

COMMITTEE ON JURIDICAL AND POLITICAL AFFAIRS

Working Group to Prepare
a Draft Inter-American Convention Against
Racism and All Forms of Discrimination and Intolerance

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ON HUMAN RIGHTS (IACHR) AT THE MEETING OF THE WORKING GROUP
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1. **The concept of indirect discrimination:**

This type of provision has typically been included in international instruments on discrimination and responds to a particular aspect of discrimination, whether on the grounds of race, gender, or other reasons, in relation to policies which at first sight do not have a discriminatory purpose or motivation and yet have that result or effect.

The concept of indirect discrimination was first recognized in Article 1.1 of the International Convention on the Elimination of all Forms of Racial Discrimination (1965):

In this Convention, the term “racial discrimination” shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.¹

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1. Similarly, Article 1 of the **Convention on the Elimination of All Forms of Discrimination against Women** (1979) provides, “For the purposes of the present Convention, the term “discrimination against women” shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field”. See also **Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities** (1999), Article I.2.a: “The term “discrimination against persons with disabilities” means any distinction, exclusion, or restriction based on a disability, record of disability, condition resulting from a previous disability, or perception of disability, whether present or past, which has the effect or objective of impairing or nullifying the recognition, enjoyment, or exercise by a person with a disability of his or her human rights and fundamental freedoms;” and Principle II of the **Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas** (Approved by the Commission on March 13, 2009): “...any distinction, exclusion, or restriction that is either designed to or has the effect of undermining or impeding the recognition, enjoyment, or exercise of the internationally recognized rights of persons deprived of liberty, shall be prohibited.”

The United Nations treaty-based bodies with the authority to interpret universal human rights instruments have also referred to indirect discrimination in interpreting the relevant provisions of the respective treaties. For example:

**Human Rights Committee (HRC)
General Comment 18, Non-discrimination
(Thirty-seventh session, 1989)**

6. The Committee notes that the Covenant neither defines the term “discrimination” nor indicates what constitutes discrimination. However, article 1 of the International Convention on the Elimination of All Forms of Racial Discrimination provides that the term “racial discrimination” shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life. Similarly, article 1 of the Convention on the Elimination of All Forms of Discrimination against Women provides that “discrimination against women” shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

7. While these conventions deal only with cases of discrimination on specific grounds, the Committee believes that the term “discrimination” as used in the Covenant should be understood to imply any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.

**Committee on Economic, Social and Cultural Rights (CESCR)
General Comment No. 5, Persons with disabilities
(Eleventh session, 1994)**

3. The Obligation to Eliminate Discrimination on the Grounds of Disability
15. Both de jure and de facto discrimination against persons with disabilities have a long history and take various forms. They range from invidious discrimination, such as the denial of educational opportunities, to more “subtle” forms of discrimination such as segregation and isolation achieved through the imposition of physical and social barriers.

**CESCR, General Comment 12, Right to adequate food
(Twentieth session, 1999) (Art. 11)**

18. Furthermore, any discrimination in access to food, as well as to means and entitlements for its procurement, on the grounds of race, colour, sex, language, age, religion, political or other opinion, national or social origin, property, birth or other status with the purpose or effect of nullifying or impairing the equal enjoyment or exercise of economic, social and cultural rights constitutes a violation of the Covenant.

**Committee on the Elimination of Discrimination against Women (CEDAW)
General recommendation No. 25**

**Article 4, paragraph 1, of the Convention on the Elimination of All Forms of
Discrimination against Women - Temporary special measures (Thirtieth session)
(2004)**

7. Firstly, States parties' obligation is to ensure that there is no direct or indirect discrimination against women in their laws and that women are protected against discrimination — committed by public authorities,² the judiciary, organizations, enterprises or private individuals — in the public as well as the private spheres by competent tribunals as well as sanctions and other remedies.

In keeping with the standards developed in the framework of the United Nations, the organs of the inter-American system for protection of human rights have also referred to indirect discrimination in their decisions.

In a landmark case on racial discrimination (*Simone André Diniz v. Brazil*. Case 12.001, Report on Merits 66/06, October 21, 2006, par. 87), the IACHR made the following determination with respect to the “institutional racism” of the police and courts in their treatment of cases of racial discrimination:

This practice has the effect of indirect discrimination, to the extent that it stands in the way of the right of a black citizen to be free from discrimination, and the enjoyment and that same citizen's exercise of the right to accede to justice to have the violation remedied.

Likewise, in the *Case of the Girls Yean and Bosico* (Judgment of September 8, 2005), the Inter-American Court reached the following conclusion:

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2. Indirect discrimination against women may occur when laws, policies and programmes are based on seemingly gender-neutral criteria which in their actual effect have a detrimental impact on women. Gender-neutral laws, policies and programmes unintentionally may perpetuate the consequences of past discrimination. They may be inadvertently modelled on male lifestyles and thus fail to take into account aspects of women's life experiences which may differ from those of men. These differences may exist because of stereotypical expectations, attitudes and behaviour directed towards women which are based on the biological differences between women and men. They may also exist because of the generally existing subordination of women by men.

