JUDICIAL SYSTEMS AND RACISM AGAINST PEOPLE OF AFRICAN DESCENT

By **Felipe González*** **& Jorge Contesse†**

INTRODUCTION

In March 2004 the Justice Studies Center of the Americas (JSCA) published a report by the authors of this study regarding the judicial treatment of the issue of racism against people of African descent in Brazil, Colombia, Peru, and the Dominican Republic.[1] The report was commissioned by the General Assembly of the Organization of American States (OAS) in the context of existing OAS initiatives, ultimately for the formulation of an Inter-American Convention for the Prevention of Racism and All Forms of Discrimination and Intolerance.[2] This article is based on that report. It contains some of sections from the original reports, summarizes other parts, and includes new information (specifically related to the Inter-American system).

In preparing the above-mentioned report visits were made to the four countries serving as its central focus. These countries were chosen because they represent different geographic areas of the Americas and contain a critical mass of people of African descent. The visits consisted of interviews with officials, judicial system operators, organizations of people of African descent, academic centers, non-governmental organizations, and other important actors in this area. Information was gathered on the treatment of racist practices in each country, especially on the judicial system's role in these matters.

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* Felipe González is director of the Human Rights Program at the Universidad Diego Portales Law School in Santiago, Chile and professor of International Human Rights Law and Constitutional Law at the same institution. He served as Latin American representative to the International Human Rights Law Group for more than a decade and has been a visiting professor at various universities in the United States and Spain.

† Jorge Contesse is a professor of Constitutional Law and Legal Theory at the Universidad Diego Portales Law School and main author of the Annual Report on Human Rights in Chile, published by the same institution. He has participated in other JSCA studies on justice administration and is currently pursuing a graduate degree at Yale University.

[1] The complete report is available at www.cejamericas.org.

[2] Through the resolution "Prevention of Racism and All Forms of Discrimination and Intolerance and Consideration of a Draft Inter-American Convention," AG/Res. 1930 (XXXIII-O/03), June 10, 2003.

While it is true that the report was not intended as a detailed reflection of the treatment of the Afro-descendent population by the region's judicial systems, both because of its limited, four-country focus and because of the methodology employed, the observations that it contains are illustrative in a number of areas and have allowed us to arrive at certain conclusions and recommendations and to formulate lines of inquiry on this topic.

COUNTRY SUMMARIES

Brazil

Historically, the widely held vision in Brazilian society and government was that the country had no racial discrimination problem. The theory is that once slavery was abolished in 1888 a sort of "racial democracy" came into being, a view upheld by a high level of integration among different races, including many interracial families. Social scientists accepted this idea almost unanimously until a few decades ago. The Black Movement's attempts to raise awareness of existing racism problems have been utterly marginalized and have had practically no influence on other public actors.

Meanwhile, statistical studies have revealed the serious inequalities that affect Brazil's Afro-descendent population. For example, the median income of households in the black community is only 43% that of white households, and the proportion of Afro-descendants living in poverty is more than double that of the white population (46.8% versus 22.4%). Indigents represent 21.8% of the black population and 8.4% of the white population.

Although legislation against racial discrimination was passed in 1951, racism was seen as an isolated issue rather than as a problem arising from the structure of society itself and attributed by some social scientists to the influence of foreign capitalism in Brazil. For this same reason the legislation that was developed focused on punishing acts of racial segregation following the pattern observed during those years in the U.S., ignoring manifestations of racism that were more typical of Brazilian society. Based on the models in place at the time, the latter were seen as isolated incidents that did not require legal or political intervention.

It was only in the 1980s that the viewpoints held by those in the Social Sciences were reformulated and the myth of "racial democracy" was reexamined. Brazilian society and government were found to be strongly hierarchical with the racial element functioning as a specific discriminatory component that functioned parallel to existing forms of socio-economic discrimination. However, this process has not been accompanied by a transformation of similar magnitude in Brazilian society in general.

In the legal system change began to manifest itself at the end of that decade, initially in the new Federal Constitution (1988) and later in new anti-racism legislation in the criminal ambit (Law 7716), although the latter has been modified on several occasions due to difficulties in its implementation.

The State's treatment of racist practices against people of African descent begins to gain importance during the second half of the 1990s at both the federal and state levels, particularly as a result of the preparatory process for the World Conference against Racism. The process continued after the event and led to the creation of a series of State institutions and public policies that addressed this issue. However, the process has not been free of obstacles, as reflected in the intense public debate that arose over the adoption of laws establishing entry quotas at some public universities for members of the black community, which even led to numerous legal disputes. It is important to note that laws instituting similar quota systems for women and the disabled were passed in the early 1980s without arousing this degree of controversy.

Nonetheless, the advances described have developed essentially in the executive and legislative branches, not in the judicial system. While there have been noticeable changes in this branch designed to increase consideration of the issue of racism against Afro-Brazilians, change is still incipient and not yet systemic; no consistent jurisprudence on the subject exists, and significant deficiencies in access to justice for Afro-descendents can be observed.

As a result, while some judicial rulings on issues related to discrimination against the Afro-descendent population have been handed down in different areas over the past few years, including criminal and civil suits and judicial review of affirmative action laws, significant developments in case-law are still lacking. In this regard it is telling that Brazilian jurisprudence's consideration of international human rights laws on racism is extremely limited, especially given that Brazil is signatory to the most important international instruments in this area, including the International Convention for the Elimination of All Forms of Racial Discrimination. Furthermore, the scant research that exists on this topic reveals that criminal prosecution represents a greater burden to Afro-descendents than to whites, and that this is particularly acute where the defendants are women of African descent.

The legal literature on this subject is also limited, frequently consisting of mere reviews of legal texts. Some attempts have been made in the last two years to compile case-law on this topic, but these are specific examples that are far from exhaustive. Legal journals that publish case-law rarely have a listing for racism in their indexes, which also impedes effective research on this topic. Only recently have exploratory studies of the judicial system's treatment of defendants in criminal processes and of black women defendants in particular been initiated.

