



**INTER-AMERICAN CONVENTION AGAINST
RACISM AND ALL FORMS OF DISCRIMINATION
AND INTOLERANCE**

POSITION PAPER No.1

***THE NEED FOR A NARROW-FOCUSED INTER-
AMERICAN CONVENTION AGAINST RACIAL
DISCRIMINATION***

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Preface

The Organization of American States is discussing the adoption of an “Inter-American Convention against Racism and All Forms of Discrimination and Intolerance” (Draft Convention). The University of Texas School of Law Human Rights Clinic, in partnership with the Observatorio de Discriminación Racial (Racial Discrimination Observatory) of the University of Los Andes, Colombia, has prepared the following series of papers to inform the negotiation process of the Draft Convention. The purpose of the papers is to further and strengthen the negotiation process of the Draft Convention and to facilitate the participation of civil society organizations. The papers analyze particular areas of the Draft Convention identified as problematic.

The first paper, drafted by Kimberly Kamienska-Hodge and John Lajzer, explains the benefits of a narrowly focused convention that only addresses racial discrimination, and the detriments of a broad scoped convention that addresses multiple forms of discrimination. The second paper, drafted by Sara Leuschke, examines the 28 grounds currently included in the Draft Convention in the context of the international community’s approach to discrimination. The first and second papers advocate for a Draft Convention focused only on racial discrimination. The third paper, drafted by Juan Zarama and Héctor Herrera, highlights the importance of recognizing collective dimensions of discrimination, particularly with regard to historically marginalized groups, like indigenous peoples and afrodescendants, and exposes the arguments in favor of the inclusion of collective rights in the Draft Convention. The fourth paper, drafted by Annie Depper, surveys the collective claims mechanisms available in international and domestic laws, and advocates the inclusion of a collective claims mechanism in the Draft Convention. The fifth and final paper, drafted by María Laura Rojas and Camila Soto, identifies the need of the inversion of the burden of proof in cases of discrimination, and advocates for a broad regulation of the burden of proof in the Draft convention. The first, second and fourth papers were written under the supervision of Ariel E. Dulitzky. The third and fifth papers were written under the supervision of César Rodríguez Garavito, Nelson Camilo Sánchez León and Isabel Cavalier Adarve.

1. Introduction

Manifestations of discrimination, unlike conventions designed to prevent them, are seldom static. This is evident throughout the 40-year history of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD). That racism continues to be a problem on a local, regional, and global scale is a reality. That a region should seek to enact policies to correct new grey areas in international law is not the final solution; it's a beginning.

Even 40 years after its initial adoption, the definition of racial discrimination and the ideals that society is bettered only through practiced equality still hold true. But ICERD reflects the global concerns with apartheid and colonialism that were more relevant four decades ago. As such does not adequately capture all the particularities of modern racial discrimination in the Americas.

The Inter-American Convention against Racism and All Forms of Discrimination and Intolerance (Inter-American Convention) should serve two purposes: 1) provide a document that is effective and adaptable to current and future racial discrimination issues in the Americas and 2) increase internal awareness in the OAS of how multiple forms of discrimination interact with racial discrimination.

2. Diluting Effectiveness Through Expanding the Scope

Without question, the set of basic human rights initially protected and preserved within the ICERD constitute the “absolute minimum” rather than the totality of rights and freedoms desirable in the international community.¹ The initial principle behind establishing an Inter-American Convention rests on adapting and expanding the principles of an existing international convention to the environment of the OAS. The new Convention should imply a movement towards strengthening existing protections and not simple reiteration.² For instance, a Convention that focuses on racial discrimination would facilitate its effective implementation of provision such as mandatory affirmative action as opposed to permissible affirmative action. Were the Convention to remain in its current broad form, affirmative action would not necessarily be required to many of the other grounds for discrimination listed in the Draft Convention.

¹ Committee on Judicial and Political Affairs, *Preliminary Contributions by the Member-States For the Future Task of Preparing a Draft Inter-American Convention Against Racism and All forms of Discrimination and Intolerance: Brazil on December 14, 2005*, p.1; http://scm.oas.org/doc_public/ENGLISH/HIST_05/CP15486E07.doc (last visited May 4, 2009)

² Committee on Judicial and Political Affairs, *Presentation by the CIDH on Resolution AG/RES. 1905 (XXXII-O/02) on March 6, 2003*, p.6; http://scm.oas.org/doc_public/ENGLISH/HIST_03/CP10932E04.DOC (last visited May 4, 2009).

