Invisibility in the Americas: minorities, peoples and the Inter-American Convention Against All Forms of Discrimination and Intolerance

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The experience of afro-descendants in Latin America provides one of the most striking examples of invisibility in the Americas. Nevertheless, discrimination is clearly experienced by a range of other ethnic, linguistic and religious communities throughout the Americas. The aim of this article is to show the importance given to the discrimination problem by incorporating opinions regarding minority rights. In this context, certain regional Human Right Systems such as the Inter-American system have implemented certain laws and instruments in order to end the discrimination problem.

Key words: Minority Rights, Marginalization, Distinct Communities, The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), Objective Criteria, Non-dominance, Effective Participation, Intolerance, Ethnicity

Introduction

There is a growing consensus that, in the Americas, race and ethnicity have contributed to the disproportionately high levels of poverty and economic discrimination amongst Afro-descendant, indigenous and other marginalized communities. The legacy of "racial democracy", which prevailed and arguably continues to prevail in many nations of Latin America, is largely to blame. The absence of overt legal exclusionary mechanisms such as the segregation or apartheid that existed respectively in the United States and in South Africa was often perceived as proof of harmonious race policies. Moreover, commentators have suggested that the notion of racial democracy, rooted in the "mixed" nature of the Continent's population, has effectively camouflaged diversity, suppressed the consciousness of non-whites to develop their own identity and demands, while making conditions ripe for excluding anyone who falls outside the norm of dominant or mestizo society (Dulitzky 2005; Burke and Gurr 2000, 103-104). The overall effect has been the pervasive invisibility of Afro-descendants and other marginalized ethnic or linguistic groups in Latin America.

The Inter-American system has pro-actively sought to address the problem of discrimination from its very inception, through the Charter of the Organization of American States.[2] Numerous other instruments have followed suit, including the American Declaration on the Rights and Duties of Man (ar-

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2 The Charter acknowledges "the right of all human beings with no distinction of race, gender, nationality, creed or social status to material well-being and spiritual development under conditions of freedom, dignity, equal opportunity and economic security" (Article 45).

ticle 2); the American Convention on Human Rights (articles 1, 13(5), 22(8), 24 and 27(1)); and the Additional Protocol to the American Convention on Human Rights, "San Salvador Protocol" (articles 3 and 13(2)). Numerous General Assembly resolutions have been adopted on the matter, in addition to declarations issued by the Hemispheric Summits. It is also worth noting that much of the Durban text on Afro-descendants comes directly from the preparatory Regional Conference of the Americas, held in Santiago in 2000. Finally, in 2006, the Inter-American system welcomed a Draft Inter-American Convention Against All Forms of Discrimination and Intolerance.

While anti-discrimination law is indeed an important step in challenging many of the attitudes and practices that have contributed to the exclusion of Afro-descendants and other communities from economic, social and political spheres, the purpose of this article is to highlight the added-value of incorporating certain tenets of minority rights into the Draft Inter-American Convention Against All Forms of Discrimination and Intolerance.[3] Conceptualizing Afro-descendants as "peoples" will also be briefly explored. The benefit of exploring these approaches stem from their ability to address inequality beyond the individual experience of discrimination. Minority rights and the rights conferred upon peoples both address the structural and root causes of marginalization suffered by ethnic, linguistic or religious communities, noting the collective dimension of the violations suffered by these entities.

Key minority rights provisions, which are inherently anti-discriminatory in both their application and scope, and thus relevant for achieving the wider object and purpose of the Draft Convention, include the protection of existence, the promotion of identity, and standards for effective participation. Far from incompatible, traditional anti-discrimination principles and minority rights are mutually reinforcing and therefore together best equipped to bridge the existing protection gap that currently denies equality to Afro-descendants and other marginalized communities throughout the Americas.

While the primary focus of this article will draw on the merits of a minority rights approach to non-discrimination, attention will first be drawn to who generally classifies as a minority. Special attention will also be accorded to dispelling popular myths about minority rights. In this regard, minority rights must be understood as a source of legal empowerment, not a vulnerable label; they allow for individual expression within a wider group rather than imposing a homogenous identity upon that community; and far from affording undue privileges to the detriment of the majority, minority rights are an essential framework for ensuring fully integrated and democratic societies.

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Who is a minority?

Although there is no internationally accepted legal definition of a "minority", there can be no doubt that minorities do exist. The diversity of cultures globally is clear evidence that human beings can form or constitute distinct communities.