141. The Court considers that the peremptory legal principle of the equal and effective protection of the law and non-discrimination determines that, when regulating mechanisms for granting nationality, States must abstain from producing regulations that are discriminatory or have discriminatory effects on certain groups of population when exercising their rights.³ Moreover, States must combat discriminatory practices at all levels, particularly in public bodies and, finally, must adopt the affirmative measures needed to ensure the effective right to equal protection for all individuals.

2. Multiple or aggravated discrimination:

As provided in the consolidated draft text, Article 1.3 – on the definition of multiple or aggravated discrimination – concerns discrimination that occurs on the basis of two or more factors prohibited under Article 1.1. That concept is recognized, for example, in paragraph 2 of the Declaration that came out of the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, 2001:

We recognize that racism, racial discrimination, xenophobia and related intolerance 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.

The Durban Programme of Action, adopted at the same conference, also contains several references to examples of multiple or aggravated discrimination:

14. Urges States to recognize the particularly severe problems of religious prejudice and intolerance that many people of African descent experience and to implement policies and measures that are designed to prevent and eliminate all such discrimination on the basis of religion and belief, which, when combined with certain other forms of discrimination, constitutes a form of multiple discrimination;

49. Urges States to take, where applicable, appropriate measures to prevent racial discrimination against persons belonging to national or ethnic, religious and linguistic minorities in respect of employment, health care, housing, social services and education, and in this context forms of multiple discrimination should be taken into account^{4/}.

3. Also, *Case Yatama v. Nicaragua*. Judgment of June 23, 2005. Series C No. 127, par. 185; *Juridical Condition and Rights of the Undocumented Migrants*. Advisory Opinion OC-18/03 of September 17, 2003, Series A No. 18, par. 88, and *Juridical Condition and Human Rights of the Child*. Advisory Opinion OC-17/02 of August 28, 2002. Series A, No. 17, par. 44.

4. Also, pars. 79 (religious discrimination as multiple discrimination); 104.c (improvement of the employment prospects of persons subject to multiple discrimination); 172 (protection of the national or ethnic, cultural, religious and linguistic identity of minorities, taking fully into account forms of multiple discrimination); and 212 (on gender equality and the advancement of women, particularly women subject to multiple discrimination).

Other international human rights bodies have also referred to and recognized the occurrence of multiple or aggravated forms of discrimination (both before and after the Durban Declaration), for instance:

**CESCR, General Comment No. 5, Persons With Disabilities
(Eleventh session, 1994)**

4. Specific Provisions of the Covenant
 - A. Article 3 - Equal rights for men and women
 19. Persons with disabilities are sometimes treated as genderless human beings. As a result, the double discrimination suffered by women with disabilities is often neglected.

**CEDAW, General Recommendation No. 25,
Article 4, paragraph 1, of the Convention on the Elimination of All
Forms of Discrimination against Women - Temporary special measures
(Thirtieth session, 2004)**

12. Certain groups of women, in addition to suffering from discrimination directed against them as women, may also suffer from multiple forms of discrimination based on additional grounds such as race, ethnic or religious identity, disability, age, class, caste or other factors. Such discrimination may affect these groups of women primarily, or to a different degree or in different ways than men. States parties may need to take specific temporary special measures to eliminate such multiple forms of discrimination against women and its compounded negative impact on them

**Committee on the Elimination of Racial Discrimination (CERD)
General Recommendation 29, Discrimination Based on Descent
(Sixty-first session, 2002)**

2. Multiple discrimination against women members of descent-based communities

k) Take into account, in all programmes and projects planned and implemented and in measures adopted, the situation of women members of the communities, as victims of multiple discrimination, sexual exploitation and forced prostitution;

l) Take all measures necessary in order to eliminate multiple discrimination including descent-based discrimination against women, particularly in the areas of personal security, employment and education;

**CEDAW, General Recommendation No. 25,
Article 4, paragraph 1, of the Convention on the Elimination of All
Forms of Discrimination against Women - Temporary special measures
(Thirtieth session) (2004)**

38. States parties are reminded that temporary special measures should be adopted to accelerate the modification and elimination of cultural practices and stereotypical attitudes and behaviour that discriminate against or are disadvantageous for women. Temporary special measures should also be implemented in the areas of credit and loans, sports, culture and recreation, and legal awareness. Where necessary, such measures should be directed at women subjected to multiple discrimination, including rural women.

3. The individual and collective dimensions of human rights in accordance with the standards recognized in the inter-American system:

Inter-American case law, specifically with reference to indigenous peoples or tribal/Afro-descendant communities, has recognized such groups as bearers of collective rights; in other words, certain groups, taken as a whole, are recognized as possessing certain rights. Indeed, groups such as indigenous peoples, or in certain instances Afro-descendant communities, exercise and enjoy many of their rights in a collective manner.

