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NOTE FROM THE CHAIRMAN OF THE INTER- AMERICAN JURIDICAL COMMITTEE  
TRANSMITING DR. FABIÁN NOVAK TALAVERA'S DOCUMENT  
CJI/DOC.339/09 REV.2 "COMMENTS ON THE DRAFT INTER-AMERICAN CONVENTION  
AGAINST RACISM AND ALL FORMS OF DISCRIMINATION AND INTOLERANCE"



COMISSÃO JURÍDICA INTERAMERICANA  
COMITÉ JURÍDICO INTERAMERICANO  
INTER-AMERICAN JURIDICAL COMMITTEE  
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Rio de Janeiro, 30 March 2010

CJI/O/03/2010

Excellency,

I have the honor to forward to Your Excellency and the Permanent Council of the Organization of American States, Dr. Fabián Novak Talavera's document CJI/doc.339/09 rev.2, *Comments on the Draft Inter-American Convention against racism and all forms of discrimination and intolerance*, adopted during the 76<sup>th</sup> regular session of the Inter-American Juridical Committee, held in Lima, Peru, from March 15 to 24, 2010, as a contribution of this Organ to the endeavors made in the framework of the "Consolidated Document: Draft Inter-American Convention against Racism and all Forms of Discrimination and Intolerance".

I avail myself of this opportunity to renew to Your Excellency the assurances of my highest esteem and consideration.



Guillermo Fernández de Soto  
Chairman  
Inter-American Juridical Committee

His Excellency  
Ambassador José Enrique Castillo Barrantes  
Chairman of the Permanent Council  
Permanent Representative of Costa Rica  
to the Organization of American States  
Washington, D.C. - U. S. A.

76<sup>th</sup> REGULAR SESSION  
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COMMENTS ON THE DRAFT INTER-AMERICAN CONVENTION AGAINST  
RACISM AND ALL FORMS OF DISCRIMINATION AND INTOLERANCE

(PRESENTED BY DR. FABIÁN NOVAK TALAVERA)

Having analyzed the Draft Inter-American Convention against Racism and all Forms of Discrimination and Intolerance being prepared by the Working Group of the Committee on Juridical and Political Affairs of the OAS, as well as the proposals made by the Member States and the comments presented by the specialists consulted by that body,<sup>1</sup> the Inter-American Juridical Committee deems it appropriate to present the following comments as a contribution to strengthening this important inter-American draft instrument:

1. A first comment refers to the name of the Convention, which underlines the theme *racism* above any other form of discrimination. As a matter of fact, the Convention expressly refers to “racism and (in a general way) all forms of discrimination and intolerance”. In this respect, one observation may be made with regard to the fact that *racism* is contained in the broader concept of *discrimination*, which is why this Committee finds no reason to use both terms in the title of the Convention.  
Nevertheless, if the intention of the Working Group is to underscore or privilege racism above other forms of discrimination — bearing in mind our regional reality — then the Committee considers that in any case the Draft Convention should contain a definition not only of racism but also of each of the forms of discrimination mentioned therein. The purpose of this is to avoid differentiated treatment of the various forms of discrimination, which would run counter to full and effective protection of the right to equality and non-discrimination.
2. Secondly, in its considerative (preamble) section, the Draft Convention contains some expressions that we feel could be improved upon or made more precise. For example:
  - a. The second paragraph refers to the “determined commitment” of member States instead of referring simply to the “commitment” of the States. We see no need to qualify the obligation made by the member States.
  - b. The third paragraph uses the word “deficiency” when in fact what is being referred to is a person’s “disability”, which is the term that is universally accepted.
  - c. The fourth paragraph mentions that “equality and non-discrimination among human beings are democratic concepts”, an expression that in our understanding could be replaced by a more precise one, such as “equality and non-discrimination are rights, among others, that form the basis of a democratic society”.

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<sup>1</sup> In addition to the final version of the Draft Convention agreed on by the Secretariat of the Juridical Committee, see the following documents: Outcome Document of the Durban Review Conference; DULITZKY, Ariel E. **Analysis of and commentary on the Draft inter-American convention against racism and all forms of discrimination and intolerance**, 22 January 2009; Alternative drafts made by the governments of Mexico, Canada and Argentina; among others.