Criteria beyond numbers

Many States recognize that minorities exist within their territories; for example, through direct constitutional recognition of groups, or through indirect policies or programs such as identification in census data. Other States may deny that minorities exist in their territory; indeed the non-recognition of minorities is a common obstacle set by States and an excuse for not respecting minority rights. The UN has confirmed, however, that the existence of minorities is a matter of fact and "does not depend upon a decision by that State party but requires to be established by objective criteria".[4]

3 This will henceforth be referred to as "the Draft Convention".

Objective criteria used to define minorities are generally acknowledged to include group characteristics such as ethnicity, language, or religion. With regard to population size, more important than numbers is the position of power held by various groups, a concept commonly referred to as *non-dominance*.[5] Most minorities (but not all) are in a position of non-dominance; that is, they are wholly or partly marginalized in the economic, political and/or social spheres. Dominant minorities (that is, minority groups that hold significant political or economic power) are still entitled to protection of their rights as distinct ethnic, religious or linguistic groups to practice their culture, religion and language; but generally the minority rights regime is intended for a situation where the participation, identity and existence of ethnic, religious or linguistic groups is *under threat* from a dominant group(s). Responding to this threat requires some State intervention.

While reference to Afro-descendants as a minority may indeed be contentious in a country such as Brazil, where they count for approximately 50% of the population, what remains clear is that they figure in a position of social, political and economic non-dominance in this country, and that they could arguably benefit from the empowerment tools afforded by minority rights. Beyond this, the added value of exercising minority rights as a tool for combating the causes and effects of invisibility in other countries of the Americas where these communities find themselves in a clear position of non-dominance, should - at a minimum - not be discarded.

Freedom of Choice

It is important to note that, in addition to objective requirements, subjective criteria also play a key role in defining minorities. Subjective criteria include the wish of individual members to collectively preserve and develop their distinct ethnic identity. The subjective criteria of *self-identification* is also of particular importance for defining who is and who is not part of a minority, as is the case with indigenous peoples.[6]

Opting-out

Fears or resistance of articulating minority rights out of concern that such mobilization would force all members of that ethnic, linguistic or religious group to self-identify as such have no legitimate basis on the grounds that the *right to 'opt-out'* and thus not self-identify as part of a minority is a fundamental principle of minority rights. In this regard, existing standards, such as the Framework Convention on National Minorities not only emphasize the right to freely choose to be treated or not to be treated as minorities, but also that *no disadvantage* shall result from this choice.[7]

Beyond recognizing that not all within a minority group may wish to identify as such, this principle also recognizes the reality that individuals within a minority are not homogenous. Different realities will indeed require different forms of protection, the most notable example stemming from the contrast between rural and urban areas.

Despite minority rights' inherent recognition of diversity within a given minority group, as well as the definition of a minority extending beyond the question of numbers, certain communities find the term "minority" ill-suited for their purposes. Resistance for some may stem from a State's real or perceived reluctance to recognizing groups as minorities. For others, as some resistance within the Americas' Afro-descendant activists would suggest, the term "minority" simply does not correspond to their self-perception. In such cases, what other alternatives exist?

4 UN Human Rights Committee, General Comment 23, The rights of minorities (Art. 27): 08/04/94, parr. 5.2.

5 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].

6 Tensions associated with self-identification pose particular difficulties when it comes to data collection. If governments rely purely on self-identification of individuals in data collection, then there is often under-reporting of minorities in the statistics due to minority fear of discrimination if they self-identify as such. This then leads to inaccurate data being used in developing policies and programs which could undermine their effectiveness. In some cases, the opposite is also true. Where programs are established for particular groups, for example a program to assist members of minorities obtain jobs, individuals who do not meet any of the objective criteria for membership of a particular ethnic group (culture, ethnicity, religion, language), may attempt to self-identify with that group in order to benefit from the program; however, there is no right to arbitrarily choose to belong to a particular minority. 'The individual's subjective choice is inseparably linked to objective criteria relevant to the person's identity'. See Council of Europe, Framework Convention for the protection of National Minorities (FCNM), Article 3.1 and Explanatory Report, H(1995)010, para. 35.

7 FCMN, Article 3(1), Declaration on the Rights of Persons Belonging to National or Ethnic , Religious and Linguistic Minorities , Article 3(2) (1992).

Afro-descendants as people? Indigenous people? Vulnerable comunities

It has been recognized that, on the surface, "the interests of Afro-descendants – principally to end discrimination, to promote their cultural heritage and to participate equally in society – match well with the international minority rights framework". It has also been observed, however, that in practice, "Afro-descendants in Latin America have aligned their claims much more closely to those institutions and rights recognized for indigenous peoples, including land rights" (Lennox 2006, 6).

