

The struggle against discrimination and intolerance

Reports and Resolutions:

CJI/RES.39 (LX-O/02):	Elaboration of a draft Inter-American convention against racism and all forms of discrimination and intolerance
CJI/doc.80/02 rev.3 corr.1	Elaboration of a draft Inter-American convention against racism and all forms of discrimination and intolerance: report of the Inter-American Juridical Committee (rapporteur: Dr. Felipe H. Paolillo)
CJI/RES.124 (LXX-O/07)	The struggle against discrimination and intolerance in the Americas
CJI/doc. 258/07	The Inter-American Juridical Committee Report on the 'Preliminary Draft Inter-American Convention against racism and all forms of discrimination and intolerance'
CJI/doc. 261/07	Explanation of vote: the struggle against discrimination and intolerance in the Americas (presented by Dr. Jean-Paul Hubert)

At the thirty-first regular session of the General Assembly in San José, Costa Rica, in June 2001, it requested the Inter-American Juridical Committee to contribute to the work of the Permanent Council by drafting a document of evaluation on the following: the provisions of international legal instruments on the subject; the replies by member States to the questionnaire on *Preparation of a draft inter-American convention against racism and all forms of discrimination and intolerance* (CP/CAJP-1687/00 rev.1); the declarations and recommendations emanating from the World Conference Against Racism, Racial Discrimination, Xenophobia, and Related Forms of Intolerance, held in South Africa in 2001, and those issued by the Regional Conference of the Americas in preparation for that World Conference, which was held in Chile in 2000; and, any contributions by other organs of the inter-American system and civil society [AG/RES.1774 (XXXI-O/01)].

During the fifty-ninth regular session of the Inter-American Juridical Committee in Rio de Janeiro, Brazil, in August 2001, the Department of International Law presented document DDI/doc.06/01, *Preparation of a draft inter-American convention against racism and all forms of discrimination and intolerance: study of the problem in the inter-American system and in other international systems*. At that same session, Dr. Felipe Paolillo was elected to serve as rapporteur for that topic.

During the LX regular session of the Inter-American Juridical Committee (Rio de Janeiro, February-March 2002), Dr. Felipe Paolillo, rapporteur for the topic, presented document CJI/doc.80/02, *Proposed ideas and structure for the document related to the need for a convention on racism and other forms of discrimination and intolerance requested to the IAJC by the General Assembly*. He observed that the document was not about a substantive issue; instead, it concerned procedure, trying to work with a number of hypothetical proposals, since the General Assembly's mandate was not altogether clear. In that document the rapporteur mentioned a number of precedents at both the global and inter-American levels. He also analyzed the member States'

responses to the questionnaire that the Department of International Law prepared on the subject and the results of the World Conference against Racism, Racial Discrimination, Xenophobia, and All Forms of Discrimination, held in Durban, South Africa, in September 2001. In his document the rapporteur concluded that the first order of business was to define more clearly the scope that the eventual convention would have; in other words, what causes of discrimination did the General Assembly believe needed regulation. In their responses, the member States underscored some forms of racism that needed to be taken into account, such as the racism spread by way of the Internet. The member States recommended that new vulnerable groups needed to be addressed, such as migrant workers, the poor, homosexuals, the elderly, women, the disabled, and others. However, the rapporteur went on to say that these groups did not fall into the category of racial discrimination. One group that the rapporteur attached special importance to, however, were indigenous peoples, and regarded it as an area in need of much more in-depth exploration.

Based on everything said, his conclusion was that a general convention on racism would be redundant, since there were already many instruments that dealt with specific aspects of the subject matter. He added, however, that these instruments had relatively few ratifications. The document in question suggested some new tendencies, especially new forms of racism, racism spread via the internet. He mentioned that another possible direction that a convention on this subject could take would be to establish a mechanism to monitor for observance.

