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

CIVIL SOCIETY CONTRIBUTIONS
DRAFT INTER-AMERICAN CONVENTION AGAINST
RACISM AND ALL FORMS OF DISCRIMINATION AND INTOLERANCE

(Presented by Minority Rights Group International)



**Draft Inter-American Convention on Racism
and all Forms of Discrimination and Intolerance**

Memorandum by Minority Rights Group International,
International Non-Governmental Organisation
with ECOSOC Consultative Status

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54 Commercial Street, London E1 6LT, United Kingdom
Tel. +44 20 7422 4223, Fax +44 20 7422 4201, www.minorityrights.org
Contact: Lucy Claridge, Head of Law, lucy.claridge@mrgmail.org

Introduction

Minority Rights Group International (MRG) is an international human rights organisation working to secure rights for ethnic, religious and linguistic minorities and indigenous people around the world. MRG was first involved with the Draft Inter-American Convention on Racism and all Forms of Discrimination and Intolerance (hereinafter “the Draft Inter-American Convention”) when it presented some initial remarks at the October 2005 meeting of the Working Group¹. This was followed up with an addendum at the February 2006 meeting of the Working Group². MRG views the Draft Inter-American Convention as a welcome and necessary step towards achieving a greater commitment to anti-discrimination and protection for minority rights in the Americas and is therefore closely monitoring its progress.

MRG intends this statement as a follow-up to the two prior MRG presentations and as a discussion of minority rights issues relevant to the Draft Inter-American Convention at its advanced stage before the Working Group submits its Final Report to the General Assembly. MRG does not offer the examination of the issues addressed in this paper as an exhaustive assessment of the Draft Inter-American Convention, but rather, of several issues which touch on MRG’s core initiatives in advancing minority rights. The first part of this paper addresses who is a minority as it relates to the Draft Inter-American Convention’s definition of discrimination. The second part of this paper emphasises the importance of maintaining Article 4 on the rights of indigenous peoples. Finally, the third part of this paper explores the duties of the State in Article 6 and stresses the important role of the State to act beyond basic recognition of minority rights and take positive action itself.

1. Who Is a Minority? (Article 1)

Although no official definition of minorities exists, the following definition is generally recognised internationally:

1. any ethnic, linguistic or religious group within a state;
2. in a non-dominant position in the state in which they live;
3. consisting of individuals who possess a sense of belonging to that group;
4. determined to preserve and develop their distinct identity;

¹ Morel, Cynthia. *Presentation by Ms. Cynthia Morel, Legal Officer, Minority Rights Group International*, presented in the meeting of the Working Group held on October 20, 2005. 26 October 2005. http://scm.oas.org/doc_public/ENGLISH/HIST_05/CP15265E06.doc

² Morel, Cynthia. *Invisibility in the Americas: Minority Rights and the Inter-American Convention Against all Forms of Discrimination and Intolerance*, Addendum to the presentation by Ms. Cynthia Morel at the meeting of the Working Group held on October 20, 2005. 7 February 2006. http://scm.oas.org/doc_public/ENGLISH/HIST_06/CP15678E04.doc

5. discriminated against or marginalized on the grounds of their ethnicity, language or religion.³

Self-identification serves as a crucial, and yet sometimes overlooked, element of this definition. The right to opt out of a minority group completes the self-identification right as its complimentary converse. Just as the individual must identify him or herself as a part of a minority group, the individual possesses also an absolute right not to identify him or herself as a member of a minority group. This means that minority rights should guarantee that individuals make a free choice about their identity without being penalised.

The aforementioned definition of minorities left open the question of whether minorities based on sexual orientation or disability would fit within the internationally recognised definition of minorities, because the protection afforded by minority rights traditionally has not extended to these groups. Yet, many acknowledge that these grounds are discriminatory. For example, many private or government organisations have embraced a policy of non-discrimination in employment which includes these grounds. The Draft Inter-American Convention presented the opportunity to expand the grounds of discrimination, and the Working Group has seized this opportunity to develop the traditional understanding of minority rights to include these grounds and others.

Who is considered a minority impacts how discrimination is defined, and therefore, the application of the anti-discrimination provisions of the Draft Inter-American Convention. The Draft Convention proposes 28 grounds of discrimination in its Article 1 definition of discrimination:

race, color, heritage, national or ethnic origin, nationality, age, sex, sexual orientation, gender identity and expression, language, religion, political opinions or opinions of any kind, social origin, socioeconomic status, educational level, migrant, refugee, repatriate, stateless, or internally displaced status [**CHAIR:** and/or condition], [stigmatized **infectious-contagious condition or any other mental or physical health-related condition,**] [**AR:** proposes deleting the word “stigmatized.”] genetic trait, disability, debilitating psychological condition, or any other social condition whose purpose or effect is to nullify or curtail the equal recognition, enjoyment, or exercise of one or more human rights and fundamental

³ Morel, Cynthia. Presentation 2005, p2. One of the definitions most commonly referred to is that of former UN Special Rapporteur Francesco Capotorti, who in 1977, defined minorities as follows: ‘A group, numerically inferior to the rest of the population of a State, *in a non-dominant position*, whose members- being nationals of the State- possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language.’ Study on the Rights of Persons belonging to Ethnic, Religious and Linguistic Minorities. UN Document E/CN.4/Sub.2/384/Add.1-7 (1977). [Emphasis added].

freedoms enshrined in the international instruments applicable to the State Parties.⁴

The Draft Inter-American Convention has therefore defined discrimination in a way that extends minority rights protections to groups beyond those generally recognised by consensus in the international minority rights framework. While MRG's own mandate remains limited to ethnic, religious and linguistic minorities as well as indigenous peoples, MRG welcomes the Draft Inter-American Convention's definition, which should be accepted as drafted.

