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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, Racial Discrimination and Related Forms of
Intolerance, and Draft of a Legally Binding Instrument Against All Forms
of Discrimination and Intolerance

(Presented by Minority Rights Group International)

Draft Inter-American Convention against Racism, Racial Discrimination and Related Forms of Intolerance, and Draft of a Legally Binding Instrument Against All Forms of Discrimination and Intolerance

Memorandum by

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1. Introduction

1.1. 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 Original Draft Convention”) when it presented some initial remarks at the October 2005 meeting of the Working Group.¹ This was followed up with an addendum at the February 2006 meeting of the Working Group,² and a presentation to the Working Group on MRG’s comments on the Original Draft Convention³ on 22 November 2011.⁴ MRG viewed the Original Draft Convention as a welcome and necessary step towards achieving a greater commitment to anti-discrimination and protection for minority rights in the Americas, and therefore closely monitored its progress.

1.2. MRG notes with concern the splitting of the Original Draft Convention into the Draft Inter-American Convention against Racism, Racial Discrimination and Related Forms of Intolerance (hereinafter the “Draft Convention against Racism”),⁵ and the Draft of a Legally Binding Instrument Against All Forms of Discrimination and Intolerance (hereinafter the “Draft Instrument”).⁶ References herein to the “Draft Convention and Instrument” or “Draft Convention or Instrument” refer to the Draft Convention against Racism and/or (as applicable) the Draft Instrument.

1.3. MRG intends this statement as a follow-up to its three prior presentations and as a discussion of minority rights issues relevant to the Draft Convention and Instrument at their 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 Convention and Instrument, but rather of several issues which touch on MRG’s core initiatives in advancing minority rights.

2. Definition of Discrimination (Article 1)

2.1. MRG welcomed the inclusion of the 28 grounds of discrimination in the definition of “discrimination” in Article 1(1) of the Original Draft Convention. The definition

0 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

1 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

2 3 References to the Original Draft Convention herein refer to draft CAJP/GT/RDI-57/07 rev. 13 dated 23 April 2010, which MRG commented on in 2011.

3 4 *Civil Society Contributions; Draft Inter-American Convention Against Racism and All Forms of Discrimination and Intolerance*, Presented by Minority Rights Group International, CAJP/GT/RDI/INF. 22/11, 22 November 2011

4 5 Draft Inter-American Convention against Racism, Racial Discrimination and Related Forms of Intolerance, 4 February 2013, CAJP/GT/RDI-179/11 rev. 13

5 6 Draft of a Legally Binding Instrument Against All Forms of Discrimination and Intolerance, 4 February 2013, CAJP/GT/RDI-180/11 rev. 11

extended minority rights protections to groups beyond those generally recognised by consensus in the international minority rights framework. MRG had submitted that the definition should be accepted as drafted. However, following the splitting of the Original Draft Convention into the Draft Convention and Instrument, the definition of “discrimination” in Article 1(1) of each of the new documents has been significantly curtailed. Article 1(1) of the Draft Convention against Racism contains a definition of “racial discrimination”, as opposed to “discrimination” more generally, and is limited to the grounds of “*race, color, descent, or national or ethnic origin.*” The definition of ‘discrimination’ in Article 1(1) of the Draft Instrument contains the remaining grounds of discrimination which were set out in the Original Draft Convention.

2.2. MRG is gravely concerned about the splitting of the Original Draft Convention into the Draft Convention and Instrument, and the consequent curtailment of the ambit of each of the new documents. States may sign or ratify the more limited Draft Convention against Racism without signing or ratifying the Draft Instrument, which is far broader. The result would be that internationally recognised minority groups within a State Party, such as linguistic and religious groups, would be deprived from the essential protections set out in the Draft Instrument. These fundamental changes are also likely to curtail the ambit of other provisions in the instruments, such as that relating to “*multiple or aggravated discrimination*” in Article 1(3) of the Draft Convention against Racism, which is limited to the grounds recognised in that instrument and the “*objectives*” of “*other recognized international instruments*”,⁷ which arguably would not cover all of the grounds set out in the Draft Instrument. This is of particular concern for indigenous groups, who are often discriminated against on the basis of their language and religion, which forms an integral and indivisible part of the collective racial identity of their communities.