Dr. Sergio González Gálvez said that the practice of adopting instruments at the regional level when universal instruments had already been adopted was not one that should be encouraged. Having said this, he went on to raise indigenous peoples and the disabled as possible subjects of a convention on discrimination. He said that before issuing any opinion advising against the adoption of a general convention, certain aspects of discrimination not covered by the existing legal instruments should be explored and a study made to determine whether the existing instruments had a significant number of ratifications. If an inter-American convention was deemed inadvisable, he suggested a regional declaration of interpretation of the *Universal Declaration of Human Rights* in this regard. As an alternative to amendment of the Universal Declaration or adoption of a general inter-American convention, he suggested that a number of conventions might be drafted in several specific areas.

Dr. João Grandino Rodas said that from time to time it was important to have a convention that pulled together all the recent legal developments on a given subject. He observed that the political reason for having such an instrument was frequently that the other similar legal instruments may have been adopted to address different needs or in different settings. He recommended that the Inter-American Juridical Committee should include the more general definitions already included in other conventions, even when putting together a draft on a more specific aspect of the problem.

Dr. Orlando Rebagliati suggested the adoption of a general declaration as an alternative to a convention on the subject.

The Assistant Secretary for Legal Affairs advised that the language of the Juridical Committee's mandate had been worded to take into account the position of those countries that saw no real reason to undertake an exercise that would result in another convention. He pointed out that the Permanent Council was looking to the

Juridical Committee's pronouncement for a clearer idea on how best to proceed from here.

Based on these observations, the Inter-American Juridical Committee adopted document CJI/doc.80/02 rev.3 corr. 1, *Elaboration of a draft inter-American convention against racism and all forms of discrimination and intolerance: report of the Inter-American Juridical Committee*, attached to resolution CJI/RES.39 (LX-O/02), *Elaboration of a draft inter-american convention against racism and all forms of discrimination and intolerance*. In that resolution the Inter-American Juridical Committee expressed its concern over the escalation in the incidence of acts of racism and intolerance worldwide and asserted the need to make common cause against these manifestations of intolerance by increasing cooperation among the States to wipe out such practices. It also listed conclusions, which appear at the end of document CJI/doc.80/02 rev.3 corr.1. The document was forwarded to the Chairman of the Permanent Council.

At its 62nd regular session (Rio de Janeiro, March 2003), the Inter-American Juridical Committee decided to again include this subject in its agenda in view of the importance assigned to it during the meeting of the Committee on Juridical and Political Affairs of the Permanent Council of the OAS in March 2003, when the Juridical Committee's annual report for the year 2002 was submitted.

The Inter-American Juridical Committee did not consider the item at its 63rd regular session (Rio de Janeiro, August 2003).

At the 64th regular session (Rio de Janeiro, March 2004), the Inter-American Juridical Committee did not discuss this topic.

At the 65th regular session of the Inter-American Juridical Committee (Rio de Janeiro, August 2004), Dr. Felipe Paolillo, rapporteur of the topic, gave a brief description of the progress of the work of the Juridical Committee on this matter.

Insofar as this topic was already the subject of a report by the Inter-American Juridical Committee, it was decided to keep the topic on the agenda as a topic in progress until a reply is given from the Permanent Council in this area. Dr. Paolillo also informed that the General Assembly, at its last regular session, adopted a resolution on the topic that it decided to ask several entities in the inter-American system for reports so that, together with the report presented by the Juridical Committee, they are analyzed and be used as basis for deciding on the convenience of adopting a convention against racism.

At its 66th regular session of the Inter-American Juridical Committee (Managua, February 28– March 11, 2005), its Chairman reported that during the presentation of the Committee's annual report to the Committee on Political and Juridical Affairs of the Permanent Council, two delegations stressed the importance of this topic for the Organization. Dr. Jean-Paul Hubert stated that until a new express mandate is received from the General Assembly, the topic should continue in the Juridical Committee's agenda as a follow-up topic. Dr. Ana Elizabeth Villalta concurred.

At its 35th regular session (Fort Lauderdale, June 2005), the General Assembly did not assign any new task to the Juridical Committee regarding this topic. By resolution AG/RES.2126 (XXXV-O/05), "Prevention of Racism and All Forms of Discrimination and Intolerance and Consideration of the Preparation of a Draft Inter-American Convention," the General Assembly instructed the Permanent Council to establish a working group in charge of receiving inputs from, *inter alia*, the Inter-American Juridical Committee, with a

view to the Working Group's preparation of a draft Convention in this subject matter.