This approach will allow the OAS to move beyond simple reiteration of existing international conventions by creating a means to more easily adapt the principles within the international conventions to the realities of the region. The adaptability of this type of international convention results from the inclusiveness of the document itself, as the OAS will be able to tailor the Inter-American Convention to the needs of the region.³

This is not to say that all of the region's problems would be solved through the adoption of an Inter-American Convention. In its current state, the draft convention is wrought with problems as a result of its broad-scope approach. As mentioned earlier, the stated purpose of seeking a new convention rests within the need for reinforcement of existing international principles in a manner that properly addresses the peculiarities of the Americas.⁴ The decision to expand the scope of the Inter-American Convention beyond the issue of racial discrimination reduces the importance of properly addressing racial discrimination while simultaneously creating substantial problems in the drafting process. A broad-scope Inter-American Convention is forced to address multiple variables of discrimination ranging from ageism to xenophobia.

Each added prohibition and protection within the Inter-American Convention will require some degree of generality in order to have a Convention that covers so many different and unrelated grounds of discrimination. The need to identify common elements and standards applicable simultaneously to the 28 different prohibited grounds will require to lower the principles to the minimum common denominator. At some point, the number of concessions made in order to have general common principles will call into question the effectiveness of the document, as it will become too vague to be of any real use to the OAS.

A broad-scope convention on discrimination additionally creates a decidedly unique problem: how effective the implementation of the Convention will be? A Convention covering so many grounds of unrelated expressions of discrimination will be very difficult to be translated into achievable, measurable and enforceable domestic policies. A broad-scope convention has the potential of creating significant obstacles in its implementation as the current proposed draft convention constitutes a mixture of unrelated grounds, measures not applicable to all the different grounds and very few specific mandated targeted oriented policies. If the Convention focuses on racial discrimination alone then the language can be more specific and will be less likely to leave the door open for loopholes and there would be less room for misinterpretation or conflicts between different grounds of discriminations. A narrow focus convention will make it easier for the ratifying States to comply with, easier to monitor whether or not the articles are being adhered to, and easier to address

³ Committee on Judicial and Political Affairs, *Preliminary Contributions by the Member-States For the Future Task of Preparing a Draft Inter-American Convention Against Racism and All forms of Discrimination and Intolerance: Argentina on November 3, 2006*, p.3; http://scm.oas.org/doc_public/ENGLISH/HIST_06/CP17076E06.doc (last visited May 4, 2009).

⁴ Committee on Judicial and Political Affairs, *supra* note 11.

violations of the Convention. The Clinic recommends that the OAS continues to pursue their original purpose by adopting a narrow-focused convention on the issue of racial discrimination in the Americas.

3. The Benefits of Adopting a Narrow-Focus Convention

The decision to adopt an Inter-American Convention against Racism and All Forms of Discrimination and Intolerance (Draft Convention) is laudable, however in its current form, as a treaty it would miss an opportunity to effectively combat racial discrimination in the Americas. The Draft Convention would be more effective if it were a narrowly focused convention that dealt with racial discrimination. The Draft Convention will prove to be difficult to be adopted and worst to be enforceable because attempts to deal with 28 separate and unrelated grounds of discrimination. As such, the Draft Convention, in its present form, lowers the general principles it contains to the “lowest common denominator” in order to cover the broad and unrelated spectrum of discrimination.

This paper will discuss four benefits of having a convention that focuses solely on racial discrimination. The first benefit is that if the OAS narrows the scope in terms of grounds, the Organization would essentially expand the scope and reach of the convention. Second, it could be modeled after existing single-issue documents already being implemented in the Americas. Third, it could implement provisions that would be impossible to implement in a broad scope convention. And fourth, it would maintain consistency with the history of this process.

