise is very different. The good news is we fortunately do have at this moment the attention of the hemisphere's foreign ministers. The Minister's formed in late 1999 an *ad hoc* working group on human rights under the leadership of Costa Rica. The *ad hoc* group is composed of members chosen directly by their ministers who are at once experts in the field, and high-level human rights authorities in their respective states. It is this group we should entrust to create a proposal which will refocusing the debate on what we want, rather than what we have.

Then Take it to the Summit

The Inter-American system is littered with unfunded mandates, blueprints gathering dust and good plans lying in perpetual wait. Once the *ad hoc* group creates the operative proposal, we must seal it with Presidential imprimatur at the 2001 Quebec Summit. We must obtain at a this level a fundamental decision regarding what we want our system to do and what we want it to be, and how we are going to pay for it. Quite simply, the subject is one that needs to seize both the imagination and self-assurance of the Presidential Summit process. Without that, the system's current structure and resource base creates too many countervailing answers to these questions and may condemn the debate to echo indefinitely.

Then Bring it Back to the OAS

Blueprint in hand, and Presidential guidance obtained, we should return to the OAS for execution. Whatever decision is made, it must be implemented within the statutory structure of the Inter-American system a process that the OAS forum has already shown itself able to effectively discharge. In terms of timing, we are coincidentally faced with a perfect opportunity to bring it all together under the OAS banner. The next General Assembly of the OAS is slated to take place in June 2001 in Costa Rica, whose President has already declared he wishes it to be the human rights general assembly. Following, as it does, months after the Presidential Summit of Quebec, we should use the OAS General Assembly in Costa Rica to cement the specific legislative measures needed to implement the changes to the Inter-American architecture.

Final Thoughts

Getting from here to there will require one thing we cannot take for granted: the constant participation, good will and favor of the system itself. Processes such as these arouse suspicion, especially within these institutions themselves. Some say that the human rights institutions of the system have, through no fault of their own, grown habituated to being small and we should not look to them for leadership in this process. This is a misconception. Here we confuse a siege mentality for a purposeful survival instinct. At worst, years of "evaluation" may have worn away some willingness to participate in it. But we can and must bring them inside. Here, then, are a few accompanying thoughts and caveats that might help.

- Commit at the outset to a Significant Budget Increase. There is one thing we can predict regarding the multiple solutions central to solving the system's problems. There will be a significant budget increase. Knowing this, we would allay many fears by committing to it from the outset of the exercise. We need to preclude immediately the possibility that this process is not well-intentioned. It is difficult to argue that a doubling, tripling or more of a budget -whatever form it ultimately takes- would yield a weaker system.
- The Process must have an end. Open-ended evaluation smacks of scrutiny and control, not of bona fide study and strengthening. Here the calendar helps us, what with two hemispheric milestones in the year or so ahead: the Presidential Summit in Quebec, Canada and the OAS GA in Costa Rica a few months later. We should commit to closure of this process within a time certain.
- Have faith in the Commission and Court. At every stage of the process outlined above, we need heavy reliance on the organs of the system, the Commission and Court. We cannot let it slip from center stage that they are part of the solution and not part of the problem. Poorly managed, the process could veer that way a mistake from which it is hard to recover.

This will not be easy. To quote the old cowboy adage, we must not mistake a clear view for a short distance. But I do believe the next two years or so provide us with a unique opportunity that we should take care not to squander. We look back on thirty odd years of achievement by the Inter-American system that make us proud. Their work has become central to this region's democracies, to our constitutional systems, and to our societies. Our challenge is to give them the tools to be central to our lives for the next thirty years.

The views expressed are his alone, and do not purport to be the opinion of the Secretary General.