During the 67th regular session of the Inter-American Juridical Committee (Rio de Janeiro, August 2005), the Chairman of the Committee recalled the report that Dr. Felipe Paolillo, ex-rapporteur of the theme, had prepared concerning this theme. He pointed out that the report of the rapporteur is still in effect and that it is now in the power of the working group of the Permanent Council to deal with the theme. During this regular session the Juridical Committee made no further considerations on the topic.

During the 68th regular session of the Inter-American Juridical Committee (Washington, D.C., March 2006), the Committee elected Dr. Jaime Aparicio as rapporteur for this topic. Dr. Jaime Aparicio said that, in his capacity as rapporteur, he would first gather information on the subject so that the Committee could assist the political organs of the OAS in the preparation and adoption of a convention on racism.

Dr. Dante Negro, Director of the Office of International Law, said that the Office, in its capacity as the Working Group's technical secretariat, was keeping track of each stage of this effort and would keep the Juridical Committee informed. Dr. Negro also said that the members of the Juridical Committee could keep abreast of the subject by means of the web site of the Department of International Legal Affairs, which has a page specifically devoted to the subject of racism (<http://www.oas.org/dil/esp/discriminacion.htm>), which may be a useful source of background information and for updating work.

The Chairman thanked the Office of International Law for its role regarding this matter and said it would enhance the activities of the Juridical Committee.

At its thirty-sixth regular session (Santo Domingo, June 2006), the General Assembly adopted resolution AG/RES.2168 (XXXVI-O/06), "Combating Racism and All Forms of Discrimination and Intolerance and Consideration of the Draft Inter-American Convention against Racism and All Forms of Discrimination and Intolerance." That resolution instructed the Working Group to begin negotiations on the Draft Inter-American Convention against Racism and All Forms of Discrimination and Intolerance, taking into account the preliminary draft presented by the Chair. It also reiterated the invitation to the organs, agencies, and entities of the Organization, including the Inter-American Commission of Women (CIM) and the Inter-American Council for Integral Development (CIDI), to prepare inputs on the prevention of racism and all forms of discrimination and intolerance, for consideration by the Working Group.

At its 69th regular session (Rio de Janeiro, August 2006), the Chairman asked the Secretariat to report on progress with the draft convention.

In response to that request, Dr. Dante Negro, Director of the Office of International Law, gave a verbal report on developments with the topic within the Organization. Among other information, he revealed that during part of 2005 and part of 2006, the Working Group of the Committee on Juridical and Political Affairs entrusted with studying the question had received contributions from several players and that, before the General Assembly, the chairman of the Group had presented a draft convention, the text of which was distributed among the members of the Committee. Dr. Negro suggested that the topic's rapporteur could study the possibility of offering comments on the draft convention, identifying where its added value was.

The members of the Inter-American Juridical Committee agreed that it would be better to offer comments on the draft convention when it was at a more advanced stage.

On 10 October 2006, the Chair of the Working Group on this topic sent a note to the Inter-American Juridical Committee requesting a contribution in writing regarding the draft convention. The IAJC Chairman responded on 17 October 2006, informing the Working Group that the Committee had submitted a report on the matter (March 2002) and that it would give the topic place of priority in its next regular session.

On January 5, 2007, the Office of International Law sent to the Juridical Committee members a consolidated text prepared by that Office, containing the original preliminary draft with the comments received to date from Member States. At the request of the Committee Chairman, on 7 February 2007 the Office of International Law forwarded to IAJC members written comments submitted by various delegations during 2005-06 (i.e. before a draft convention had been prepared). As could be expected, these comments were thus general in nature and did not refer to the draft *per se*.