3.1 The Need to Bring Visibility to the Issue of Racial Discrimination in the Americas

The first benefit of a convention that focuses on racial discrimination would address the issue of a region where there is a denial of the mere existence of racial discrimination. This denial, present in several countries, often prevents effective action to combat racial discrimination by leading people and Governments to ascribe to discrimination to other forms of oppression. This phenomenon calls for an Organization of American States (OAS) Convention focused on racial discrimination to give visibility and make explicit the need and commitment to combat the different manifestations of racist attitudes, practices and structures currently present in the Americas. Much needed emphasis would be placed on the ongoing problems with racial discrimination in the Americas. Creating a convention that solely addresses racial discrimination in all its forms would help to unveil the thinly disguised problem of racial discrimination in the Americas as a first and crucial step to create more just and equal societies.

Racial discrimination in the Americas has its origins in the historic reality that all of the Americas were subjected to colonialization and slavery. Each of the States in the Americas all have a history of being colonized and of slavery, to varying degrees and lengths.

Whatever the history and however long slavery and colonialism officially lasted, it has had a lasting effect on each State and the lasting effect has been the continued existence of racial discrimination. Having a Convention that narrowly focuses on racial discrimination would allow for the OAS to take a stronger stance on the issue of racism and racial discrimination that has existed in the Americas for far too long. With a Convention focused on racial discrimination the OAS would be enabled to give its full attention to the common historical origins and current manifestations of racial discrimination without being bogged down in a document that tried to protect 28 separate and unrelated grounds of discrimination.

3.2 The Trend Toward Narrowly Focused Conventions

A Convention focused on racial discrimination would fit with the strategy being followed by the OAS in the last two decades. The Inter-American system has been moving toward the use of Conventions that focus on a single issue, and these existing, narrowly-focused Conventions can be used as prototypes for a focused Convention on racial discrimination. Some Inter-American examples of this are the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women (Convention of Belem do Para) and the Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities (CEDPD). At the universal level, example of Conventions that focuses on a single issue such as the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), or the recently adopted United Nations Convention on the Rights of Persons with Disabilities. Europe has also followed this trend by passing for instance the Framework Convention for the Protection of National Minorities as well as the Council Directive 2000/43/EC of 29 June 2000 Implementing the Principle of Equal Treatment Between Persons Irrespective of Racial or Ethnic Origin.

Discrimination against women and discrimination based on race can be paralleled to one another and could be consider an example of the approach proposed here. Each group has been subjected to generations-long subordination simply for being members of their respective group. As the problem of racism and racial discrimination is hidden in many countries, “[v]iolence against women, in all its forms, is a central concern of contemporary women's movements in the Americas. Recognition of the problem, after its being concealed for so many years...”⁵⁵ was such a concern that the Convention of Belem do Para was drafted and has since been ratified by 32 Member States of the OAS. Both groups have experienced massive inequalities in the area of employment. The Belem do Para is a narrowly focused Convention for the protection of women that clearly connects the issue of violence with discrimination (e.g. Article 3). Article 9 of the Belem do Para also provides for a model on how to consider the intersectionality of multiple grounds of discrimination

⁵⁵Inter-American Commission of Women, History of CIM, <<http://www.oas.org/CIM/english/History8.htm>>

and vulnerability. Article 9 model presents a framework on how to consider multiple/aggravating forms of discrimination so as not to limit protections to just one ground of discrimination.

The OAS also realized that discrimination against peoples with disabilities was pervasive enough and with specific manifestations adopt the Inter-American Convention on the Elimination of All Forms of Discrimination Against Persons with Disabilities, which has since been ratified by 17 Member States of the OAS.

3.3 Historical Consistency

A Convention focused on racial discrimination would maintain the consistency with the history of this process. When the OAS started the discussion of adopting a new Convention it did so in the context of the preparatory process of the Third World Conference Against Racism, Racial Discrimination, Xenophobia and related Intolerance. As such, the OAS clearly was thinking on a Convention that would deal primarily with racial discrimination and related forms of intolerance.

In effect, the Regional Preparatory Conference of the Americas against Racism, Racial Discrimination, Xenophobia and Related Forms of Intolerance held in Santiago, Chile, in December 2000,

Call upon States to prepare, in the context of the Organization of American States, an Inter-American Convention against Racism, Racial Discrimination, Xenophobia and Related Intolerance to widen the scope of existing international instruments, by including provisions on the new manifestations of racism, racial discrimination, xenophobia and related intolerance and establishing follow-up mechanisms (204).