The Draft Inter-American Convention also solidly grasps the importance of recognising that discrimination is often indirect. While Article 1.1 prohibits discrimination "whose purpose or effect" denies fundamental freedoms similarly to ICERD⁵, Article 1.2 takes indirect discrimination a step further than ICERD by specifically defining indirect discrimination as a "seemingly neutral (innocuous) factor" that puts minorities at a "disadvantage". Thereby, the Draft Inter-American Convention not only extends the inclusion of minority groups who are protected, but also extends the prohibition against indirect discrimination.

Significantly, the Draft Inter-American Convention provides also for multiple discrimination in recognition of the fact that discrimination may occur based simultaneously on two or more minority characteristics. This is an important point, because minority groups are often not distinct and separate, rather they can and do overlap when an individual or a collective possesses multiple characteristics, which aggravates their disadvantage in their society. A common example of this is an ethnic minority who is also a woman and suffers discrimination on both accounts. Multiple discrimination aggravates the discrimination by the combination of factors that lead to it more than by worsening the degree of the harm suffered.⁶

2. Rights of Indigenous Peoples and Afro-descendants (Article 4)

⁴ CAJP/GT/RDI-57/07 Rev. 13, Chap. 1, Art. 1; *See generally* Leuske, Sarah, Note, Position Paper No. 2: *An Examination of 28 Grounds of Prohibited Discrimination in the Draft Inter-American Convention Against Racism and all Forms of Discrimination and Intolerance*. Human Rights Clinic, School of Law, University of Texas. May 2009 at <http://www.utexas.edu/law/clinics/humanrights/work/Paper2-28-Grounds-of-prohibited-discrimination.pdf> for a discussion of the 28 grounds of anti-discrimination in the Draft Inter-American Convention in the context of the international community's approach to discrimination.

⁵ ICERD Art. 1.1 "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." (emphasis added).

⁶ Inter-American Institute of Human Rights. "Draft Inter-American Convention against Racism and All Forms of Discrimination and Intolerance: Working Document" 2008. p38.

Article 4 of the Draft Inter-American Convention specifically addresses the rights of indigenous peoples and Afro-descendants:

The States Parties to this Convention recognize the collective rights of indigenous peoples and [CO: ~~when pertinent,~~] of persons of African descent that are indispensable for their existence, well-being, and integral development as peoples, *inter alia*, the right to their collective action; to their social, political, and economic organization; to their legal systems; to their own cultures; to profess and practice their spiritual beliefs; to use their languages; and to administer, make use of, and control their habitats and natural resources [CO: in accordance with the Constitutional provisions of the States Parties].⁷

Indigenous peoples and Afro-descendants in the Americas have a long history of discrimination, marginalization and exclusion. Racism and discrimination have made it difficult for many Afro-descendant communities to organize against their exclusion. In view of the distinctive historical discrimination indigenous groups and Afro-descendants have suffered in the Americas, it is vital that the Draft Inter-American Convention should include special protection for these groups. Special mention of indigenous peoples serves as a reaffirmation of the rights of groups traditionally harmed by racism, discrimination and intolerance. The technique of specific recognition and visibility offers a reinforced guarantee of protection to historically vulnerable groups, while it creates specific obligations for States Parties.⁸

Including indigenous groups and Afro-descendants in the Draft Inter-American Convention further reinforces a guarantee for their protection under the anti-discrimination affirmations. Even if drafts or adopted international instruments of the OAS or the UN, deal with the same matter as Article 4 of the Draft Inter-American Convention, this is not a sufficient reason to omit it.⁹ MRG recommends that the Draft Inter-American Convention maintain Article 4's provisions on indigenous peoples. MRG submits that the Draft Inter-American Convention is an appropriate forum for its inclusion, especially because indigenous peoples and Afro-descendants are often and repeatedly victims of discrimination, so an anti-discrimination convention would be incomplete without a specific affirmation of their rights. The importance of reiterating human rights should not be doubted.¹⁰

The language of Article 4 refers to "the collective rights" of indigenous peoples and Article 3 specifically provides for rights "at both the individual and collective levels." MRG stresses the importance of maintaining the protection of collective rights in addition to individual rights. Where collective rights are recognised, a collective claim mechanism must

⁷ CAJP/GT/RDI-57/07 Rev. 13, Chap. 2, Art. 4. Note: the States Parties have not approved this article by consensus.

⁸ Inter-American Institute of Human Rights, p78.

⁹ Inter-American Institute of Human Rights, p79.