2.3. In light of the advanced stage in the drafting process and the protracted discussions on the splitting of the Original Draft Convention, MRG understands that there may be little scope for reemerging the Draft Convention and Instrument into one document. Nevertheless, MRG is concerned that the Working Group and delegations have not seized the opportunity to protect all internationally recognised minority groups under the Draft Convention against Racism, let alone develop the traditional understanding of minority rights to include these grounds and others. MRG therefore respectfully urges the Working Group and delegations to include the grounds of language and religion in the definition of “*discrimination*” in Article 1(1) of the Draft Convention against Racism.

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

3.1. Article 4 of the Original Draft Convention, which recognised the collective rights of indigenous peoples and Afro-descendants, has been excluded from the Draft Convention and Instrument. The inclusion of this provision is vital, as it would: reaffirm the rights of groups traditionally harmed by racism, discrimination and intolerance, whilst also create specific obligations for State Parties;⁸ reinforce a guarantee for the protection of such

7 7 The wording in Article 1(3) of the Draft Discrimination Instrument appears more favourable, although it is possible that the difference is a typo and will be brought in line with the wording in the Draft Racism Convention.

8 8 Inter-American Institute of Human Rights, “*Draft Inter-American Convention against Racism and All Forms of Discrimination and Intolerance: Working Document*” 2008, p 78.

groups under anti-discrimination affirmations; and expressly recognise collective rights in addition to individual rights. Collective rights are particularly important for indigenous groups as they may collectively suffer violations of their rights, including customary land rights, arising by virtue of their historic occupation and use of land. MRG therefore expresses deep concern at the deletion of this language from the Draft Convention and Instrument.

3.2. In addition, international treaties and conventions rarely include a collective claim mechanism whereby complaints may be brought on behalf of a group or collective without naming the individual members within the group.⁹ However, international instruments, such as the African Charter on Human and Peoples' Rights, have increasingly incorporated collective claims. Despite this emerging practice, the Working Group has not included a separate collective claim mechanism in the Draft Convention and Instrument.

3.3. MRG respectfully urges the Working Group and delegations to reconsider their deletion of the vital protections afforded to indigenous groups and Afro-descendants. In particular, MRG respectfully urges the Working Group and delegations to reinstate Article 4 of the Original Draft Convention, and include a collective claim mechanism in line with emerging international and domestic practice.

4. Protected Rights (Articles 2 and 3)

4.1. MRG understands that certain delegations propose to merge Articles 2 and 3. Whilst MRG does not object to this amendment in principle, the amended article should not narrow the scope of the existing provisions, which together lay down the principle of equal treatment - a fundamental protection afforded in most international human rights instruments. Article 3 also expressly guarantees human rights for all humans "*at both the individual and collective levels*". The explicit reference to collective rights operates in a similar way to the reference in former Article 4 (discussed in paragraph 3.1 above), and therefore should also not be omitted or curtailed in any amended draft.

5. Duties of the States (Chapter IV)

5.1. Article 5(x) of the Original Draft Convention required State Parties to prevent, eliminate and punish any "*restriction or limitation of the use of the language, traditions, customs, and culture of persons **or groups who are members of minorities or vulnerable groups, in public or private activities***". The wording in **bold** has been deleted from the current version of this provision in Article 4(ix) of the Draft Convention and Instrument. Minority groups, including indigenous peoples, are often denied the ability to exercise, enjoy or express their language, traditions, customs and culture, which are central to their livelihoods, ways of life

⁹ 9 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>.

and collective identities. MRG therefore strongly recommends the reinstatement of the wording in **bold**, without which minority groups will be denied the explicit protection under this essential and fundamental provision.

5.2. A new provision has been included under current Article 4(xv) of the Draft Convention and Instrument which requires State Parties to prevent, eliminate, prohibit and punish the “*restriction of access to public and private places with access to the public*” on any of the discriminatory grounds set out in the Draft Convention or Instrument, as applicable. As mentioned in paragraph 3.1 above, indigenous or minority groups may have the benefit of collective land rights arising from their traditional occupancy and use of land. A blanket prohibition against “*restriction of access to public and private places with access to the public*” may restrict the ability of indigenous groups to protect, exercise and enjoy their collective land rights over and above other conflicting claims to the land, which would be given automatic priority. As such, MRG strongly recommends that the Working Group and delegations delete this provision.

5.3. MRG notes with grave concern the proposal to include the following activity in the list of prohibited measures under current Article 4 of the Draft Convention and Instrument:

“Restricting or unjustifiably limiting of the right of all persons, peoples, or nationalities from accessing and using in a sustainable manner water, natural resources, ecosystems, biodiversity, and ecological services that constitute part of each state’s natural heritage, protected by pertinent international instruments and their own domestic laws.”