At the 70th regular session of the Inter-American Juridical Committee (San Salvador, February-March 2007), Dr. Jaime Aparicio, rapporteur for this topic, said that examination of the documents distributed to Committee members made it clear to him that the Committee should lend its expertise in this area, but that the draft itself was too general in nature, and its scope and objectives needed to be better defined. With this in mind, he recommended that the Juridical Committee not enter into an analysis of the draft itself, but rather contribute to the process through general observations. He added that it would also be necessary to define the complementary nature of the new convention, and to clearly set out its limits to assure that it would not trespass on other areas of the Inter-American system.

Dr. Ana Elizabeth Villalta Vizcarra recalled that there are a number of existing UN and Inter-American conventions on this topic, and that this draft gets into complex areas, especially in regard to the rights and duties of States or the respective roles of the Inter-American Court and the Inter-American Commission on Human Rights.

Dr. Antonio Fidel Pérez added that to assure that the United States would be willing to enter into a convention on human rights, it would be necessary to insert safeguard clauses taking into account certain constitutional issues, such as freedom of expression and religion, and especially in regard to the Internet.

Dr. Eduardo Vio Grossi underlined that in its response the Inter-American Juridical Committee should not appear to be against the adoption of a text in this area as that could make it seem that its members were in favor of racism and discrimination, and that for that reason the Committee should stay on the margins of the legislative process that has been initiated. In his opinion, the document prepared by the Committee is an extension of the previous report and should be complementary in nature without diverging from other Inter-American instruments such as the American Declaration of the Rights and Duties of Man, and the American Convention on Human Rights and its Additional Protocol. He stressed that the question of racism and discrimination in the Americas is not a legal problem but a social one: Member States have no domestic legislation regulating non-discrimination. He proposed that an effort be made to come up with a text that would be acceptable to all States, including those that are not Parties to the American Convention, under a title such as Inter-American Commitment against Racism, rather than a convention. This would mean that the document would not require legislative-branch ratification. He said that such a document could comprise 5 chapters. The first would lay out the objectives. The second could explain the meaning and scope of the American Declaration and the American Convention, citing which articles of each are being interpreted and reiterating that said articles impose an international duty to combat acts of racism or discrimination according to the Draft Convention. The third chapter could give examples of acts that are to be

considered racist or discriminatory. A fourth chapter would treat the obligation on States to refrain from carrying out, promoting or protecting racist or discriminatory acts. The fifth chapter would cover the protective measures to be provided by States Parties to the Convention, and the application of Article 106 of the Charter of the OAS by non-parties. Dr. Vio Grossi said that the Juridical Committee opinion on this topic should clearly state what is involved and why this matter is being taken up. It should mention that Article 45 of the Charter of the OAS is not sufficiently explicit and needs to be extended to cover new forms of discrimination. He cited the provisions of Article 2 of the American Declaration of the Rights and Duties of Man, Article 1 of the American Convention on Human Rights, and Article 3 of the Additional Protocol, explaining that all leave a door open for the addition of other forms of discrimination. This, he added, leads him to conclude that a new document must complement rather than substitute existing norms. He added that the report could mention existing apprehensions and the conclusions of Dr. Felipe Paolillo in his previous report. In conclusion, he pointed out that Article 45.a of the Charter and the American Declaration of the Rights and Duties of Man are common to all Member States, but there is no enforcement mechanism. The Convention does have such mechanisms, but not all OAS Member States are Parties to it. The difference is an enforcement mechanism. During the session, Dr. Vio Grossi presented document CJI/doc.251/07, "Preliminary Report on the 'Preliminary Draft Inter-American Convention against Racism and All Forms of Discrimination and Intolerance' (CP/CAJP-2357/06, 18 April 2006)", which he cited when explaining his opinions.

Dr. Ricardo Seitenfus said he favored a formal convention because it would have the force of law and could also complement existing instruments, especially in regard to new forms of discrimination that are not *per se* acts of racism, such as neo-nazi actions, xenophobia, certain ways that illegal immigrants may be treated, etc. He underscored the complexity of the topic, which would certainly provoke debate in all countries. Nonetheless, he thought that the Juridical Committee had to do something.