From the outset, it would appear that the traditional understanding of indigenousness in the Americas somewhat limits the extent to which Afro-descendants could legitimately articulate their claims within the indigenous legal or political discourse.[10] This understanding, of course, relates to the concept of "indigenousness" belonging to those pre-colonial peoples occupying their traditional lands since time immemorial. Nonetheless, whilst the indigenous are "peoples" whose self-determination has been denied by colonialism, the self-determination of Afro-descendants can also be arguably construed as having been denied by colonialism.[11]

While the right to self-determination – often exercised through territorial autonomy – is a right conferred upon "peoples", and that such autonomy might indeed best reflect the needs of Afro-descendant communities such as the Quilombolas, asserting the right to self-determination ranks among the most contentious claims under international law.[12]

Whether or not Afro-descendants in the Americas will attempt to use their experience of colonialism as a basis for articulating their claims as "peoples" (as per the meaning under international law) remains to be seen. What may unfortunately limit them from succeeding is the fact that, while the right of colonial peoples to exercise their right to self-determination by breaking away from the "imperial" power is now undisputed, Afro-descendants would almost certainly be barred from relying on this angle, as the "imperial power" is generally construed as the colonizing powers of the past; not independent sovereign States of the present. And beyond colonial peoples, there is very little political or legal consensus on who "peoples" are.[13] Together, these factors would suggest that - at least in theory - the concepts of "peoples" and self-determination fall outside of the scope of the Draft Convention. Whether it may be successfully articulated as part of the wider Afro-descendant advocacy strategy in pursuit of justice and equality remains to be seen.

Case of Moiwana Village v. Suriname

Fortunately, in practice, the Court has helped bridge an important protection gap for communities falling outside of the classic indigenous framework by adopting a flexible approach in the recent case of *Moiwana Village v. Suriname*. As such, in its response to a forced eviction of the affected Afro-descendant community, the Court recognized the "all-encompassing relationship" of the N'djuka tribal people to their traditional lands.[14] The Court also lent special recognition to the fact that "their concept of territory was not centered on the individual, but rather on the community as a whole".[15] While this is certainly cause for celebration, it remains but a first step in looking beyond the individual experience of discrimination of Afro-descendants and other minorities.

Minorities vs "vulnerable or marginalized communities"

The potential for minority rights to meaningfully contribute towards further closing the protection gap beyond the *Moiwana* judgment has been reflected in the Preliminary Draft of the Inter-

10 To date, the Garifuna are the only Afro-descendants who have succeeded in articulating their claims as indigenous peoples. While doing so may be viewed as a welcomed opportunity to some, it raises at the same time important questions as to the effect it may have on the integrity of indigenous advocacy, which has been carefully crafted over several decades.

11 Id.

12 The concept of self-determination has proven to be the most contentious point of debate in the negotiations relating to the UN Draft Declaration on the Human Rights of Indigenous Peoples. For case law on the right to self-determination, see: Reference re Secession of Quebec, Supreme Court of Canada, [1998] 2 S.C.R.

13 For instance, Article 1(3) of ILO Convention 169 states that, "the use of the term 'peoples' in this Convention shall not be construed as having any implications as regards the rights which may attach to the term under international law". See also Article 1, Declaration on the Granting of Independence to Colonial Countries and Peoples Adopted by General Assembly resolution 1514 (XV) of 14 December 1960; Reference re Secession of Quebec, Supreme Court of Canada, [1998] 2 S.C.R.

14 *Case of Moiwana Village v. Suriname*. Judgment of June 15 2005.Series C No.124, para 133.

American Convention Against All Forms of Discrimination and Intolerance. The importance of specific references to minorities and minority rights standards within the Convention draws largely from the fact that the exclusive reference to alternative wording such as "vulnerable or marginalized communities" would deny the extensive body of law that has been developed in relation to minority rights.[16] The term "vulnerable or marginalized groups" has no standing in international law, and therefore relying solely on those terms would pose serious obstacle the application of minority rights in the Inter-American context, in turn, undermining the level of protection potentially afforded to communities needy of broader protection. The following sections attempt to elucidate the content and meaning of these rights.

Discrimination against minorities, who disproportionately count amongst the poorest of the poor, is one of the most important barriers to their full human development. It is also one of the most important barriers to the economic prosperity of countries throughout the Americas.