The precariousness of the situation is reflected in the institutions that present complaints of racism in the courts. Government institutions and NGOs working in this area are small in size, hence their efforts are notoriously insufficient given the size of the black population of Brazil. In other words, there is a serious problem of access to justice, which has been a decisive factor in the failure to position racism as a critical issue in the courts and the legal community.

To this situation we must add the fact that judicial system operators (judges, public prosecutor's offices, and public defender's offices –where these exist) lack training in this area. The view held by numerous organizations within the Black Movement and many

academics is that the lack of training among judicial system operators perpetuates the myth of racial democracy which holds, as stated above, that Brazil does not have a race problem.

Colombia

After Brazil, Colombia has the largest Afro-descendent population in Latin America. Although there are no uniform official statistics, the number of Afro-Colombians is estimated at 16 to 25% of the total population, or between 6 and 10.5 million people. The Afro-Colombian population is settled throughout the entire territory, including the archipelago of San Andrés, Providencia and Santa Catalina islands, located 770 kilometers off the mainland and inhabited by the native *raizal* population. While the majority of Afro-Colombians live on the Pacific coast (*departamento* of Chocó), migration to urban centers has increased significantly in the past few years.

Colombia's armed conflict has been synonymous with death and risk for the country's black population for decades now; its position as the poorest and most numerous sector of the population in many areas makes it particularly vulnerable. Furthermore, Afro-Colombian communities often occupy areas whose arable lands and navigable rivers make them strategic for the armed groups.

Social indicators on Afro-Colombians speak eloquently. According to official statistics, 80% of black communities' needs are not met and their members live in extreme poverty. The average annual per capita income ranges from 500 to 600 dollars, compared to the national average of 1500 dollars. Seventy-four percent of the Afro-Colombian population earns less than the legal minimum wage, and the life expectancy of this group is 55, ten years less than the national average.[3]

In its 1991 Constitution Colombia recognized indigenous peoples and formally decreed the nation to be pluri-ethnic and multicultural, guaranteeing that the official language in lands

[3] Ministerio del Interior, *Visión, Gestión y Proyección de la Dirección de Asuntos para las Comunidades Negras – DACN. Dos años después. 1995-1996,* Santa Fe de Bogotá, enero de 1997, p.15.

settled by ethnic groups be that of those peoples. The Constitution also establishes the equality of all inhabitants and their right to not be subject to racial and other forms of discrimination. In contrast to the references to indigenous communities in the Constitution, Afro-Colombians are only referred to in a transitory statement that mandates the legislature to pass a law to regularize the collective property of black communities. This law was passed in 1993 (Law 70), and established a procedure for collective ownership of land, to be administered by community councils. It also contains a provision that expressly aims to punish acts of discrimination against this community, though many state that it is nothing but a declaration of good intentions. In addition, "Afro-Colombian Day" (celebrated on May 21) was legally established, and the General Directorship for Black Communities and Ethnic and Cultural Minorities was created in 1995, under the Ministry of the Interior.

In regard to political representation, the Constitution empowers the legislature to establish special constituencies in order to ensure the participation of ethnic groups. The resulting Law Nº 649/2001 gives black communities the right to elect two representatives, a level that is weaker than that established for indigenous communities.

Among the country's black groups, only the *raizal* population has received special treatment from Colombian lawmakers. The 1991 Constitution transformed what had been the local administrative region of Archipielago into a higher-ranking *departamento* and created laws designed to preserve the customs of the *raizal* by limiting access to the island and implementing specific regulations in the areas of economics, administration, external commerce, and others (Law Nº 47/93).

At present, there are no studies in Colombia that systematically address the prison situation and judicial treatment of individuals of African descent. All told, only one general study of the prison situation in Colombia reveals the manner in which Afro-descendents are treated in the country's penitentiaries. The authors of the study report that in places such as Bogota's "La Modelo" district prison, inmates of African descent do not even have a place to sleep and, as the poorest of the poor, are forced to occupy a space between two cell blocks (where the water and sewage pipes and electrical cables are located) called the

"tunnel" or "hole."[4] The report reveals the increased invisibility of the Afro-Colombian population within the nation's prison system compared to other individuals or groups: some inmates have spent several years in jail for minor infractions, reflecting the lack of an adequate professional defense services. The greater discrimination that this population faces in prison does not seem to have been explored or noted even by sentence enforcement judges.

There are no statistics on individuals of African descent working in the justice administration system (though the Ombudsman's Office has been gathering such information since October 2003). It is, however, important to note that of the eight judges (ordinary jurisdiction) and six magistrates (special jurisdiction and appeals) sitting in the courts on the island of San Andrés there is only one "half" indigenous person (on her father's side) in the *Juzgado Promiscuo Municipal,* an ordinary instance. Furthermore, none of the seven prosecutors who work on the island are of *raizal* descent, and only one of the five staff members of the Technical Investigation Center (*Centro Técnico de Investigación* or CTI—the branch of the public prosecutor's office charged with carrying out judicial investigations) is a member of the indigenous population. These are particular examples of a generalized occurrence—that Afro-Colombians have historically been marginalized from official positions.

In terms of jurisprudence, there is a disparity in how disputes involving Afro-descendants are treated in Colombia's courts. In contrast to lower instances, the Constitutional Court has been receptive; though few, its rulings have all been very important. Cases presented in the San Andrés archipelago involving the *raizal* community are significant here, particularly the application of common law to a community with its own customs and practices, which differ from those of mainland Colombians. In this context the State has been discriminatory, by allowing such practices as the registering of lands by mainland

[4] Misión Internacional Derechos Humanos y Situación Carcelaria, *Informe: Centros de Reclusión en Colombia: un estado de cosas inconstitucional y de flagrante violación de derechos fundamentales,* preparado por F. Marcos Martínez, M. Tidball-Binz y R. Yrigoyen Fajardo, octubre 2001. See http://www.hchr.org.co/documentoseinformes/informes/tematicos/informe%20carceles.htm.