- d. The seventh paragraph refers to a person's "psychic suffering" instead of "psychological condition", which is a technically more correct and precise expression.
  - e. The eighth paragraph uses the expression "African matrix" to refer to a person's origin, which we suggest should be replaced by the simpler and more direct phrase "African origin".
3. Thirdly, in the opinion of this Committee, article 1 of the Draft Convention concerning definitions presents some limitations as regards the motives that can lead to discrimination; thus, although the Draft contains a long list of these motives, recognition is not given to some of the criteria included in the International Convention on the Elimination of All Forms of Racial Discrimination, dated 7 March 1966 (see in particular articles 1 and 2) or in the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, dated 18 December 1990 (see in particular articles 1 and 7).

Furthermore, this Committee agrees with the observation made by Dr. Ariel Dulitzky in the above-mentioned report, that the definition of racism contained in article 1 of the Draft confuses the concept of *racism* with that of *racial discrimination*, notwithstanding that doctrine clearly makes the distinction between the former as an ideology and the second as a concrete practice prohibited by International Law.

In respect to the definition of *intolerance* also contained in article 1, we concur with the observation made by some State delegations that the definition is too broad and liable to be understood as including dissention, which is rather a characteristic of any democratic system.

4. In respect to article 3 of the Draft Convention, this Committee proposes the need to maintain the distinction between individual and collective discrimination. The reason for this is that both forms of discrimination have their own characteristics but also because, in practice, discrimination not only refers to a concrete individual but also to a religious, racial, ideological, or any other such group. To support this position, we have some international instruments available of a universal nature that include both types of discrimination<sup>2</sup>, as well as numerous reports of the Inter-American Commission on Human Rights<sup>3</sup> and the jurisprudence of the Inter-American Court of Human Rights.<sup>4</sup>
5. In the opinion of the Committee, article 5 of the Draft Convention is particularly questionable, referring as it does to other rights that should also be protected, such as the right to freedom of expression.

Indeed, the Committee understands the undeniable need to prohibit the spreading of ideas that foster hate and violence for reasons based on some of the factors of discrimination pointed out in the actual Draft Convention. However, in order for this prohibition not to be applied abusively, the Committee suggests that it should be rendered effective when the spreading of such ideas directly or indirectly "promotes" or "incites", rather than just "presenting" or "representing", hate and violence, without defending or justifying these ideas. These ideas could very well be presented for clearly pedagogical or academic reasons.

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<sup>2</sup> As is the case of the International Convention on the Elimination of All Forms of Racial Discrimination (article 2, paragraph 2, for example).

<sup>3</sup> See the Annual Reports and Special Reports of the Inter-American Commission on Human Rights as of 1996, in particular the Special Reports of Mexico (1998), Colombia (1999) and Peru (2000).

<sup>4</sup> See Advisory Opinion OC-18/03 dated 17 September 2003 on the Juridical Condition and Rights of the Undocumented Migrant; the Sentence of the De La Cruz Flores Affair, dated 18 November 2004; among others.

This is why the Committee advises that the prohibition should be expressed with definite concepts that make it quite clear that the purpose of the norm is to prevent hate and violence being fostered through the media and other channels of mass communication.

6. As for article 11 of the Draft Convention, which posits the obligation of Member States to implement legislative measures to invert the burden of proof so that the accused has to prove adoption of procedures and practices that ensure equal, non-discriminatory treatment, the Juridical Committee must remember that although inverting the burden of proof is accepted in the international practice of criminal law, the same does not hold true of other areas such as the administrative, labor or civil spheres. In this sense, it would be appropriate to establish beforehand the feasibility of this obligation so as not to create obstacles or complications to the States when they come to evaluate adopting this international instrument.

On the other hand, still with regard to article 11, we appreciate the proposal formulated by some State delegations not to limit the right to equal “access to the system of justice” but to extend it to equal treatment “in the process itself”. In this way, equal treatment becomes more comprehensive.