Key pillars of minority rights as a means to bridge the protection gap[17]

Failure to speak at some level of the situation of Afro-descendant, indigenous and other communities in their collective dimension compromises our ability to effectively challenge the historical, socio and political structures that have enabled the discrimination and invisibility to persist from past centuries through to present times. In order to fully appreciate the vital role minority rights can play in closing the protection gap that currently exists with regard to the discrimination faced by Afro-descendants and other non-dominant communities in the Americas, this section will first refer to underlying principles of non-discrimination that are most relevant to minorities. It will then outline the key pillars of minority rights, a complimentary field of law whose foundations lie on the protection and promotion of identity, the protection of existence, and effective participation.

Non-discrimination

The right to non-discrimination is firmly established in international law and in most domestic law, but discrimination widely persists in practice. Discrimination may be direct or indirect (an intended or unintended effect). In some cases discrimination may be deeply embedded in social and cultural norms that are not questioned. In these situations, discrimination is not about "leaving out" certain groups, but is rather an active process of oppression. Discrimination against minorities, who disproportionately count amongst the poorest of the poor, is one of the most important barriers to their full human development. It is also one of the most important barriers to the economic prosperity of countries throughout the Americas.

The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) is the core international treaty on the right to non-discrimination. It requires the establishment of effective remedies for the prohibition and elimination of discrimination in the enjoyment of such rights as the right to work; the right to housing; the right to public health, medical care, social security and social services; and the right to education.[18]

One remedy that ICERD allows for are "special measures"[19] in the 'social, economic, cultural and other fields' to be taken to achieve full and equal enjoyment of human rights for groups that are targets of discrimination.[20] This has most commonly taken the form of affirmative action policies (also known as "positive discrimination"), such as those to improve access to employment or education. These policies aim to overcome the barrier posed by discrimination in order to ensure that certain groups can access their rights equally, e.g.

15 Id., para 133.

16 See, for instances, the numerous references to the interchangeable use of both "minorities" and "vulnerable communities" throughout the Santiago Summit Plan of Action, Santiago April 18-19, 1998.

17 This section draws heavily from papers produced by Corinne Lennox and Kathryn Ramsay from Minority Rights Group International for the attention of the Office of the High Commissioner on Human Rights and the Committee on the Elimination of Racial Discrimination.

18 International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), Article 5.

to employment and education, and should terminate once the barrier of discrimination is no longer a factor in preventing the enjoyment of these rights.

Given the high degree of complimentarity between the anti-discrimination and minority rights approaches, it is clear that the above ICERD provisions play an important role for the protection of minorities, including Afro-descendants in the Latin American context, independently of whether or not individuals from this group wish to identify themselves as such. Affirmative action policies and all references to promote cross-cultural understanding found in ICERD should therefore inform the new Inter-American Convention.

In addition, suggestions by various activists to consider a horizontal application of the Draft Convention, on the grounds that much racial discrimination occurs in the private sphere (for example, in employment, in housing, and in access to bars, restaurants and other public accommodations) is also vital to minorities. One practitioner has explicitly cautioned that, "a legal norm which limited its application only to government action would fail to address some of the most important problems that racial and ethnic minorities face" (Goldston 2005, 36-43)[22]. The obligations to prevent, investigate, sanction and remedy violations in a non-discriminatory manner in accordance to the principle of due diligence is a further consideration of extreme importance to incorporate into the Draft Convention, given the degree of vulnerability in which most ethnic, linguistic and religious minorities find themselves. What is then the added value of incorporating an added minority rights perspective?

Protection of Identity

Having a distinct ethnicity, religion, culture or language is part of an individual's identity. Minority rights help to protect these identities from being eliminated and help to enable these identities to flourish. Identities may entail many aspects, including language, livelihoods, traditional territories, customary laws and other cultural practices. The protection of cultural heritage essential to a group's identity is also vital, including for example burial sites, buildings, religious places, documents and/or libraries (Thornberry 1995, 41).

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As previously stated, the starting point for protecting distinct identities is recognizing that they exist.[24] A second important step towards protecting identities is through State obligations to take positive measures to ensure that minorities can express and nurture their distinct identities. Positive measures to protect identities may include provision of minority language education, recognition of traditional land titles, or subsidies to create cultural centers that preserve cultural knowledge.