Colombians under current legal provisions, but in violation of pre-existing verbal agreements between natives and those from the mainland.

One case in which racial discrimination was directly debated before the courts was that of "*Negra Nieves"* (Black Snow), a popular cartoon character from Cali that was created in the late 1960s. Negra Nieves was a black maid who made comic commentaries on current events in Colombia. An attorney representing various Afro social organizations presented a protection remedy (*acción de tutela*), considering that the cartoon denigrated the black race. The action was not successful in first or second instance as the judges felt that, rather than discrediting individuals of African descent, the figure of Nieves dignified them.

A final example of a local court's lack of response to discrimination involves the class action suit presented to the Inter-American Commission on Human Rights regarding the systematic and reiterated violations of various basic rights in the Chocó area as a result of the confrontations between paramilitary and rebel forces. Many of the cases presented to the Commission were previously presented to local judicial and non-judicial authorities without receiving a satisfactory response, and the denial of justice ultimately led to the filing of the complaint before the inter-American agency.

Peru

The Afro-Peruvian movement, which at one time possessed the cohesion and means to articulate a unified discourse on the community's needs and concerns, is now characterized by invisibility and lacks the unity that would allow it to place its demands on the public agenda. This can be attributed to historical factors, including the importation of black slaves from a variety of countries, which led to a significant amount of ethnic heterogeneity, and the current political situation, as we will see in the following paragraphs.

There are no official statistics on the current number of people of African descent living in Peru (the last time a racial variable was included in the national census was in 1940). However, there is general agreement that Afro-Peruvians represent between 8 and 15% of the total population, with most of these (55-60% of the total Afro-descendent population) located in the central area of Lima, el Callao, and the neighboring coastal areas.

Laws and institutions specifically oriented towards people of African descent in Peru are virtually absent, although the 1993 Constitution includes a general clause on equality that prohibits racial discrimination and other forms of intolerance and recognizes the right to ethnic and cultural plurality. These Constitutional rights are covered under a protective remedy (*amparo*).

In response to the lack of legal norms that specifically address blacks and other ethnic minorities, indigenous and Afro-Peruvian communities presented a proposal to add a clause recognizing those peoples to the Constitution in April, 2003.[5] This was a landmark joint action for racial groups in Peru.

Despite this joint effort, the State seems to pay more attention to native communities than to Afro-descendent groups, and has established the legal status and identity of the former[6] and allowed them to carry out jurisdictional functions through a special regulation.[7] In addition, laws that address specific aspects of native communities have been passed, such as *Decreto Ley* 22175/78; no similar laws exist for Afro-descendents.

The principle of equality established at the Constitutional level is echoed in the Code for Children and Adolescents (Law 27337) and in Peru's labor legislation, which was modified in 1997, mainly as a result of the activism of the now virtually extinct Francisco Congo Black Movement. Finally, the crime of discrimination was added to the Criminal Code (Art. 323) in 2000, which completed the process of establishing legal protection of this right in Peru.

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[5] The projected law states that "[e]l Estado reconoce a la comunidad afroperuana como persona jurídica de derecho público y garantiza sus derechos colectivos. La comunidad afroperuana cuenta con derechos colectivos propios de su tradición cultural y conocimientos que enriquecen al conjunto de la Nación Peruana. Es obligación del Estado facilitar su desarrollo autónomo y participación en la vida política mediante una incorporación directa en el parlamento nacional. Es obligación del Estado combatir en todas sus formas la discriminación que sufre la comunidad afroperuana y lograr su plena vigencia multicultural."

[6] Chapter VI of the Constitution.

[7] Articles 89 and 149 of the Constitution.

Peru had no institutions charged with promoting and protecting the rights of ethnic and racial minorities until the National Commission of Andean and Amazonian Communities (*Comisión Nacional de los Pueblos Andinos y Amazónicos*, CONAPA) was created in 2002.[8] The purpose of this body is to strengthen and foster the improvement of the situation of ethnic minorities in Peru.[9] Following its creation, a consensus was reached regarding extending the Commission's objectives to include Peru's Afro-descendent community, even though this is not expressly stated in the institution's mandate. In a report on CONAPA's first few years, those interviewed –including members of the Commission itself—noted that the institution had not fulfilled the expectations that it had generated in the black community. This is due in part to the fact that the Commission has carried out and facilitated some basic initiatives for promoting Afro-Peruvians' rights but has silenced the few voices that remained in the black movement, which tried to call attention to these issues, and established "official" positions that are not shared by the entire Afro-Peruvian community.

It is important to note that no statistics are available on the number of black inmates in Peru's prison system. However, many agree that they are truly "clients" of the criminal system. Peruvian prisons have a significant overcrowding problem (up to 159% at the San Pedro prison). This prison's significant Afro-descendent population lives in deplorable conditions, and inmates often do not know why they have been incarcerated (in some cases this imprisonment has extended beyond acceptable human rights standards). Many agree that Afro-Peruvians are the most vulnerable subjects of the criminal system.

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[8] For many the limited receptiveness and lack of attention of the State towards the Afro cause is clear in that the official name of the Commission did not initially include Afro-Peruvians. It is important to note here that even though not all official documents –including the organism's Website- refer to the Afro-Peruvians as part of CONAPA, it does develop programs and promote policies in favor of Peru's black community.