Similar to Article 4(xv), this provision may serve to limit or override customary indigenous land rights which are not explicitly recognised in “*pertinent*” international instruments or domestic laws. MRG therefore firmly opposes the inclusion of this provision as it could deny or severely limit the enjoyment by indigenous and minority groups of their land which is integral to their collective livelihoods and identities.

5.4. MRG notes the inclusion of new Article 8, in which States Parties undertake to ensure that the adoption of security and other measures do not discriminate directly or indirectly against *persons or groups* on the grounds set out in the relevant instrument. Security measures often target minorities and other vulnerable groups, and have a disproportionately restrictive affect on the rights of such groups compared to the rights of others. There is a significant risk that such differences in treatment are without objective and reasonable justification and hence discriminate against those targeted groups. MRG therefore welcomes the inclusion of this important provision.

- 5.5. MRG notes the continued absence of a provision which explicitly requires State Parties to adopt context-appropriate domestic legislation to fulfil its positive obligations under the Draft Convention and Instrument. MRG therefore reiterates its previous suggestion of including a provision requiring States to 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*”.

6. Protective Mechanisms and Monitoring of the Convention (Article 15)

- 6.1. MRG notes with concern the proposal to delete Article 15(i) which permits the submission of individual and inter-State petitions to the Inter-American Commission on Human Rights (IACHR) regarding alleged violations of the Draft Convention and Instrument by State Parties. These mechanisms are fundamental features of most international human rights treaties, without which the means of redress for victims of violations would be significantly curtailed. MRG therefore strongly opposes the deletion of these mechanisms. At the very least, State Parties should have the ability under the Draft Convention and Instrument to opt into these mechanisms should they choose to do so.

- 6.2. Similar concerns arise with regards to the proposed deletion of Article 15(iii) which affords State Parties the option to recognise as binding the jurisdiction of the Inter-American Court of Human Rights (IACtHR) on matters relating to the interpretation or application of the Draft Convention and Instrument. MRG recommends keeping this explicit reference to the option in the Draft Convention and Instrument to put the availability of the option beyond doubt.

- 6.3. MRG opposes the proposed deletion from Article 15(iv) of the requirement that the members of the committee bodies be independent experts. The current language in Article 15(iv) is in line with the approach taken in other key international human rights instruments. It also provides additional protection to both State Parties and victims of alleged violations that the decisions of the committee are impartial, practical and correct in law.

7. Conclusion

- 7.1. MRG expresses grave concern at the serious limitation and/or deletion of protections afforded to minority and indigenous groups in the Draft Convention and Instrument. Whilst MRG appreciates the previous impasse in negotiations leading up to the splitting of the Original Draft Convention, it recalls the reputed history of the Organisation of American States in advancing standards of protection for vulnerable individuals and groups, and notes that there is still opportunity to include or delete certain provisions which would at the very least bring the Draft Convention and Instrument in line with international human rights standards on the protection of indigenous and minority groups. These should include:

- 7.1.1 *Including the grounds of “language” and “religion” in the definition of “discrimination in Article 1(1) of the Draft Convention against Racism;*
- 7.1.2 *Reinstating former Article 4 regarding indigenous peoples and Afro-descendants in both the Draft Convention and Instrument;*
- 7.1.3 *Refraining from limiting the scope of current Articles 2 and 3 in any redraft of those provisions;*
- 7.1.4 *Reinstating the original wording in Article 4(ix) to make explicit reference to “groups who are members of minorities or vulnerable groups”;*
- 7.1.5 *Deleting Article 4(xv) regarding the restriction of access to public and private places;*
- 7.1.6 *Rejecting calls to prohibit the restriction or unjustifiable limitation of the right of access and use of water, natural resources, ecosystems, biodiversity, and ecological services protected by pertinent international instruments and domestic laws;*
- 7.1.7 *Including a provision which requires State Parties to 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”;*
- 7.1.8 *Rejecting calls to delete Article 15(i) regarding inter-state and individual complaints mechanisms to the IACHR;*
- 7.1.9 *Including a collective complaints mechanism;*
- 7.1.10 *Rejecting calls to delete Article 15(iii) regarding the option to recognise the jurisdiction of the IACtHR on matters relating to the interpretation or application of the Draft Convention and Instrument;*
- 7.1.11 *Rejecting the proposal to delete from Article 15(iv) the requirement that the members of the committee bodies be independent experts.*