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Workshop

Standard-setting: Lessons Learned for the Future

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NOTE ON STANDARD-SETTING IN THE INTER-AMERICAN SYSTEM OF HUMAN RIGHTS PROTECTION

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1. Here I use the term standard-setting in a restrictive sense, as a process of elaboration of human rights instruments through the codification of legal norms. I start from the assumption that regional standard setting can be a positive phenomenon. It has been encouraged by the 1993 World Conference on Human Rights that found that "[r]egional arrangements play a fundamental role in promoting and protecting human rights", at the same time it warned that they should serve to "reinforce universal human rights standards, as contained in international human rights instruments."

2. In the Americas, the regional practice on human rights is richer than its set of international treaties suggests. Indeed, a good deal of standard setting (*sensu lato*) takes place through the jurisprudence of the organs of the system, in country reports, consultative opinions and in their handling of individual petitions.

3. Standard setting in the OAS is as old as the organization. In a Bogotá Conference in 1948, the governments of the hemisphere founded the Organization of American States. At the same conference they adopted the Declaration on the Rights and Duties of Man and a Social Charter. In 1948 the OAS also adopted two conventions granting civil and political rights to women.

4. The American Declaration came to light eight months before the Universal Declaration of Human Rights, a fact that Latin American diplomats and OAS bureaucrats frequently boast of in inaugural sessions and celebrations. Less well known are some of the peculiarities of the instrument, such as the inclusion of the right to property and a final section on human duties that betrays the authoritarian leanings of the regional governments of the time. However, the Declaration has played and continues to play an important role, and the organs of the system consider it to be mandatory (while the states tend to challenge its binding character). It does constitute in any event, a normative fallback for countries that have not yet ratified the American

Convention, including the United States. Women in the region waited 46 years until a new treaty was devoted to them, this time aiming at the prevention and eradication of gender violence. A fair way to describe the fate of the Social Charter is to say that it was forgotten.[1]

5. The legal cornerstone of the system today (together with the OAS Charter and the Declaration) is the American Convention on Human Rights (Pact of San Jose de Costa Rica, 19xx). The Convention is complemented by treaties against torture, the forced disappearance of persons, gender violence and discrimination against persons with disabilities. Also, the American Convention has two Protocols namely on economic, social and cultural rights and on the abolition of the death penalty.

6. OAS rhetoric throughout decades of standard setting activity has strongly emphasized the connection between human rights and democracy. This feature (different from the universal or other regional systems) was irrelevant during the many years of authoritarianism or military dictatorship. Over the last 15 or 20 years, however, with the intensification of processes of democratization in the region, and the OAS's renewed interest in building mechanisms to guarantee democratic governance, it has gained new significance.

7. The American Convention is a treaty on civil and political rights (the regional equivalent of the ICCPR). It contains one general provision on economic, social and cultural rights that has not been tested for the moment. A quick comparison with the provisions of the ICCPR shows that there are differences, some of which may be due to the idiosyncrasies of the region. They also hint at the debates that must have taken place during the drafting, for example:

8. The Convention is weaker than the ICCPR in relation to the grounds that may trigger the derogation clause. While the universal system requires a threat to the "life of the nation", the Convention demands a lower threshold; it includes war, but also – and more worryingly – a threat to the "security of a State". Given the regional inclination to invoke threats to state security as a justification for declaring states of emergency, this constitutes a dangerous loophole through which arbitrary actions may be carried out "in conformity" with regional human rights law.

9. On a more positive note, the list of non-derogable rights is longer than in similar human rights instruments. More significantly it includes the prohibition to derogate from judicial guarantees essential for the protection of the non-derogable rights including habeas *corpus* and the Latin American institution of "*amparo*".

10. The article on the right to life in the Convention says that such right shall "be protected…in general, from the moment of conception." This has given rise to acrimonious debates between partisans and opponents of the right to abortion. The issue is far from settled but there is one decision of the IACHR that suggests that States do not need to ban abortions in order to comply with the Convention.