[9] The fact that no mention of Afro-Peruvian is made in the description of the objectives of CONAPA is systematic. The objectives state that the Commission should "promover y garantizar el reconocimiento y aplicación, por la sociedad peruana, de los derechos colectivos e individuales de los *pueblos indígenas*; asegurar el respeto a los derechos fundamentales de los *pueblos indígenas* vulnerables, especialmente a los pueblos en aislamiento voluntario y en extrema pobreza; fortalecer institucionalmente a las organizaciones representativas de los *pueblos indígenas* y a la Secretaría Técnica; representar al Estado como la entidad transversal que promueva las demandas de los *pueblos indígenas* con los organismos públicos y la sociedad civil y promover el desarrollo autodeterminado, sostenible y con identidad propia de los *pueblos indígenas*." The italics were added by the authors of this document.

No empirical information is available on the racial composition of the justice administration system, but system operators' testimony indicates black employees in a justice system agency –such as the Ombudsman's Office, public prosecutor's office or National Magistrate's Council, as well as in the courts themselves- tend to occupy positions with a low level of responsibility, such as the delivery of documents or some similar task.

The black movement lacks organization and focuses on calling attention to day-to-day racist practices and attitudes. In addition, people lack confidence in the judicial system, which prohibits them from using it in order to effectively address their complaints. As a result, virtually no cases of racial discrimination have reached the courts. Only one case had been presented prior to October, 2003 when a former National Police officer who had sought help from various national agencies lodged a complaint against the Peruvian government with the United Nations High Commissioner alleging his basic rights had been violated. The complaint makes specific mention of his rights to due process, equal treatment under the law, and to work. Many also feel that complaints against clubs and discos that denied entry to people of African descent in the in the late 1990s, which were presented in the media and through legal action, also reflect the racism that exists in the country (and the judicial system's failure to respond). It is, however, important to mention that these complaints did not only involve discrimination against Afro-Peruvians but included the cases of members of many races and ethnicities who did not meet the profile determined by club employees.

Dominican Republic

The case of the Dominican Republic is unique in that racism is generally focused on Haitians. The migration of Haitians to the Dominican Republic provided a source of cheap labor but fostered a climate of relative mistrust and nationalism, casting Haitians as a potential threat to national security and sovereignty. Despite the lack of official figures –the 2002 census did not include questions on race- it is estimated that there are as many as 650,000 Haitians with irregular immigration status in the Dominican Republic and 10,000 Dominico-Haitians (individuals of Haitian descent who were born in the Dominican Republic and who are also victims of racial discrimination). Based on these figures, the

Haitian presence in the Dominican Republic involves as many as 800,000,[10] or almost 10% of the total population.

Members of this group are at a decided disadvantage when it comes to their quality of life. The areas in which they tend to settle, known as *bateyes*, have no hospitals, virtually no drinking water (90% of homes) and very high illiteracy rates.[11] Illnesses such as HIV/AIDS are reaching very serious levels even for the geographic area of the Caribbean, which already has a high exposed population.[12] All of this is accompanied by the manifestations of racial discrimination (and xenophobia) found in the State's institutional structure. As we will see, anti-Haitian sentiment has been developed by the elite sector of the Dominican Republic and is not a manifestation of an aspect inherent in Dominican society in general.

According to the Dominican government there is practically no racial discrimination in the country.[13] The country has no official institutions charged with addressing the issue of race; indeed, many feel that the creation of such bodies would in itself constitute or manifest racism. The only existing legal instruments that could be used to protect the rights of Haitians and Dominico-Haitians are Constitutional provisions on the equality of all people.

Given that the problem of racism is linked to Haitian migrants and their descendants, it is important to review the legal norms that apply to this group. The Constitution contains a *jus solis* rule that grants Dominican nationality to anyone born in Dominican territory. The only exceptions are the children of active foreign diplomats and individuals who are "in transit" at the time of the child's birth (Article 11, Nº 1). Furthermore, the Migration Law (Nº 95, passed during Rafael Trujillo's regime, which was characterized by its anti-Haitian stance) defines people "in transit" as those who "attempt to enter the Republic for the main

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[10] Projections based on the poll carried out by the International Office for Migrations in 2003.

[11] Centro de Estudios Sociales Padre Juan Montalvo, *El mercado mundial del azúcar y su impacto en las comunidades bayeteras de la República Dominicana*. *Resumen Ejecutivo*, unpublished document, p. 10.

[12] According to official statistics, while 1.5% of the nation's population is infected with the virus, the figure rises to 5% in the *bateyes.* Centro de Estudios Sociales y Demográficos *et al.*, *Encuesta Demográfica y de Salud. Informe Preliminar sobre VIH/SIDA*, Abril 2003, pp. 12-13. General indicators are also available at http://www.unicef.org/infobycountry/domrepublic_statistics.html.

[13] See Committee for the Elimination of Racial Discrimination, 55th period of sessions, *Final Observations of the Committee for the Elimination of Racial Discrimination: Dominican Republic. 12/04/2001*, CERD/C/304/Add.74, paragraph 5.

purpose of continuing on to a destination beyond its borders"; that is, those who do not intend to reside in the Dominican Republic. This law was later amended to include a maximum period of 10 days for individuals considered to be in transit.

Racial discrimination and xenophobia are also manifested in judicial institutions. Current statistics on the prison population in the Dominican Republic, which are disaggregated by nationality, indicate that foreign nationals represented between 5 and 6% of the total prison population in the Dominican Republic in late 2003. Of these, 61% were Haitian, the great majority of them (91%) males; most were accused of committing drug-related crimes, homicides and crimes against property. 69% of the Haitians incarcerated at that time were in preventive custody, and approximately 71% had not yet been brought to trial.

In addition to facing the problems posed by severe prison over-crowding, Haitians who are prosecuted by the criminal justice system are generally not informed of the charges against them, do not speak enough Spanish to effectively communicate with their attorneys, and have no family to visit them. The number of Haitians and Dominico-Haitians imprisoned in the Dominican Republic presents an incomplete picture of the degree of discrimination to which members of this group are subjected, as it is common for Haitian citizens accused of committing a crime to be deported before formal charges are laid.