7. Article 13 of the Draft sets forth that the obligation of States Parties is to develop studies on situations or manifestations of discrimination that have been occurring in each of their territories. Nevertheless, as has been observed by some State delegations, the objective of these studies has not been made clear, so the Inter-American Juridical Committee suggests giving them a useful purpose. The Draft could therefore point out that these studies should be meant as a contribution toward drawing up public policies against discrimination and intolerance, as well as to devise and execute national plans or strategies of action designed to ban any discriminatory practice.
8. The Draft Convention sets out to create the Inter-American Committee for the Prevention, Eradication and Punishment of Racism and all Forms of Discrimination and Intolerance, designed to assess the situation of each of the Member States as regards compliance with the provisions of the Convention.

In this respect, the Inter-American Juridical Committee states that, in this case, it is not in favor of creating a new body within the inter-American system, in the first place because of the budgetary limitations existing at the Organization of American States, and secondly in order to avoid duplicating functions that could well be assumed by the Inter-American Commission on Human Rights.

Nonetheless, should a favorable opinion prevail for the creation of this new body, we consider that the present wording meant to establish its characteristics and general structure could be ameliorated. We are therefore of the opinion that assurance should be given that the body to be created will have a technical rather than political format, consequently enjoy full autonomy, allow the participation of civil society, and be clear as to its competences and remit, none of which has been included in the Draft as it currently stands. We believe that the experience of the Committee of Persons with Disabilities, the model on which this new Committee is doubtless based, should serve to guarantee effective functioning of this follow-up body to be created, as well as to avoid duplicating functions being undertaken by other bodies of the OAS, as is the case of the Commission and the Inter-American Court of Human Rights.

9. Considering the model of the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (the Convention of Belem do Pará), adopted on 9 June 1994,<sup>5</sup> we support the initiative for the Draft Convention in question to enable

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<sup>5</sup> Article 11: “The States Parties to this Convention and the Inter-American Commission of Women may request of the Inter-American Court of Human Rights advisory opinions on the interpretation of this Convention”.

the Inter-American Court of Human Rights to emit Advisory Opinions at the request of Member States and competent bodies of the OAS concerning the provisions of the Convention. This would allow relying on a very high-level jurisdictional body that could doubtless clear up the problem of the true sense and scope of the Convention being commented upon.

10. Finally, the Inter-American Juridical Committee considers the convenience of contemplating a mechanism to lodge petitions in the Draft Inter-American Convention against Racism and all Forms of Discrimination and Intolerance, as established in article 12 of the Convention of Belem do Pará, which provides:

Any person or group of persons, or any nongovernmental entity legally recognized in one or more member states of the Organization, may lodge petitions with the Inter-American Commission on Human Rights containing denunciations or complaints of violations of Article 7 of this Convention by a State Party, and the Commission shall consider such claims in accordance with the norms and procedures established by the American Convention on Human Rights and the Statutes and Regulations of the Inter-American Commission on Human Rights for lodging and considering petitions.

In any case, beyond these suggestions and remarks, the Inter-American Juridical Committee wishes to assert the importance and historical significance of this inter-American draft instrument which includes among its norms, some that are today considered to be *ius cogens*<sup>6</sup> and whose culmination and being put into effect will contribute to banish discriminatory and intolerant practices on our continent and lead to egalitarian treatment of people without distinction, preference or exclusion.

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<sup>6</sup> This is the case of the right to non-discrimination. See GROS ESPIELL, Héctor. *Derechos Humanos*. Lima: Cultural Cuzco, 1991, p. 221; CÁRDENAS, Fernando and Mauricio ROMAN. *El Sistema Interamericano de Derechos Humanos: Tesis*, Bogotá: Pontificia Universidad Javeriana, 1985, p. 103-104; ZAFFARONI, Eugenio Raúl. “*El Racismo como estructura discursiva contra los Derechos Humanos*”. En: *Presente y Futuro de los Derechos Humanos. Ensayos en Honor a Fernando Volio Jiménez*. San José: Instituto Interamericano de Derechos Humanos, 1998, p. 433-442. See, in this same context, the jurisprudence of the Inter-American Court of Human Rights.