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**Plenary Speech: “Considering Hemispheric Challenges to Democracy and
Judicial Independence”**

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Thank you, Carlos.

Distinguished Panelists and Distinguished Guests.

I am honored to be among many of our hemisphere’s leading lawyers and judges. I am heartened to see that the Inter-American Bar Association has demonstrated once again that its members are engaged not only in seeking justice for their respective clients, but also in strengthening democracy and the administration of justice for the collective good of all of our societies.

While my comments today draw in part on observations I’ve accumulated in my current post, they do not necessarily reflect the opinions of the OAS, the General Secretariat or the Secretary General, I also draw in part on my experiences in legal reform and rule of law projects dating back to the earliest American Bar Association and USAID projects in Central America in the mid 1980s, and then with the World Bank in the early 1990s.

I’ll start my talk with an anecdote.

At an OAS reception several years ago, several Latin American ambassadors cornered me. They wanted me to explain what was going on in Canadian politics. At the time the fate of the government hung in the balance, with talk of coalitions, dissolution and other maneuvers.

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One ambassador asked me: "Didn't you guys just have an election?" "Yes", I replied.

Asked another: "So the other parties can just get together right away and topple the government?" "They can try through a parliamentary vote", I replied.

Asked yet another: "But the government can stop the parliamentary vote by just shutting down the Parliament if it wants to?"

"Well, yes", I replied, "if the Prime Minister gets approval from the Queen's representative".

"The Queen of England?" "Yes", I replied.

"Is the Queen's representative elected by Canadians?"

"No", I replied.

"For how long can they shut it down?"

"For as many days as they want", said I.

"What are the criteria in the Canadian Constitution or Canadian law for shutting down Parliament?"

"There are none", I replied. "It's not in the Constitution or in written law. It's a constitutional convention called prorogue."

And so it went on like this for a while, with bemused puzzlement on their faces, until one ambassador piped up: "Well, Ken, congratulations. You Canadians have been members of the OAS for less than 20 years and you have already become just like us!"

Now, the fact of the matter is that in sustaining democracy, the hemisphere has moved closer to Canada than vice versa.

This is a big change. Two decades ago social scientists openly wondered if Latin America could hold free elections and return to democracy. There was widespread skepticism that Latin America could sustain democratic systems for more than spasmodic interludes.

Two decades ago we presumed what democratic models looked like and how these models might be seeded and cultivated in undemocratic countries through training and technical assistance. Aid providers presumed that, with some proper training and technical assistance, democratic institutions, such as an independent judiciary, would flower in undemocratic countries and in countries transitioning to democracy. Many came to believe that there was a natural sequence in which the establishment of the rule of law had to precede the emergence of a democratic system.

It turns out that more was presumed than known.

As Secretary General Insulza has commented frequently, Latin America has become one of the most democratic regions in the world.

We have learned, as Thomas Carothers of the Carnegie Endowment argues persuasively, that the path to democracy is varied and defies any pattern. Democracy was reborn in this hemisphere and the rest of the world in different ways. No determinative factors exist, least of all the pre-existence of the rule of law. Economic development seems to help, but not even that is determinative. Ingraining democracy has never been the result of quick authoritarian-bypass surgery, but rather of a messy and lengthy process.

Democratic models and national constitutions can be more diverse than we realized two decades ago. When Justice Ginsburg of the US Supreme Court recommends the South African Constitution as a model for most countries in the world, she acknowledges the advances in new ideas and approaches.

Our thinking has become more flexible and expansive. Our understanding of democracy accommodates variations and nuances based on each country's historical circumstances and social, ethno-cultural and religious values. To borrow a concept adopted in European human rights law, we acknowledge a "margin of appreciation"—that is, leeway for each country to follow in its own context internationally accepted democratic norms.

We acknowledge that Canada's allowance of prorogue is not a worrisome aspect of Canadian democracy in light of Canada's infrequent use of prorogue and its traditional respect for democratic norms and institutions, such as an independent judiciary. In the context of other countries in the region, however, the closure of the legislature by the executive branch and/or the military has historically been carried out as an illegal assault on democratic order.

So, too, we acknowledge why a country transitioning to democracy may for a time guarantee military personnel senate positions—why a country that suffered from *caudillismo* would want to ban any discussion of presidential re-election—and why a country whose indigenous population has been subjugated would allow parallel legal systems which may not include some of the democratic principles we extol.

This doesn't mean that we should accept undemocratic practices under some theory of cultural or historical relativism. There is a baseline below which the practices should not fall.

Through their adoption of the of OAS's Inter-American Democratic Charter, the countries of this hemisphere were forerunners in spelling out the evolving international consensus on fundamental democratic norms. These democratic norms include, among others, respect for human rights and fundamental freedoms and recognition of the critical interconnection between democracy and fair social and economic conditions. They also include the separation of powers and independence of the branches of government. In other words, the independence of

the judiciary from the other branches of government is an essential element of democracy.

We don't have a science for measuring when an act is undemocratic or how undemocratic it is, or when an act underscores a pervasive lack of judicial independence in a particular country. We make judgments based on a pattern of acts and behavior, or an individual act or abuse of a democratic norm that violates our sense of fairness and impartiality and whose supposed justification strains credibility beyond its reasonable limits. The more that the violation strikes at the heart of a fundamental democratic right or principle, the more concerned we are, particularly in countries lacking strong institutions that act as a check on undemocratic actions.