In this regard, positive measures for the protection of minorities extend beyond the classic understanding of anti-discrimination; an approach which generally frames its provisions in the negative terms of to "fight", to "eliminate", and to "eradicate" discrimination. Moreover, while a classic affirmative action approach under the principle of non-discrimination focuses primarily on facilitating the *individual's* access to services or employment, positive measures afforded by minority rights prove not only vital for individuals' more equitable access, but also for the more effective accommodation and inclusion of these individuals' ethnic, linguistic or religious *communities* in the wider "dominant" society.

In essence, the protection of identity therefore relates to the protection of minorities from forced assimilation. Signs

19 The provisions and conditions for taking special measures are outlined in Article 1(4) of ICERD.

20 ICERD Article 2(2).

22 Goldston points to the obligation under ICERD "to prohibit and bring to an end … racial discrimination by any persons, group or organization…" (Art 2(d)); and also to the EU Race Directive's explicit recognition of discrimination in both the public and private spheres through article 3(1).

24 This non-recognition of some or all minority groups typically stems from fear of claims to economic resources, political power, or secession. However, as previously stated, the UN Human Rights Committee that monitors compliance with the ICCPR clearly states that the existence of minorities is a matter of fact, not a matter of law, and should be assessed based on objective criteria. See UN Human Rights Committee, General Comment 23, The rights of minorities (Art. 27): 08/04/94.

of states with assimilationist policies include the denial of the existence of minorities and the promotion of "nation-building" through a single national language and/or religion.[25] The denial of identity though these actions, or through culturally inadequate or inaccessible education would constitute discrimination under the ICERD if perpetrated by a State party against a particular minority group. It should also constitute discrimination under the proposed Convention.[26]

Promotion of Identity

The importance of promoting identity, in addition to protecting it, may not immediately strike human rights defenders as essential or within the natural scope of normative standards pertaining to non-discrimination. The relevance nonetheless stems from the dynamic nature of cultures, and the ability of the dominant group(s) within a state to exercise their right to promote their identity automatically, for example through use of the language and cultural programs in the media. In some states, the promotion or development of national identity is contained in the Constitution. Enabling minorities to promote their identity does not afford them with "special rights" to the detriment of the majority; it simply ensures that they can also promote their identity on an equal footing with the dominant groups, therefore ensuring non-discrimination.

As a means to effectively promoting the identity of minorities, the Permanent Court of International Justice, nearly a century ago already established that:

> [T]here would be no true equality between a majority and a minority if the latter were deprived of its own institutions and were consequently compelled to renounce that which constitutes the very essence of its being as a minority.[27]

The Court considered it necessary in this respect for states to "ensure for the minority elements suitable means for the preservation of their racial peculiarities, their traditions and their national characteristics".[28]

The UNDM in Article 4(2) further elaborates the issue of the promotion of identity and culture, requiring States:

> [T]o take measures to create favorable conditions to enable persons belonging to minorities to express their characteristics and to develop their culture, language, religion, traditions and customs, except where specific practices are in violation of national law and contrary to international standards.

In this regard, tolerance of, or non-interference in, minority cultures is not sufficient. Article 4(2) requires active measures from the state to create the favorable conditions mentioned in the Article. What those measures are will depend on the situation of the minority in question but they may require resources from the state (depending on the availability of those resources). If a State provides funding for the development of the language or culture of the majority then it should, proportionately, provide resources for the minority also. Provisions in the ICERD require non-discrimination in the provision of resources to different groups, as should the final draft of the Convention Against All Forms of Discrimination and Intolerance. Failure to do so could contribute to assimilation and an atmosphere of intolerance.[29]

Protection of Existence

The UNDM Article 1(1) requires states to protect the existence of minorities 'within their respective territories. While the physical existence of groups is generally understood as the right to be protected against genocide,[30] the denial of the existence of a minority need not involve the physical destruction of members of the

25 France, which has made a reservation against Article 27 of the ICCPR based on the justification that all individuals in France are French, serves as an excellent example. Numerous observers agree that the denial of recognition of ethnic, religious and linguistic communities by the French Government has contributed to the escalation of racial violence in this country in recent years. Minority rights contribution to conflict prevention cannot be understated.

26 Article 6, sub paragraph XXX, of the Preliminary Draft Convention recognizes the protection of identity.

27 Minority Schools in Albania (1935), PCIJ Ser. A/B, No. 64, 17.

28 Id.

29 Note that the degree to which the state is obliged to provide resources will depend on the size of the group and its territorial concentration. All measures to be taken by the State should be developed with the effective participation of the minority.