The racial composition of the justice administration system in the Dominican Republic is quite varied, as is true of all social sectors. It is not uncommon to find blacks working in the system (in fact, two Supreme Court justices are black). This is not, however, a reflection of the problems faced by Haitians and Dominico-Haitians in regard to access to justice and the manifestation of discrimination in some government and judicial contexts. While it is true that confidence in the judicial system has increased as a result of the implementation of the judicial reform that began in the mid-1990s (according to interviews and archival research), the social marginality in which Haitians and their children tend to find themselves inhibits them from approaching government authorities, as they fear being expelled from the country before having a chance to properly present their complaints.

The first cases that shed light on the Haitian problem were related to the government's refusal to register the Dominican-born children of Haitian nationals as Dominican citizens. The Central Electoral Board argued that Haitian citizens who reside in the Dominican Republic illegally are to treated as people who are in transit regardless of the number of years that they have resided in the country (decades in some cases). The government based its findings on its interpretation of American Convention on Human Rights, deciding that the Haitian Constitution's *jus sanguinis* rule should take precedence.

Two cases have been presented through the same legal action and have led to opposite judicial responses. In the first, which occurred in the city of Santiago, the court accepted the government's argument and denied the request for Dominican citizenship presented by the plaintiffs. The District Court of Appeal upheld the sentence, and it is currently being presented to the Supreme Court through a cassation appeal. A different outcome was obtained in the second case, as the Santo Domingo Court found that national law should take precedence and ordered that the children be registered as Dominican citizens. The sentence was upheld by the Court of Appeal but the court's order to register the children regardless of any appeals has been disregarded by the executive branch and the case has been brought before the Supreme Court (also via the cassation route), where it is currently pending.

Other cases have been presented in response to more generalized racist practices involving Haitians. For example, there are cases in which Haitian citizens have received severe punishments for minor infractions despite the fact that there were insufficient grounds for prosecuting them, and have often had to spend long periods in jail without being apprised of the charges against them. The system has also failed to energetically pursue cases of family violence; the few women who present complaints tend to come up against police officers who require that they complete procedures, which compromises the system's ability to protect them.

Another paradigmatic case is that of the Guayabín massacre, in which six Haitians and one Dominican were murdered by a military patrol. The victims were traveling from Santiago in a truck that did not obey an order to halt, at which point the soldiers fired, killing all of the passengers. The case is pending a Supreme Court ruling on a jurisdictional dispute that developed between the military courts (where the action was unsuccessful) and ordinary justice (where it initially progressed very quickly before stalling).

In summary, the judicial treatment of racism (and xenophobia) in the Dominican Republic is at an incipient and very sensitive stage, as the problems faced by Haitian citizens in this country –such as the irregular status of their children- have yet to be resolved by the Supreme Court following the issue of contradictory rulings by local instances. In addition, xenophobia, though not prevalent among ordinary citizens, has been used as political discourse and rallying point, and thus has also passed into the judicial ambit.

CONCLUSIONS

The information gathered in the JSCA report suggests that the invisibility of racist practices and intolerance on the American continent continues to seriously affect the Afro-descendent population. The historical denial of the very existence of these practices—a belief that persists in many areas— is the product of a variety of factors and tends to be obscured by the fact the abolition of slavery was not followed by a legally-instituted racial segregation of Afro-descendents. However, the absence of legal segregation does not indicate the absence of racist practices. While some countries, such as Brazil, have recently seen growing efforts to confront this problem, the general situation of Afro-descendents in these four countries is still quite precarious. The case of Peru is illustrative in this regard, as racist practices are not socially recognized and there is an almost complete lack of public policy in this area despite the presence of more than two million people of African descent in that country. Furthermore, individuals rarely seek assistance from the judicial system for this type of problem.

The invisibility of the Afro-descendent population is particularly serious when compared to the progress that has been made in the treatment of and responses to members of other at-risk groups—including women, indigenous communities, and the disabled–, which have been the object of growing (though still insufficient) movements in American states and the Inter-American system. In many countries in Latin America and the Caribbean both the government and society in general are not aware of the problem of racism against people of African descent, which makes it impossible to make any progress in addressing the issue through public policies. One very revealing fact in this regard is that in many countries in the region the population census does not provide the identification category of "Afro-descendent" or an equivalent term referring to the black population, even though practically all, if not all, of these countries, has some inhabitants of that origin.

In other contexts, such as in Brazil, the sheer size of the black population makes it impossible to ignore, but society continues to refuse to recognize the problems of racism and intolerance. This situation is due in part to the persistence of the myth that Brazilian society is integrated. This is also the case in the Dominican Republic, though here the society is even less willing to confront the problem. In some cases, such as Peru, blacks try to "whiten" themselves in order to improve their social status. In those contexts the concept of *mestizaje* is used to avoid recognizing existing racism; those who address the problem are often labeled the true racists and are accused of drawing attention to a matter that is considered invalid by a society that views itself as integrated.

The relative lack of organization of Afro-descendent communities on the continent as compared to other at-risk groups is also indicative of the invisibility that we have described. While some local efforts—such as Inter-American Development Bank (IDB) initiatives and the preparation for and follow-up activities after the United Nations' World Conference against Racism and Intolerance—have led to actions in a number of countries, these are generally nascent initiatives whose impact and political visibility are not significant. Of the countries covered by the JSCA report, the most dramatic situation is that of Peru, where researchers observed a regression in the level of organization of the black movement, which is currently minimal (it was fairly well-developed in the 1980s and 1990s).

Institutions that work to address the situation of Afro-descendents have limited power to demand that their rights be respected; there are very few institutions charged with carrying out this work and those that do so face adverse conditions.