The Declaration and Plan of Action of Quebec City adopted by the Heads of State during the Third Summit of the Americas, held in Quebec City, Canada, April 20-22, 2001 emphasized this narrow approach by reiterating the Heads of State commitment to

Support efforts in the OAS to consider the need to develop an inter-American convention against racism and related forms of discrimination and intolerance

The Draft Convention needs to move back towards its beginnings, to where it was being drafted to deal solely with the problem of racial discrimination as recommended at the Third Summit of the Americas and the Regional Preparatory Conference of the Americas in the context of the Third World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance. Thus, the Draft Convention should be modeled after the other narrowly focused Conventions that have been signed and ratified in the Americas, discussed earlier, but this one to focus on the pervasive problem of racial discrimination.

4. Combining Both Methodologies

Discrimination is seldom singular. As several of the member-states have expressed, discrimination in the Americas is not limited to racial grounds, but rather exists and thrives in several unique manifestations—often manifesting differently within countries in the region. Thus, the new convention should not only strive to deal with racial discrimination, but should address how related types of discrimination manifest and interact with racism. The Durban Declaration and Plan of Action recognizes that racism and racial discrimination occur on the grounds of race, colour, descent or national or ethnic origin and that victims can suffer multiple or aggravated forms of discrimination based on other related grounds such as sex, language, religion, political or other opinion, social origin, property, birth or other status (para. 2). As such, the Durban documents provide a model or framework on how to address multiple forms of discrimination (see para 14 on religious prejudice and intolerance people of African descent; para. 18 on indigenous women and girls; para. 31 on women migrants para. 49 on persons belonging to national or ethnic, religious and linguistic minorities; para. 79 on religious discrimination; para. 172 on national or ethnic, cultural, religious and linguistic minorities; para. 212 on women subject to multiple discrimination).

The decision by the OAS to adopt a narrow-focus Inter-American Convention should not be viewed as a decision between mutually exclusive options. Rather, the OAS should attempt to adopt a narrow-focused convention which allows for considerations into other areas of discrimination. Using techniques such as aggravated forms of discriminations, multiple factor consideration, and implementing subsequent complementary conventions, the OAS could achieve the perceived benefits of a broad-scope convention without simultaneously obtaining the real detriments of such a system.

Under the aggravated forms of discrimination model, the OAS would be able to address multiple manifestations of discrimination in a single situation through enhancing the penalty levied on the offending party. For example, an employer who refuses to hire an indigenous woman for a job would receive an increased penalty, as the employer's actions were displays of both racial and gender discrimination. A multiple factor approach allows for a similar expansion. This method would allow the OAS to increase awareness and ensure that protections either currently existing or recently created are applied across a wide spectrum of potential victims of discrimination within a class of persons. Art. 9 of the Convention of Belem do Para is a good example of the use of this method within the OAS system, as the protections for women against violence should consider not only that women are victimized solely due to their gender but also pay particular attention to different circumstances that put certain women or group of women in more vulnerable situations (i.e. due to their age, race, or economic status).

The use of subsequent conventions to complement the Inter-American Convention would allow the OAS to establish a sufficient consensus regarding additional regional problems (i.e. gender discrimination) without limiting the effectiveness either document. The success of using a multiple convention method to bridge the gap between a narrow-focus and a broad-scope convention is tied directly to the success of the initial convention. As mentioned earlier, one broad-scope Inter-American Convention will necessarily incorporate protections for multiple terms to a lesser degree than several one term, narrow-focus Inter-American Conventions. Under this process, the OAS will be able to address several modes of discrimination without having to sacrifice full enforcement of one to get partial enforcement of another.

5. Conclusions and Recommendations

In determining the proper method for directing the new Inter-American Convention, the evidence indicates that problems associated with implementing a broad-scope convention vastly outweigh any benefits. By limiting the focus to the issue of racial discrimination, the Inter-American Convention will establish a more unified position regarding an issue of major concern within the region. This same result cannot be achieved with a broad-scope document. Both the OAS and the Americas are better served through an Inter-American Convention that is narrow in its focus, as such a document would be more likely to effectuate real change through the Americas.