30 The Genocide Convention does not define genocide in terms of the existence of groups but in terms of their destruction: "genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such". Article 6 of the Rome Statute draws on the same definition.

group. A minority could be denied existence where their cultural identity is destroyed or they are forced to give up that identity.[31]

Though the protection of existence afforded by minority rights may at first glance seem out of context in the present-day reality of the Americas, one must acknowledge, at the very least, the genocidal foundations on which the Continent was first colonized. One must also consider the crimes against humanity, such as deportations or forcible population transfers, which disproportionately affect minorities around the world.[32] Notable examples in the Americas in this regard include the experience of the people of Haitian-descent in the Dominican Republic. The State-planned massacre of 1986 against the Moiwana Community in Suriname is a further testament to the physical insecurity certain peoples face at the hands of their governments.[33]

While serving as a modest contribution to the actual protection of (cultural if not physical) existence of minorities in the Americas, recognition of the existence of ethnic, cultural, religious and linguistic minorities within the preambular paragraphs of the final draft of the Convention would certainly constitute an important first step in guaranteeing their protection. As asserted throughout this article, protection cannot be afforded without first recognizing that these groups, these communities, these minorities indeed *exist*.

An operative paragraph guaranteeing substantive rights to individuals belonging to minorities, as currently afforded through Article 6 of the Preliminary Draft Convention, should indeed draw on the wording of Article 3(1) of the UNDM.[34] Alternatively, the term "minorities" or "minority status" could be considered as one of the listed grounds of discrimination.

Participation

The right to participate for minorities has three aspects: the right to participate in public life and decision-making, in particular on issues that affect them; the right to participate in the life of their own community; and the right to participate in the benefits of economic progress and development.

The right of everyone to participate in the conduct of public affairs is outlined in Article 25 of the ICCPR.[35] The definition of discrimination in Article 1(1) of the ICERD covers any distinction that impairs the enjoyment of human rights in the "political, economic, social, cultural or any other field of public life".[36] Some states place clear legal restrictions on the participation of minorities, for example by requiring that the head of state be from a particular group or religion. This is a clear violation of the ICERD.

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Even where overt legal restrictions do not exist, minorities may still be denied, or have difficulties in exercising the right to participation. If the majority, or dominant groups in society, are able to participate, then the principle of non-discrimination requires that the participation of minorities be also ensured by the state. The final draft of the Convention should therefore be equipped to identify and remedy the *de facto* exclusion of minor-

31 Patrick Thornberry provides insight on the meaning of existence for minorities: "Existence is a notion which has special sense for a collectivity. An individual exists or he does not; his non-existence is his individual death. A collectivity such as a minority group exists in the individual lives of its members; the physical death of some members does not destroy the existence of the group, though it may impart its health. There is, however, another existence for a minority through the shared consciousness of its members, manifested perhaps through language, culture, or religion, a shared sense of history, a common destiny. Without this existence, it is possible to say that individuals live but the group does not: it has been replaced by something other than itself, perhaps a new group, larger or smaller" (Thornberry 1994, 57).

32 Article 7(d) of the Rome Statute includes Deportation or forcible transfer of population as one of the acts constituting a crime against humanity.

33 See *Moiwana Village v Suriname*, Inter-American Court of Human Rights, Ser.C, No. 124, Judgment of June 15, 2005.

34 UNDM Article 3(1): "Persons belonging to minorities may exercise their rights, *including those set forth in the present Declaration*, individually as well as in community with other members of their group, *without any discrimination"*. [Emphasis added] Inspired by the wording of Article 27 of the ICCPR, Article 3(1) of the UNDM provides a more recent and positive formulation for the protection of persons belonging to minorities, and should therefore serve as the primary point of reference for future normative instruments.

35 "Every citizen shall have the right and the opportunity … (a) To take part in the conduct of public affairs, directly or through freely chosen representatives". Public affairs in the meaning of this Article have been interpreted as "a broad concept, which relates to the exercise of political power, in particular the exercise of legislative, executive and administrative powers". HRC General Comment 25 on the right to participate in public affairs, voting rights and the right of equal access to public service, Art 25 (1996), UN doc. CCPR/C/21/Rec.1/Add.7, para 5.