¹⁰ Id.

be available to defend attacks on these collective rights. A collective claim mechanism provides a means by which complaints may be brought on behalf of a group or collective without the requirement of naming the individual members. It permits claims to be brought on behalf of beneficiaries such as communities, the citizenry as a whole, and marginalised groups.¹¹ Collective rights can be particularly important for indigenous groups, especially concerning land claims where an indigenous group owns the land collectively by their historic occupation of it, and therefore, will have suffered collectively.

International treaties and conventions rarely include a collective claim mechanism.¹² However, over the past twenty years international actors have begun to examine the rights of indigenous peoples and, in conjunction, the collective right.¹³ This has led some international instruments to incorporate collective claims.¹⁴ For example, the African Charter on Human and Peoples' Rights provides for collective claims. In a landmark decision adopted by the African Union in 2010, the African Commission ruled on such a collective claim where it declared the Kenyan government's expulsion of the Endorois community from their ancestral lands illegal.¹⁵ Additionally, some American states provide for collective claims at the domestic level.¹⁶ MRG therefore strongly recommends that the Draft Inter-American Convention include a collective claim mechanism whereby affronts to collective rights may be remedied.

3. Duties of the States and Positive State Action (Article 6)

The State holds an obligation to prevent discrimination. Article 6 of the Draft Inter-American Convention clearly sets out this obligation.¹⁷ The State also holds an obligation to protect the fundamental rights of its population. Key pillars of minority rights are the protection and promotion of identity, the protection of existence, and effective participation.¹⁸ These principles incorporate land and property issues, education issues, gender issues, linguistic rights, religion, the right to development, and self-determination.

Anti-discrimination is a crucial element in the protection of minority rights, and the obligations of the States Parties included in Article 6 should be maintained. However, MRG submits that anti-discrimination law alone is insufficient to address the deeply-rooted forms

¹¹ Depper, Annie, Note, *Position Paper No. 4: Collective Claims and the Draft Inter-American Convention on Racism and all Forms of Discrimination and Intolerance*. Human Rights Clinic, School of Law, University of Texas. p5. May 2009 at <http://www.utexas.edu/law/clinics/humanrights/work/Paper4-CollectiveClaims.pdf>

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Centre for Minority Rights Development (Kenya) & Minority Rights Group International on behalf of the Endorois Welfare Council v The Republic of Kenya*, Communication 276/2003,

¹⁶ *See Id.* p11-13 for a discussion of how collective claims are used in the domestic laws of American states.

¹⁷ CAJP/GT/RDI-57/07 Rev. 13, Chap. IV, Art. 6.

¹⁸ *See Morel, Cynthia*. Addendum presentation 2006, pp5-13, for a discussion of these key pillars of minority rights and the anti-discrimination progress ICERD achieved.

of discrimination and virtual invisibility of minorities such as Afro-descendant communities in the Americas. To successfully incorporate anti-discrimination obligations, the State must not stop at recognition and criminal enforcement of fundamental rights. Rather, the State must act positively in addition. Positive measures mean not implementing assimilationist policies and protecting diverse identities. Positive actions can include various special measures that range from ensuring the recording of fully accurate population census to implementing affirmative action policies.¹⁹

Articles 7-10 of the Draft Inter-American Convention attempt to create State duties to undertake positive actions aimed at including minorities²⁰. While these affirmations do not include specific guidance on how they should be implemented, required action and implementation may vary from State to State. MRG submits that the provisions included in Article 7-10 should be maintained and considered as a starting point for domestic legislation. In these provisions, the States Parties agree to adopt and implement measures aimed at affirmative action, equitable treatment and opportunity, anti-racism legislation, and political and legal systems reflecting diversity. Domestic legislation to combat racism will need to be context appropriate and outline positive State action.

Minority rights will benefit if the Draft Inter-American Convention leads each State Party to adopt context appropriate domestic legislation with clear State obligations to take positive action in furtherance of the provisions in Articles 7-10. This will in turn translate to more whole societies with greater minority participation. The State benefits when it protects minority rights, because they are a tool to ensure integrated societies, meaning societies where different religious, linguistic and ethnic groups including Afro-Descendant communities are able to live together and communicate in one society. Thus, the State should establish “conditions to allow groups, and individuals within those groups, to continue to express their identities and to enjoy their human rights equally within the rest of the population.”²¹

Conclusion

The Draft Inter-American Convention successfully seizes the opportunity to expand the grounds of minority discrimination in Article 1. The States Parties should approve the affirmation on indigenous groups and Afro-descendants set out in Article 4 without any qualifying modifications to its language. Furthermore, the States Parties must not only recognise their duties as enforcers of anti-discrimination principles, but also take positive action beyond recognition of minority rights by not implementing assimilationist policies and by promoting minority participation in wider society. MRG believes these steps are necessary for the protection of minority rights and ultimately will benefit the States in their

¹⁹ Morel, Cynthia. Presentation 2005, p3.

²⁰ CAJP/GT/RDI-57/07 Rev. 13, Chap. IV, Art. 7-10.

²¹ Id.

entirety, because a more inclusive society can lead to stronger development prospects for the States.