Dr. Galo Leoro Franco expressed doubts on a real need for new international law in this area. In his opinion, States already have in place domestic measures to safeguard human rights. National constitutions usually provide for protection of rights in principle, although they often prove ineffective. The Inter-American System, he added, already has enough instruments in place, including a Court, which would lead one to suspect that a new document was not going to have any greater legal or political force than the existing instruments. In spite of these doubts, however, he would support any decision of the Juridical Committee.

Dr. Jean-Paul Hubert reminded the group that the letter received from the Chairlady of the Working Group of the Committee on Juridical and Political Affairs asks the Juridical Committee to offer its views as a contribution to the negotiating process. In other words, she asks for a simple opinion within a process that is still at a preliminary stage.

Dr. Freddy Castillo Castellanos joined the view that the Committee should submit an opinion more comprehensive in character than its previous one. He added that he also favored a complementary instrument that would be more expository than specific in regard to identifying new forms of discrimination.

Dr. Jorge Palacios Treviño stated that the Inter-American Juridical Committee should respond to the consultation in line with the faculties granted it under the Charter. Although the majority opinion seems to be that a convention is not going to resolve the problem, he believes that the Committee should work on the text of the convention, taking into account comments from governments.

Dr. Antonio Fidel Pérez suggested a hybrid solution: a response that would set out the criteria deemed necessary to the success of a convention and that should be taken into consideration during work on a new version of the draft text.

Dr. Mauricio Herdocia Sacasa said that it was necessary to comply with the General Assembly mandate, but it should be done from an appropriate legal perspective as the draft is clearly in need of more work. He added that a binding instrument is needed, be it a convention or something else suitably based on the progressive development of law, and that it must also be complementary in nature. He expressed agreement with the view that the IAJC should not limit itself to compiling a list of the contents of existing instruments, and it should bear in mind that many States of the Americas are parties to other international conventions. Thus the UN Convention against Racism should be taken into consideration and its terminology followed to avoid the use of varying definitions. Other aspects of the matter should also be considered, such as culture, indigenous peoples and the causes of discrimination, with stress being placed on prevention. By proceeding in this fashion, the Inter-American Juridical Committee would be contributing to the progressive development of international law.

Having considered all these views, the Inter-American Juridical Committee approved resolution CJI/RES.124 (LXX-O/07), "The struggle against discrimination and intolerance in the Americas", by which it reiterated its concern for the persistence of acts of discrimination and intolerance and the appearance of new forms of the same. It stressed the need to remain united and seek greater cooperation among States in order to eradicate such acts. Through this resolution, the Juridical Committee also adopted document CJI/doc.258/07, "The Inter-American Juridical Committee Report on the Preliminary Draft Inter-American Convention against racism and all forms of discrimination and intolerance", by which it hoped to contribute to the negotiations undertaken by the Working Group, and decided to remit it and the resolution to the Chairlady of the Working Group. It also decided to maintain this topic on its agenda under the heading "The struggle against Discrimination and Intolerance in the Americas," with Drs. Jaime Aparicio, Ricardo Seitenfus and Hyacinth Evadne Lindsay as co-rapporteurs. The resolution was adopted with Dr. Galo Leoro Franco abstaining. Dr. Jean-Paul Hubert registered an explanation of vote, now classified as document CJI/doc.261/07, "Explanation of Vote: The struggle against discrimination and intolerance in the Americas".

On 21 March 2007, the Office of International Law delivered to the Chairlady of the Working Group the note of the Chairman of the Juridical Committee by which he remitted to her the resolution, the document adopted by the Committee, and Jean-Paul Hubert's explanation of vote.

On 6 July 2007, the Office of International Law distributed to the members of the Inter-American Juridical Committee document CP/CAJP-2357/06 rev.7, "Preliminary Draft Inter-American Convention against Racism and All Forms of Discrimination and Intolerance". This seventh revision includes the observations and comments made by OAS Member States during the Working Group's efforts leading to the 37th regular session of the General Assembly.

During the Inter-American Juridical Committee's 71st regular session (Rio de Janeiro, August 2007), Dr. Jaime Aparicio suggested that this item should remain on the Juridical Committee's agenda and that the Committee itself stay abreast of the work being done by the Organization's political bodies, as it had as yet received no response to the document it had approved.