11. There are also differences on the issue of freedom of expression. The American system achieves a good balance between freedom of expression and the duty of States to prohibit hate speech and prohibits prior censorship. The Convention also incorporates an individual right to reply to "offensive statements or ideas disseminated to the public". However the realities of the region have compelled the regional organs of protection to elaborate standards through means other than codification – a study of the IACHR in this case – in order to protect freedom of speech from the so called "desacato" laws (see below).

[1] See: "Human Rights in Latin America and the Caribbean**:** A Regional Perspective". A paper submitted to the Human Development Report 2000 "Human Rights and Human Development" Juan E. Mendez and Javier Mariezcurrena

12. The OAS system of human rights protection has at its center the Inter-American Commission on Human Rights (with a double jurisdiction derived from the OAS Charter and the American Convention on Human Rights) and the Inter-American Court of Human Rights (created by the American Convention). Both are expert bodies composed by individuals of high standing and competence. Only the Commission plays as direct role in the codification of international human rights law and generally during the initial stages of the process. Its mandate includes making "recommendations to … states on the adoption of progressive measures in favour of human rights in the framework of …international commitments, as well as appropriate measures to further observance of those rights". Beyond a limited role in the elaboration of legal instruments, the IACHR has made a formidable contribution to the advancement of human rights in the Americas, not least during the decades when South and Central America were plagued by military dictatorship and the substance of many of its decisions have been found in subsequent draft conventions.

13. The Permanent Council of the OAS (its Committee on Juridical and Political Affairs) is the forum where most of the political negotiations on texts take place. And the General Assembly, the superior organ of the OAS, adopts the regional treaties. The American Convention was adopted by a specialized conference in 1969. Finally, the Inter American Juridical Committee, based in Rio de Janeiro, plays a technical role as an advisory body on juridical matters and is charged with the promotion of the progressive development and the codification of international law in the region.

14. Standard setting processes in the region (in the narrow sense of legal codification) have been characterized, inter alia, by the following features :

15. As in the UN system, draft instruments tend to be stronger at the beginning of the drafting process and become weaker while they climb the ladder of political approval though the institutional organs. A good example of this is the original draft of the inter American convention on forced disappearances, prepared by the IACHR in 1988 (after informal consultation with regional NGOs). The strength of that draft, that incorporated innovative and powerful mechanisms of protection (as a reaction to the systematic practice of "disappearances" in the region) served as inspiration to the UN drafting exercise (of a declaration) that was taking place at the time. However, once the instrument reached the Permanent Council stage its contents were dramatically diluted and the draft convention never recovered the protective potential of the Commission's original text.

16. The OAS has not resorted frequently to the drafting of soft law human rights instruments. While there are a plethora of resolutions emanating from the political organs of the system, these do not play the same role as the series of declarations, principles, rules and guidelines that are typical of the UN system. The latter are invaluable tools in the interpretation and definition of the scope of international human rights law and they frequently reflect best practices of states or denote the consolidation of a rule of international law. One important exception in the Inter American system is the Declaration of Principles on Freedom of Expression (adopted by the IACHR) that serves as a term of reference to the work of the Commission's Special Rapporteur on Freedom of Expression. Another case that merits attention is the process of elaboration of a declaration on the rights of indigenous peoples that was prepared by the Commission and presented for negotiations in 1997.

17. In spite of this dearth of soft law instruments, recent years have seen an increase in the studies and pronouncements by the organs of the system (in particular the IACHR) that have brought a new dynamism to the standard setting processes. One early example is the 1994 study on laws that punish offensive speech directed at public officials. These laws are known in the region as

"desacato" (contempt) laws. A number of countries still retain the criminal offence of "desacato" in their legal systems. Even if not very frequently used, these provisions are arbitrary, pose a constant threat to freedom of speech and have a paralysing effect on public debate. The study concluded that member states of the OAS should repeal or amend those laws in order to bring their legal systems in conformity with the regional human rights instruments. A more recent example is the 2002 IACHRs report on Terrorism and Human Rights, prepared in reaction to the events that followed the attacks of September 11 2001. In its report the Commission sets out a series of human rights principles that should inform the fight against terrorism. The report both clarifies and confirms the role of international law in this context. The IACHR has recently used the device of making so called "recommendations" on topics such as asylum and international crimes, on the protection of the mentally ill and the recruitment and participation of children in armed conflict. In this way the Commission can react quickly to events that are current in the human rights debate both in the region and at the international level.