As the situation in Brazil and Colombia described in the JSCA report testifies, over the last few years some countries have established standards and mechanisms for protecting the Afro-descendent population from racial discrimination. However, this process is still in its initial stages and the slow and complex process of making the legal protections that are put in place effective has not yet begun. The effectiveness of the Constitutional clauses and legal protections for human rights that have been established in the region have been limited, thus illustrating the dichotomy between legal regulation and social reality. This is even truer of the internal norms aimed at the Afro-descendent populations given these groups' invisibility and scant influence in the public debate. The region has a long tradition in which legal provisions guaranteeing the protection of basic rights are in practice treated as mere programmatic guidelines, and in some cases they do not even function in that restricted sense.

This situation, which affects the quality of public policies, is particularly manifest in the judicial system, where a series of factors makes it especially difficult to move cases involving racist and intolerant practices against the Afro-descendent population, which have historically been postponed, through the judicial system. As the JSCA report reveals, the substantive content of the rulings is not the only significant aspect of the judicial treatment of the discrimination that exists against the Afro-descendent population. This is particularly true in Brazil and Colombia. Without denying the importance of the rulings' content, even if advanced case-law could be developed in this subject matter its reach would fall far short of the mark if most Afro-descendents continue to feel marginalized from effective access to justice, as is currently the case in the countries studied. The most extreme situation observed in the context of this report is that of Peru, given that access to this type of justice is practically non-existent.

RECOMMENDATIONS

Steps that can be taken at the national level

One basic step to be taken internally in order to increase the visibility of the Afro-descendent population –and launch actions to prevent and eventually eliminate racism and intolerance directed at this group- consists of creating an institutional system within the government that is *specifically* concerned with the situation of people of African descent and with designing, planning and implementing coherent public policies in this area.

Given the extreme lack of awareness of this situation, it is recommended that a high-level public institution be created to coordinate a network of other agencies that will be charged with handling various aspects of the problem. This structure would necessarily involve the judicial sector. Of the countries observed for the JSCA report, Brazil is the most advanced in this area, though the work being done in that country is still incipient and some areas present a lack of continuity. Colombia has some government institutions that work in this area, but their effectiveness is as yet quite limited. The Dominican Republic has a minimal institutional structure that cannot be characterized as a system. Peru created an agency responsible for handling these matters in 2001, but it is not seen as an important player.

The design, planning and implementation of public policies in this area should be based on international human rights standards as developed by specialized agencies. Furthermore, the comparative experience of other countries should be used in this process. The following paragraphs present a list of measures designed to promote and protect the rights of people of African descent, particularly in regard to the judicial system.

1. One fundamental task of this institutional system should be to establish indicators on the presence of Afro-descendents in various areas, including the judicial system and. As noted above, some countries lack general indicators regarding the size and distribution of their Afro-descendent population. In other cases basic indicators are available but there is no complete information on the judicial and prison systems.

The results suggest that some basic indicators that are needed for the judicial system and related areas. These include:

- Information on the presence of people of African descent in the judiciary, public prosecutor's office, public defender's office or equivalent institutions, and in agencies related to the judicial system. Mention should be made of hierarchical, geographic and gender distribution (considering the special disadvantages faced by women of African descent, which has been duly noted in this report).
- Data on the prison population disaggregated by race and gender, specifying the length of time each inmate has spent in prison, the crimes for which they have been processed and/or convicted and their geographic distribution, as well as the nature of defense services that they have received (public or private).

2. There should be an effort to systematically gather information on the Afro-descendent population and the judicial system. The experience gained during the preparation of the JSCA report may be helpful in this effort, which should go beyond the identification of basic indicators. The authors initially requested that local agencies prepare studies on the situation in their respective countries and provided a limited timeframe under the assumption that systematic and relatively exhaustive studies of this issue would be available. The reality, however, was quite different: this data was not available, and at most (and only in some countries) the agencies were only able to find studies that covered the situation in specific geographic areas of the country over a limited period of time (or, in other cases, only referred to other groups that have historically faced discrimination, which demonstrates the special invisibility that Afro-descendents experience).

None of the institutions or forces that might be expected to carry out exhaustive studies of the judicial system's treatment of racism against people of African descent –such as the State, academic institutions and organizations that represent people of African descent (most of which seek to call attention to racist practices through publicity actions and, in only a very few cases, provide legal services)- have done so. In the case of governments and academic institutions (such as universities or research centers, including those that are linked to the judicial system) there is a need to place more emphasis in this area and to

allocate the resources that are required to do so. In many cases these agencies will not be able to implement actions without State financial support.

3. There is a need to promote a vigorous public debate on racist practices against people of African descent in general and on the judicial treatment of this issue in particular. Of the four countries studied, there is absolutely no debate on this issue in Peru and incipient debates have developed in Brazil and Colombia. In the Dominican Republic the discussion is more vocal, though it does not focus on discrimination and racism against Haitians and Dominico-Haitians in particular and involves nationalist expressions against those groups. Judicial treatment of the problem of racism against Afro-descendants is not a major topic of discussion in any of the countries under study and should be focused on making the problem more visible .

4. The organizations that participated in the preparation of the JSCA study repeatedly suggested that judicial operators receive training on racial discrimination. Training initiatives of this sort would contribute to improving the visibility of the issue and would also call into question certain socially-rooted ideas that influence judicial operators, such as the denial of the existence of the problem. These training activities should emphasize the fact that the struggle against racism is a priority for the judicial system in view of the fact that the core of this struggle is protection of human rights. There is also a need to familiarize judicial operators with developments in international law on racial discrimination, its parameters and all relevant case-law, and to incorporate the most relevant experiences in comparative law in this area.

5. Affirmative action initiatives designed to ensure the increased presence of people of African descent in the judicial system should be adopted. It is reasonable to assume that, in addition to addressing a matter of justice, the adoption of such policies would increase awareness and concern for the issue, thus contributing to true recognition of the issue by the judicial system. Furthermore, they would contribute to introducing the idea that “differentiating” according to racial criteria does not necessarily imply being racist (an idea that is strongly rooted in Latin American societies).