36 ICERD, Article 1(1).

ity groups from political and economic participation at all levels, including local government, and call on governments to address it. This may require special measures as permitted by Article 1(4) of the ICERD. Remarkably, the Preliminary draft of the Convention extends beyond the mere adoption of special measures, providing for nothing less than the "individual *and collective* right to free and informed participation in all areas of society, particularly in matters that affect or concern one's own interests".[37]

Public life in the UNDM

> must be understood in the same broad sense as in the ICERD article 1 […] Additionally included in "public life" are, among others, rights related to election and to be elected, the holding of public office and other political and administrative domains.[38]

The right of minorities to participate in the life of their own communities facilitates this participation in decision-making, by allowing minorities to form their own associations – political or otherwise – to represent their concerns and interests. This right extends to forming associations and contacts across territorial boundaries with members of the same minority group or with other minorities.[39]

Finally, the right to participate in the benefits of development ensures that minorities are not disadvantaged in development, for example by having their land or resources removed to make way for a development project from which they receive no benefits. It also ensures that minorities are not discriminated against and left behind in the process of development while other sections of the population benefit.[40] This integration of minorities into the development process must take place with their full informed consent, in ways that ensure minorities can preserve their identity.

The key in all these provisions is *effective* participation. This has two elements. States must ensure that any measures they take or mechanisms they establish are not tokenistic. It is not sufficient for one member of a minority to rubberstamp a decision taken by the State. The measures should include opportunities for consultation before decisions are made and the state must take into consideration the outcomes of the consultation process when making decisions. The second element is that no culture is homogenous and the State must make efforts to ensure that the consultation process includes as wide a range of opinions as possible within the minority community. Problems may arise when a State only deals with selected community "leaders" because these "leaders" may not be representative of the community as a whole.

Anti-discrimination in ICERD: an evolution

While the above sections argue that both the individual and collective experience of discrimination must be taken into account in order to combat the deep-rooted exclusion and marginalization of ethnic, linguistic and religious minorities, it must be noted that the collective dimension of identity is not explicitly recognized in the original drafting of the ICERD Convention. The Committee on the Elimination of Racial Discrimination (CERD) has nonetheless since incorporated this important dimension to the interpretation of the Convention through various General Recommendations in recent years, and the content of these recommendations should transpire from the Preliminary Draft currently in circulation, to its inclusion into the final Convention Against All Forms of Discrimination and Intolerance.[42]

One of the most important steps taken by the CERD in understanding the interplay between discrimination and the respect for a collective way of life was first addressed in General Recommendation XXIII on Indigenous Peoples, where the Committee called upon States parties to "recognize and respect indigenous distinct culture, history, language and way of life as

37 Article 4 (paragraph xi) of the Preliminary Draft Convention. [Emphasis added]

38 A. Eide, *Final Commentary to the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*, E/CN.4/Sub.2/AC.5/2001/2, 2001.

39 UNDM, Article 2(5). The only limit on this is that contact must be peaceful.

40 This is of particular relevance given minorities' over-representation amongst the world's poorest of the poor.

42 Key CERD General Recommendations include: General Recommendation XXIII: Indigenous Peoples (1997); General Recommendation XXV: Gender-Related Dimensions of Racial Discrimination (2000); General Recommendation XXVII: Discrimination Against Roma (2000); General Recommendation XXIX: Descent (2002); and General Recommendation XXX: Non-citizens (2005).

an enrichment of the State's cultural identity and to promote its preservation".[43] General Recommendation XXVII on the Elimination of Discrimination Against Roma, for its part, underscored the core minority rights principle of self-identification.[44] A reference to this principle is regrettably absent from the Preliminary draft of the Convention.[45]

That said, perhaps one of the most relevant provisions for the future protection of minorities in the Americas is the attention drawn by CERD to provisions for bilingual education where relevant and the need for recruitment of teaching personnel from within the minority community,[46] as well as the need:

> [t]o include in text books, at all appropriate levels, chapters about history and culture of [minority communities], and encourage and support editing and disseminating books and other publications as well as television and radio programs, as appropriate, about their history and culture, including in languages spoken by them.[47]

Both recommendations were conceivably drafted in an effort to create a less alien environment for Roma; a set of recommendations that would thus arguably apply also to numerous other ethnic, religious or linguistic community living in a position of non-dominance, such as Afro-descendants in the Americas.[48] Alienation through perpetuation of stereotypes in school materials or lack of cultural sensitivity to minorities' way of life and needs has been widely documented as a reason for high drop-out rates among these communities. Also well documented is the inextricable link between low levels of education and socio-economic marginalization and political exclusion.

While classic anti-discrimination principles may indeed be well equipped to tackle denial of individual access to education, the present article argues that failure to acknowledge the needs and characteristics of different ethnic, linguistic and religious minorities will inevitably result in failure to not only identify the *de facto* inaccessibility to (or inadequacy of) education systems, but also of other public services including housing or health care.