We are encouraged to see instances of judicial independence in the region on important issues that we might not have seen in the past. There have been, for example, courageous judicial opinions in several countries with respect to presidential succession that denied the petition of the executive branch.

We have also seen glaring examples of laws, opinions and acts that strike at the core of judicial independence and impartiality. Some of these acts have been highlighted in the reports and decisions of the OAS's Inter-American Commission for Human Rights and Inter-American Court on Human Rights. These acts include judicial decisions on presidential succession and freedom of expression whose legal reasoning strains credulity beyond its natural limits. They include laws designed to allow the executive branch to exert control over all aspects of the judicial appointment, removal and adjudication process. And they include acts of the executive branch, such as threats of criminal and other vexatious actions against judges in order to force their retirement or secure favorable decisions.

The concern about judicial independence is not localized to only a handful of countries in the region. A well-known newspaper opinion columnist wrote only a couple of months ago:

"[The Supreme Court] has squandered even the semi-illusion that it is the unbiased, honest guardian of the Constitution. It is run by hacks dressed up in black robes. All the fancy diplomas of the conservative majority cannot disguise the fact that its reasoning on the most important decisions ... seems shaped more by a political handbook than a legal brief."

Many of you might believe that the sentiment could apply to a number of countries, perhaps even your own. In this case, the columnist is from the New York Times, writing about the United States Supreme Court. While no one should doubt the comparative independence of the U.S. judiciary, both long-established and more recent democracies continue to face challenges.

Establishing and ensuring judicial independence has been challenging in many countries for many reasons. While other fundamental democratic attributes existed in the region before the onset of military rule, there was a thinner history for

countries returning to elected civilian rule to draw on judicial independence from other branches of government, political influence and private economic influence. This has bred a deeply rooted cynicism.

Everyone understands that a denial of the rights to vote or to freedom of expression is undemocratic. And most everyone would understand how these abuses might be rectified.

However, while everyone understands that a compromised judiciary is a violation of a fundamental democratic right, non-lawyers are less likely to know how to fix the problem. Judicial systems are opaque to non-lawyers. It's difficult for non-lawyers to feel empowered to build a constituency to force change or find solutions. Finding a way out of the cynicism and helping to lead this constituency is the civic duty of every lawyer and bar association.

Citizen attempts to change the situation can and should be fortified by the efforts of multilateral institutions. The OAS's Inter-American Commission for Human Rights and Inter-American Court on Human Rights address undemocratic practices when they result in a deprivation of an individual's human rights as defined primarily by the American Convention on Human Rights. They do not generally interpret the norms in the Democratic Charter concerning systemic democratic deficiencies. The political bodies—the General Assembly and the Permanent Council—with input from the General Secretariat are empowered to do that.

There haven't been many interpretations. In the one recent case in which the Democratic Charter was applied—the suspension of Honduras following the 2009 coup—the OAS's political bodies might have enhanced the precedential value of their decision had they weighed with a quasi-judicial approach and temperament all facts and circumstances. They might have explained more expansively their view of the fundamental principles of Charter interpretation and application.

By adopting a more judicial approach, the countries would demonstrate their ability to analyze undemocratic acts on legal principles. This would remove as much as reasonably possible the shadow of partisan political considerations. This might also have the important effect of elevating and activating the principles in the Charter as the framework for current discussions concerning Cuba's role in hemispheric organizations and other polemical cases.

We know of course that the troubling democratic challenges we face do not derive simply from coups, though of course they must be dealt with seriously on the rare occasion in which they arise. Our main challenges are the underlying deficiencies, such as the lack of independent judiciaries that exist within democratically elected systems. If not timely addressed, the deficiencies distort the democratic life of a country and may ultimately lead to extreme disruptions of the constitutional order.

Contrast our region's response to these challenges with those of the European Union. Concerned about the Hungarian government's recent constitutional reforms which compromise judicial independence, the EU has threatened Hungary with

sanctions unless it reforms its laws to comply with the EU's "principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law".

We note that the EU acted in anticipation of an imminent problem, rather than wait until the problem manifested itself fully. The EU acted in Hungary, and its leaders have recently threatened to boycott public events in Ukraine over perceived misuse of judicial process against a former president, regardless of the fact that both governments were democratically elected.

Strengthening democracy is a lot more complicated than adopting new constitutions and laws and reforming institutions. Most countries in the region had for a long time constitutions and laws that should have been sufficient to sustain democracy. The greater challenge continues to be how the laws are applied and whether the democratic institutions are maintained with integrity.

We should not expect that more recent democracies with a lean tradition of judicial independence would solve their problems overnight. But we can hope that they develop a tradition, and that established democracies shore up their traditions, in which the political class and the judiciaries are accountable publicly for practices that defy the broad requirements of the Democratic Charter.

Our hemisphere has many of the legal tools it needs to act in these situations. It just lacks the collective will to do so.

This lack of collective will to act may be a greater threat to the future of hemispheric democracy than the undemocratic practices in individual countries.

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