6. There is also a need to promote more government action in the international human rights system on several fronts, including compliance with the international standards that have already been adopted; the judicial system's application of international case-law in this area; and contributions to the development of international parameters through the adoption of new instruments. International human rights law has historically compensated for gaps in the protection of these rights at the national level and called attention to certain forgotten or ignored areas.

In the case of measures focused on Afro-descendant and other civil organizations, while the above recommendations require government participation in order to be successfully implemented, the following priority areas also emerge:

- Promoting and supporting the development of organizations of people of African descent and networks of such institutions. Given their direct involvement with the problem their perspective is irreplaceable; in addition, the creation of networks will increase their public influence.

- Actively and effectively involving these organizations in the design, planning and execution of public policies in the area under study, establishing appropriate channels for participation. Successful experiences in some countries in the region show how civil society has interacted with State agencies in order to promote judicial reform.[14] One example of this is the work that has been done in the Dominical Republic, where organizations of this type used the judicial system reform carried out in the mid-1990s to establish their place in the judicial system in order to present the demands that are most relevant to the work of their base organizations.

- Favoring organizations of people of African descent for carrying out monitoring, follow-up and evaluation of public policies in this area.

- Providing training for members of these groups to familiarize them with international standards, international mechanisms for protecting their rights and comparative experiences from other countries in this area. When necessary, these initiatives should include training on the use of internal legal mechanisms given that the judicial tool

[14] See *Justicia Social y Sociedad Civil: el papel de la sociedad civil en la reforma judicial: estudios de casos en Argentina, Chile, Perú y Colombia,* Justice Studies Center of the Americas, Buenos Aires, 2003.

may –and in many cases already has- been used to place issues and problems of Afro-descendant populations on the public agenda.

- Encouraging and supporting the development of public interest actions on the part of Afro-descendent organizations, using litigation to highlight the paradigmatic nature of their complaints before the courts and public opinion. These initiatives should extend beyond those directly affected in order to maximize the potential of their judicial litigation work.

- Promoting and supporting the inclusion of the problem of racism on the agendas of other civil society institutions. The experience in other areas, such as women's rights – which gained prominence on the agendas of Latin American human rights NGOs as recently as the 1990s- demonstrates the importance of ensuring that civil society organizations other than those that are directly affected by the issue also take up the cause. This increases the visibility of the problem and strengthens citizen initiatives.

The Inter-American System and Racism against People of African Descent

As we noted at the beginning of this study, this four-country report was developed in response to the OAS's discussion of an eventual process to prepare an Inter-American convention against racism. If internal judicial systems do not adequately address the prevalence of racist practices in the Americas, it will be necessary to assess whether the Inter-American system's traditional- and still customary – way of responding to this issue is adequate for strengthening the work of internal agencies. The following paragraphs summarize the Inter-American instruments that apply to this issue and the work that has been carried out by OAS agencies.

The work of the OAS in general and the Inter-American Human Rights System in particular has been very limited in regard to racism. While the general human rights instruments that have been created by the Inter-American System establish the principle of non-discrimination, this type of clause has very little operability. The non-discrimination clause is present in the American Convention on Human Rights and other inter-American instruments- including the American Declaration on the Rights and Duties of Man, the Additional Protocol to the American Convention on Human Rights in the area of economic,

social and cultural rights (the San Salvador Protocol) and others. This is not surprising given that one of the main factors that prompted the creation of the international human rights system in the aftermath of World War II was precisely the need to eliminate the discrimination that had led to the commission of crimes against humanity. In contrast, mention of racial discrimination is scant and usually general in the Inter-American instruments.

The OAS has adopted several instruments focused on at-risk groups. For example, the Inter-American Convention to Prevent, Punish and Eliminate Violence against Women (the "Convention of Belém do Pará") was adopted in 1994, and the Inter-American Convention on the Elimination of All Forms of Discrimination against Disabled Persons was passed in 1999. In contrast, the only instrument that exists in the area of racial discrimination is the proposed Declaration on Indigenous Communities, which has been under discussion for close to fifteen years.

Initiatives by OAS political agencies are isolated and basically limited to discrimination against members of indigenous communities (possibly reflecting the norm within the countries themselves). Only in the last decade has this work expanded to include discrimination against people of African descent, though efforts are still incipient. In this context it is notable that during the Regional Preparatory Meeting on Racism *ad portas*, the OAS General Assembly of 2000 charged the Permanent Council with studying the need to prepare an Inter-American Convention against Racial Discrimination.[15] The Assembly's consideration of this issue continued in 2001[16], 2002[17], 2003[18] and 2004.[19]

Still, work carried out by inter-American human rights agencies has focused little on the problem of racial discrimination against people of African descent. The Commission only began to include this issue in its country reports during the last decade, though some countries that have a critical mass of these populations still do not treat the issue. In three of

[15] AG/Res. 1712 (XXX-O/00), June 5, 2000.
[16] AG/Res. 1774 (XXXI-O/01), June 5, 2001.
[17] AG/Res. 1905 (XXXII-O/02), June 4, 2002.
[18] AG/Res. 1930 (XXXIII-O/03), June 10, 2003.

the countries chosen for the JSCA study the Commission had paid special attention to Afro-descendent populations, namely in the Brazil report from 1997 and the Colombia and Dominican Republic reports of 1999. In contrast, the 2000 Peru report does not contain a chapter on this issue.

The Commission has not published any topical reports on Afro-descendent populations, a fact that stands out against the agency's topical publications on the situation of women, the mentally challenged, indigenous communities and other at-risk groups. Similarly, the Inter-American Human Rights System has no mechanisms or agencies whose specific purpose is to address problems of racial discrimination in the region.