The fact that a provision on indirect discrimination figures prominently within the preliminary draft of the Convention is a step of paramount importance if the *de facto* marginalization (and related invisibility) of Afro-descendants and other communities is to be adequately addressed. Two existing instruments dealing squarely with this form of discrimination includes ICERD's Article 1(1), which prohibits "any distinction, (…) which has the *purpose or effect* of nullifying or impairing the recognition, (…) on an equal footing of human rights (…)".[49] A further normative instrument to draw from in this respect is the EU Race Directive, where both direct and indirect discrimination is recognized, and where discriminatory intent therefore has no relevance.[50]

43 CERD General Recommendation XXIII: Indigenous Peoples (1997), para 4(a). Given their position of non-dominance and distinct culture and way of life, indigenous peoples are generally agreed to also constitute minorities. Minorities, however, cannot interchangeably self-identify as indigenous given the lack of pre-colonial relationship to ancestral land (among other criteria).

44 Id., para. 3.

45 Note that the principle is nonetheless so well established in international law that there is little cause to fear that a failure to explicitly mention this principle in the convention would bar access of any genuine minorities to make claims under this instrument.

46 Id., para 18: "To prevent and avoid as much as possible the segregation of Roma students, while keeping open the possibility for bilingual or mother tongue tuition; to this end, to endeavour to raise the quality of education in all schools and the level of attainment in schools from the minority environment, to recruit school personnel from among members of Roma communities and to promote inter cultural education."

47 CERD General Recommendation XXVII: Discrimination Against Roma (2000), para. 26.

48 With regard to minority rights in the sphere of education, see also: Article 14 of the Framework Convention for the Protection of National Minorities; Article 8 of the European Charter for Regional or Minority Languages; Article 4 of the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities; Paragraph 8 of the Council of Europe Recommendation 1201 (1993) on an Additional Protocol on the Rights of National Minorities to the European Convention on Human Rights; and Recommendations 11-16 of The Hague Recommendations regarding the Education Rights of National Minorities.

49 [Emphasis added]. Eliminating the need to prove any intent through recognizing actions or policies whose purpose "or effect" is discriminatory is crucial for an effective remedy in the Americas where the concept of racial democracy is so deeply entrenched.

50 Council Directive 2000/43/EC: Implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (29 June 2000). The EU Race directive also provides for the reversal of the burden of proof once a prima facie case has been established.

Conclusion

Despite their significant numbers, Afro-descendants experience a high degree of marginalization and invisibility in the Americas. It has been argued that much of this marginalization has been sustained because of the current system of protection's inability to reach beyond the individual experience of discrimination, or to challenge the historical, social and political structures that have enabled the discrimination and invisibility to persist from past centuries through to present times.

This article has sought to demonstrate how minority rights can be used as a valuable set of tools for bridging the current protection gap through not only protecting, but to also promoting the identity and viable existence of different ethnic, linguistic and religious groups. These forms of protection, coupled with non-discrimination provisions that are sensitive to alternative needs, address a vast number of invisibility's root causes by affording these groups the possibility of integrating without the need to assimilate.

By creating new spaces for effective participation in wider society, in addition to tackling direct and indirect discrimination in access to various public spaces, it is clear that minority rights also serve as an important tool for individual and collective empowerment, and in turn, for strengthening of democratic institutions across the Americas. Far from increasing the vulnerability of ethnic, linguistic and religious minorities, or further entrenching their marginalization, the spaces that minority rights create for these communities in the process of development is also central to successfully addressing the economic exclusion that Afro-descendants and indigenous peoples in particular have suffered for centuries throughout the Hemisphere.

In light of the above, minority rights articulated in conjunction with anti-discrimination principles thus enable to protect the "project of life" of communities.[51] The degree to which minority rights - or at least the collective experience of discrimination - is acknowledged in the Inter-American Convention Against Racism and All Forms of Discrimination and Intolerance will nonetheless greatly determine the extent to which the project of life of marginalized communities throughout the Americas can indeed aspire to a project of life that is sensitive to their history, their needs, and their dignity as distinct communities.

51 The concept of "project of life" has been referred to in cases such as *Villagran Morales et al. v Guatemala*, Inter-American Court of Human Rights, Ser. C, No. 63, Judgment of November 19, 1999; and also *Moiwana Village v Suriname*, Inter-American Court of Human Rights, Ser.C, No. 124, Judgment of June 15, 2005.

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