18. Unlike the UN – with its system of specialized monitoring committees established by the respective human rights treaties – the OAS has a single set of monitoring organs for a plurality of human rights treaties. One known attempt to discuss the possible creation of a new Inter-American organ to monitor compliance with a human rights convention took place in the mid 1980s. A seminar was then convened to debate the possible creation of a system of visits to examine the treatment of persons deprived of their liberty with a view to preventing torture. The idea, clearly inspired by the 1987 European Convention for the Prevention of Torture, encountered fierce opposition by the IACHR. The Commission feared that the multiplication of bodies could eventually lead to the weakening of the system. Given the degree of pressure and attacks that the IACHR had encountered in the 1970s and 80s, it is difficult to judge whether this was the right or wrong direction to take at the time. The organisers of that initiative then moved to the UN arena and started work that eventually led to the elaboration of an Optional Protocol to the Convention against Torture, which was adopted in December 2002.

19. A regrettable but defining feature of standard setting processes in the OAS has been the absence of a substantive role for civil society organizations. Human rights NGOs were not allowed to take part in the formal process of elaboration and political debate on the norms until recently. The one notable exception were the informal consultations carried out by the IACHR during the early stages of the process. Otherwise NGOs had not opportunity to provide input once the negotiations on the texts started.

20. During the 1970s and 80s, and as a reaction to the systematic violations of human rights committed by the dictatorships, Latin America saw the birth of strong civil society organizations. NGOs coordinated the defence of rights and sometimes played a leading role in the restoration of democracy. Yet even once the process of democratization was well under way, in the 1990s, there was still no consultative status for NGOs. The secretariat of the OAS used to extend ad hoc "invitations" (if requested each time) to attend the General Assembly, but NGOs did not appear before the Permanent Council.

21. A hostile attitude towards NGOs prevailed in some governments of the region during the 1990s. This was not just a hangover from the years of military dictatorship. To a large extent civil society integration in OAS standard setting processes did not happen as part of the recovery of democracy in the region because of tensions brought by new human rights issues generated by the transitional processes themselves. Newly elected governments had passed amnesty laws or decreed other impunity measures for the perpetrators of systematic human rights violations during the early years of democratic recovery. These states had a virulent reaction to the 1992 resolutions of the IACHR, which found that impunity measures contravened the regional human rights legal frame. Human rights NGOs were blamed to a large extent for this and found staunch

opposition to their possible integration into the regular life of the OAS. This was bound to affect their participation in standard setting processes.

22. As a result of this civil society organizations remained mostly shut out of the political deliberations on key issues such as the Inter American convention on "disappearances". Discussions took place almost exclusively within the hermetic environment of the diplomatic missions in DC; without real specialist input, let alone hearing the voice of the victims.

23. The lack of expert input and the reality check provided by civil society organizations led to significant flaws in the texts that were being prepared during that period. By 1992, for example, the draft convention on "disappearances" was almost ready to go to the AG with a provision that affirmed the principle of due obedience as a cause of justification for the crime. It was so difficult to discuss this in Washington that the NGOs who happened to learn about it had to travel to the capital of the country that had proposed the due obedience provision and persuade the Minister of Foreign Affairs to withdraw it (to her credit, that was done immediately).