Moreover, the Commission has resolved very few individual cases that involve racism against people of African descent in particular. The great majority of these cases deal with individuals of African descent who have received the death penalty in the United States and English-speaking Caribbean. Regarding the countries included in the JSCA study, the Inter-American Commission has only published decisions regarding admissibility on racism against people of African descent in Brazil. Such is the case of Brazilian Simone André Diniz, a woman of African descent who alleged that she had been the victim of racial discrimination when applying for a job.[20] However, the Brazilian government reports that there are currently no complaints in progress in the Inter-American Commission on Human Rights involving racism against people of African descent in Brazil.[21] In the Dominican Republic, the only case considered was an admissibility matter handed down in the case of Dilcia Yean and Violeta Bosica, two girls of Haitian descent born in the Dominican Republic who were denied Dominican nationality and faced deportation.[22] The Commission accepted a request that protective measures be granted in order to prevent their deportation.

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[19] AG/Res. 2038 (XXXIV-O/04), June 8, 2004.
[20] Inter-American Commission on Human Rights, Report Nº37/02 (admissibility), Petition 12.001, Simone André Diniz v. Brazil, October 9, 2002.
[21] Ministério da Justiça, Secretaria de Estado dos Direitos Humanos, Segundo Relatório Nacional sobre os Direitos Humanos no Brasil (2002).

For its part, the Inter-American Court has not issued any sentences regarding racist practices against people of African descent.

Though not specifically an OAS activity, an interesting development in this area involved the report prepared by the organization's member states for the Preparatory Conference on Racism held in Santiago in December 2000. The proposal that emerged from the Conference went beyond all previous OAS work to date in this area, and also went beyond the U.N. Convention for the Elimination of All Forms of Racial Discrimination.[23] The Santiago document is much more far-reaching and analyzes the problem of racial discrimination much more precisely. It reflects a more current approach to this problem and its connection to various other rights. For example, the Santiago Proposal reviews the problem of multiple discrimination and racial discrimination in combination with other forms such as race and gender, or race and poverty. The Proposal is also more specific than the U.N. Convention in pinpointing mechanisms and institutions that can be carried out to resolve the problem of racial discrimination, including detailed reports and systematic data-collection for indicators; a prompt warning system to prevent large-scale acts of racism and genocide; and the use of new technologies to combat racism.

As noted earlier, during the past decade the OAS adopted treaties on the issues of violence against women and people with disabilities, areas that clearly were already regulated through general human rights agreements such as the American Convention on Human Rights. Whether or not there is express mention of these issues, no one denies that they are to be considered included in the treatment of those general texts. In this sense, the main goal of the adoption of conventions on violence against women and people with disabilities was to make these problems more visible. The processes of preparing, signing and ratifying these agreements on the part of the OAS member states has helped position these issues on the Organization's agenda and those of the countries that belong to it. In the areas of violence against women and people with disabilities, this increased visibility has led to an increase in the number of cases that are addressed by the Inter-American

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[22] Inter-American Commission on Human Rights, Report Nº28/01 (admissibility), Case 12.189, Dilcia Yean and Violeta Bosica v. The Dominican Republic, February 22, 2001.
[23] See the Santiago Proposal, WCR/RCONF/SANT/2000/L.1/Rev.4 (December 20, 2000).

Commission on Human Rights. The Commission's current requirement that all internal avenues have been exhausted before it will consider a matter, and the fact that this requirement is met in almost every case, is also a reflection of the increase in judicial litigation in these areas at the State level.

If we contrast this situation with that which occurs with discrimination against people of African descent, the differences are evident. The number of cases brought before the Commission is extremely low, as is judicial litigation at the internal level. Even in Brazil and Colombia, where Afro-descendents make up a significant percentage of the population, judicial action is limited. Greater visibility should contribute to strengthening debate and legislative reform at the internal level. Furthermore, having an agreement dedicated to this specific issue provides those interested in making progress with an important tool for promoting internal legal changes.

It is also important to consider the possible impact of a specific agreement on the development of case-law at the internal and international levels. As we have already noted, general human rights instruments can be used to infer interpretations that favor the struggle against racial discrimination, but those responsible for interpreting them tend to develop jurisprudence that protects a specific right or set of rights mentioned in an agreement specifically created for this purpose.

This argument is even more valid for internal case-law, given that local judges usually make rulings in accordance with international standards only when their application is already established in internal judicial culture, and rarely venture out to offer innovative interpretations of general human rights conventions. As a result, the adoption of a specific inter-American instrument on racial discrimination would make it more likely for judges to take an active and protective role in interpreting clauses regarding this topic. This process must, of course, be accompanied by the presence of a better-organized civil sector that is more conscious of the judicial tools that are available to protect and promote the rights of people of African descent.

It is important to note that while many American governments are signatories to the U.N. Convention for the Elimination of All Forms of Racial Discrimination, in most of these states the current U.N. system has considerably less visibility and impact than the Inter-American system. Therefore, development of this issue under the latter system would be an additional significant step.

Another important step is the establishment of new protection mechanisms in this area, in particular international ones that require States to legislate the creation of new, more efficient mechanisms. While not all of the most recent conventions adopted by the OAS on specific issues have instituted specific international mechanisms to address the respective topic, all do at least identify institutions and mechanisms that should be established internally by law, which is progress in itself.

Experience shows that the existence of issue-specific instruments has played a key role in promoting international concern for these issues under the international human rights protection system. While general international conventions and declarations on human rights –including the U.N. instruments, namely the Universal Declaration of Human Rights, the International Pact on Civil and Political Rights and the International Pact on Economic, Social and Cultural Rights, and the OAS instruments, namely the Declaration on the Rights and Responsibilities of Man and the American Convention on Human Rights - already have parameters for addressing rights violations such as gender discrimination, racism, and other specific abuses, work in these areas has been substantially strengthened by the development of specific international instruments that further develop these parameters and frequently create agencies that provide international oversight of States' compliance.

In conclusion, an International Convention on the issue analyzed in this report would serve to promote and strengthen initiatives within the countries mentioned. In many countries in the region the invisibility of racist practices against people of African descent is so severe that it is extremely difficult to change the situation without ongoing support from international human rights agencies and the development and definition of standards in this area.