In the first case on this subject (Resolution 12/85 of March 5, 1985. Case No. 7615, Yanomami v. Brazil. Operative Paragraph 1), the IACHR decided that:

[T]here is sufficient background information and evidence to conclude that, by reason of the failure of the Government of Brazil to take timely and effective measures in behalf of the Yanomami Indians, a situation has been produced that has resulted in the violation, injury to them, of the following rights recognized in the American Declaration of the Rights and Duties of Man: the right to life, liberty, and personal security (Article I); the right to residence and movement (Article VIII); and the right to the preservation of health and to well-being (Article XI).”

For its part, the Inter-American Court, in its milestone case concerning indigenous peoples (*The Mayagna (Sumo) Awas Tingni Community Case*. Judgment of August 31, 2001), ruled that:

148. Through an evolutionary interpretation of international instruments for the protection of human rights [...] it is the opinion of this Court that article 21 of the Convention protects the right to property in a sense which includes, among others, the rights of members of the indigenous communities within the framework of communal property.

The Inter-American Court also noted that:

149. Given the characteristics of the instant case, some specifications are required on the concept of property in indigenous communities. Among indigenous peoples there is a communitarian tradition regarding a communal form of collective property of the

land, in the sense that ownership of the land is not centered on an individual but rather on the group and its community.

The Inter-American Court reached similar conclusions in its decisions in the cases of the *Indigenous Community Yakye Axa* (Judgment of June 17, 2005, pars. 83, 96, 124, 130 and 215); and the *Indigenous Community Sawhoyamaya* (Judgment of March 29, 2006, par. 120).

In the *Case of the Moiwana Community* the Court decided that this community was ‘not indigenous to the region, but rather constituted a tribal community that [...] had “a profound and all-encompassing relationship to their ancestral lands” that was centered, not on the individual, but rather on the community as a whole.’ Their communal concept of ownership, therefore, prompted the Court to apply to the Moiwana community its jurisprudence regarding indigenous peoples and their right to communal property under Article 21 of the Convention (Judgment of June 15, 2005, pars. 132-133).

In another, more recent decision on this subject (*Case of the Saramaka People*, Judgment of November 28, 2007) concerning alleged violations of Article 21 of the Convention to the detriment of the Saramaka People, the Inter-American Court echoed the interpretation adopted by UN Human Rights Committee on the obligations of states parties to the International Covenant on Civil and Political Rights (ICCPR) (specifically with respect to Suriname) under Article 27 of that treaty on the right of minorities to enjoy their culture, as follows:

94. [M]inorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture[, which] may consist in a way of life which is closely associated with territory and use of its resources.”

According to the Court, the above analysis supports an interpretation of Article 21 of the American Convention, interpreted in light of the rights recognized under common Article 1⁵ and Article 27 of the ICCPR,⁶ which “grants to the members of the Saramaka community the right to enjoy property in accordance with their communal tradition” (par. 95).

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5. 1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
 2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.
 3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.
 6. In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

Apart from the aforementioned inter-American case law and Articles 1 and 27 of the ICCPR, ILO Convention No. 169 also recognizes the collective dimension of rights:

Article 5

In applying the provisions of this Convention:

a) the social, cultural, religious and spiritual values and practices of these peoples shall be recognised and protected, and **due account shall be taken of the nature of the problems which face them both as groups and as individuals**;

Part II. Land

Article 13

1. In applying the provisions of this Part of the Convention governments shall respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories, or both as applicable, which they occupy or otherwise use, and **in particular the collective aspects of this relationship**.

Other human rights treaty monitoring bodies have also interpreted applicable provisions in accordance with the individual and collective dimensions of such rights, for instance:

**HRC, General Comment 22, The right to freedom of thought, conscience and religion
(Article 18) (Forty-eighth session, 1993)**

4. The freedom to manifest religion or belief may be exercised "either individually or in community with others and in public or private"

**CESCR, General Comment 13, The right to education (Article 13)
(Twenty-first session, 1999)**

39. Members of the academic community, individually or collectively, are free to pursue, develop and transmit knowledge and ideas, through research, teaching, study, discussion, documentation, production, creation or writing. Academic freedom includes the liberty of individuals to express freely opinions about the institution or system in which they work, to fulfil their functions without discrimination or fear of repression by the State or any other actor, to participate in professional or representative academic bodies, and to enjoy all the internationally recognized human rights applicable to other individuals in the same jurisdiction.

Note:⁷

7. The documents cited here are available at the following web addresses: United Nations: <http://www2.ohchr.org/english/law/index.htm#core> IACHR: <http://www.cidh.oas.org/casos.eng.htm> I/A Court H.R.: <http://www.corteidh.or.cr/casos.cfm> (Contentious Cases) <http://www.corteidh.or.cr/opiniones.cfm> (Advisory Opinions)