24. The result of flawed standard setting processes was that the system produced less than satisfactory legal instruments. Thus, the inter-American system now has conventions, that due to the lack of enforcement mechanisms look more like non-binding declarations than proper treaties. All that states parties to the Convention against Torture need to do to enforce the provisions of the convention is to "inform the Inter-American Commission on Human Rights of any legislative, judicial, administrative, or other measures they adopt in application of [the] Convention". And the 1994 convention against "disappearances" establishes for all mechanism that when the IACHR receives an allegation of "disappearance", the Executive Secretary "shall urgently and confidentially address the respective government, and shall request that government to provide as soon as possible information as to the whereabouts of the allegedly disappeared person". The convention to prevent discrimination against persons with disabilities sets up a committee to monitor implementation but missed the possibility of incorporating a system of individual petitions for alleged violations. And the Protocol of San Salvador on economic, social and cultural rights has a very weak protection mechanism, reserving the individual petition system only for violations of the right to education and trade union rights. The latter, however, can hardly be said to be a weakness of the Inter-American system alone.

25. These problems persisted throughout the 1990s. Even in 1999, the General Assembly came close to examining the text of a draft declaration on freedom of expression, whose provisions fell below the threshold of protection afforded by the American Convention. The elaboration process for this text took place without consultation with sectors of civil society or journalists. Eventually a number of concerned institutions mobilised and managed to bring that process to an end.

26. The convention on the elimination of violence against women stands apart from the others in this respect. It requires states to present periodic progress reports (to the Inter American Commission on Women), specifies that the issue may be the subject of advisory opinions by the Inter American Court and sets up a complaints mechanism (to be triggered by individuals or NGOs) before the Commission.

27. However, it is clear that many of the flaws that affect the other texts could have been prevented at least in part, had there been a meaningful involvement by human rights NGOs during the drafting processes and negotiations.

28. Things began to change in the early 1990s, when a general OAS reform process was sparked by the 1994 Miami summit. This meeting of heads of state began the search for a post cold war identity for the organization, always emphasising the democratic ideal, probably in a more

genuine version this time. At the same time the coordinated actions of NGOs in the General Assembly, the emergence of coalitions to advocate for specific issues as well as the incorporation of Canada – to the OAS with a more progressive vision of the role of civil society (together with Chile), prompted the opening of a debate on the role of the NGOs in the system.

29. A good experience has been the work on the rights of indigenous peoples started in the early 1990s. Since then the Commission has had a special rapporteur on the rights of indigenous people and has dealt with a number of individual complaints. In 1994 the process of elaboration and negotiation of a draft American Declaration on the Rights of Indigenous Peoples started and in 1997 the IACHR submitted the text for debate in the AG. All through the process, representatives of indigenous peoples have been consulted and their participation has reached a level of involvement unlike those of other sectors of civil society in previous standard setting exercises. The frequent formal consultations carried out to discuss the substance of the instrument and the general acceptance of their presence may well constitute useful models for future exercises.

30. The organs of civil society are today given more of a voice in the OAS, but even this level of participation was only gained at the end of a torturous process. A set of guidelines was finalised in 1999 and a register of civil society organizations was set up. Registered groups may distribute written documents during the meetings of some political organs – as well as receive documentation in advance – and give presentations at the beginning of the debates. They continue to be scrupulously excluded from deliberations and negotiations adopted by member states. This situation has been regarded as an improvement although participation is still not at the level NGOs are allowed at the UN in Geneva, where they have become a necessary and healthy ingredient of the standard setting processes. A series of meetings organized between regional leaders and civil society prior to the General Assembly or Summits has also proven to be a positive experience. The relationship of NGOs with the IACHR has always been extremely positive, and continues to be so. At the moment most of the interaction with the political bodies of the OAS takes place in context of the activities of the Permanent Council and prior to the regional summits.

31. The current standard setting agenda is part of the wider human rights agenda in the OAS. With some important exceptions, the organization is no longer forced to focus on massive or systematic violations of civil and political rights by arbitrary regimes. Current initiatives tend to be centred on issues relevant to the democratization processes, such as administration of justice or the protection of vulnerable groups. Items in the standard setting agenda of the political bodies (apart from the declaration on the rights of indigenous peoples mentioned above) include: a) the treatment of persons deprived of liberty, after Costa Rica submitted a draft declaration in 2001; b) a possible Inter-American Convention against Racial Discrimination that has been promoted by Brazil and debated since 2000; c) a draft Social Charter of the Americas and a Plan of Action recently promoted by Venezuela.