

IACHR

The Situation of People of African Descent in the Americas

INTER-AMERICAN COMMISSION ON HUMAN RIGHTS



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THE SITUATION OF PEOPLE OF AFRICAN DESCENT IN THE AMERICAS

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THE SITUATION OF PEOPLE OF AFRICAN DESCENT IN THE AMERICAS

EXECUTIVE SUMMARY

1. The Inter-American Commission on Human Rights (hereinafter “the Inter-American Commission”, “the Commission”, or the “IACHR”) has established that the principle of nondiscrimination is one of the pillars of any democratic system and that it is one of the fundamental bases of the human rights protection system instituted by the Organization of American States (hereinafter “OAS”). Despite that, persons of African descent in the Americas have traditionally suffered and continue to suffer exclusion, racism, and racial discrimination¹, and have been rendered “invisible”, even though they make up the majority of the population of some States in the region.

2. By means of this report, the Commission seeks to make a contribution to the ownership of human rights by persons of African descent in the Americas, to their strengthening, and to give persons of African descent a tool for empowerment. This report is also intended to support increasing “visibility” for this population *vis-à-vis* third parties; thereby sensitizing others regarding their existence and their contribution to the development of their own States. The IACHR expects that this report will be an effective tool for States to ensure full dignity for persons of African descent: children, women, men, the elderly, and the disabled. Moreover, the Commission seeks to insist in the inclusion of a cross-cutting ethnic-racial perspective in its reports.

3. Consequently, the purpose of this report is to underscore and focus on the situation of persons of African descent, on the understanding that the identification of this population, and its needs—even in those States where it makes up the majority of the population—is the initial step to be able to construct appropriate legal categories and embark on the legal measures and policies needed to protect and ensure their human rights. Accordingly, the Commission hopes that this report will make a substantive and positive contribution to the advancement, and protection of the human rights of persons of African descent and will constitute a useful tool both for the protection of persons of African descent at the national level and for the utilization of the inter-American human rights protection system by all users. In addition, this report would allow the IACHR to comply with the mandate entrusted to it by the General Assembly of the OAS through operative paragraph 6 of resolution AG/RES. 2606 (XL-0/10) “Draft Inter-American Convention against Racism and All Forms of Discrimination and Intolerance”.

4. In this context and, particularly, on the occasion of the International Year for People of African Descent, the Commission understands that this regional report represents a first attempt to adopt a general and systemic approach to the situation of persons of African descent in the Americas, which will, moreover, pave the way for various future lines of work. Thus, this report identifies the principal trends in the region and puts

¹ The IACHR uses the term “racial” not because it adheres to theories claiming the existence of different races in the human species, but rather in line with the nomenclature of Article 1 of the American Convention on Human Rights.

forward recommendations aimed at guaranteeing the human rights of persons of African descent.

5. This report is the result of information that the Commission has analyzed and systematized regarding the circumstances surrounding persons of African descent in the Americas. To that end, the Inter-American Commission has taken into account the responses to the questionnaire published in May 2011, inputs from the technical meeting of international experts held on July 14 and 15, 2011, information provided by States and civil society in the thematic hearings held before the IACHR, cases and petitions presented to the inter-American human rights protection system, and the country and thematic reports adopted by the Commission. In addition, the IACHR has used international decisions and recommendations by specialized international agencies regarding the identification of standards in this area.

6. Although States have recognized the persistence of racism and racial discrimination in the region and have begun to adopt measures to address them, persons of African descent in the Americas are still victims of structural discrimination.

7. Throughout the report, the Commission analyzes issues related to racial self-identification and the living conditions of the Afro-descendant population. Later, based on the diagnostic assessment carried out, the IACHR examines the structural discrimination against the Afro-descendant population in the context of State obligations to ensure equality and nondiscrimination. Furthermore, the Commission examines the dynamics of the realities faced by the Afro-descendant population and the obligation to provide appropriate judicial guarantees, in its two manifestations: on the one hand, the obstacles faced by the Afro-descendant population in accessing and obtaining justice, and on the other hand, racial profiling and racial bias in the criminal justice system. In this report, the Inter-American Commission also addresses the different measures that the States of the region have adopted to comply with their guarantee and protection obligations. Accordingly, consideration is given to the legislative framework regarding the ban on racial discrimination and the report looks in detail at the positive measures and affirmative action measures implemented by the States.

8. Finally, the Commission formulates conclusions and recommendations that it considers pertinent for an appropriate treatment of the matters addressed in the report. The recommendations are geared to cooperate with States of the region in processes aimed at the adoption of measures and policies that make it possible to comply effectively with the obligation to protect and ensure the human rights of persons of African descent in the Americas.

9. The IACHR draws attention to the fact that, although the Afro-descendant population accounts for approximately 30% of the population of the Americas, the “Afro-descendance” variable has not been incorporated into censuses or other demographic survey mechanisms until recently and that, moreover, those attempts to incorporate it have come up against certain technical difficulties before, during, and after the survey. The Commission values the experiences undertaken by the States of the region in attempting to include the “Afro-descendance” variable in censuses, household surveys, and other

demographic studies and points out that the incipient progress achieved in this direction confirms the need to expand and improve them.

10. The Commission understands that, with respect to best practices, States must consult with civil society through institutionalized mechanisms for cooperation, coordination, and influence, that respond to their expectations, with respect to the design and categories used in the self-identification questions with a view to developing technically adequate tools and strengthening the process of sensitization, awareness-raising, and empowerment of persons of African descent in the region. In addition to those efforts, the IACHR considers it necessary for States to conduct awareness and training campaigns regarding the self-identification categories to encourage the Afro-descendant population to identify itself and to sensitize those conducting the surveys.

11. Likewise, based on the available information, Afro-descendants in the region systematically inhabit the poorest areas with the most precarious infrastructure and are more exposed to crime and violence. Furthermore, Afro-descendants encounter serious obstacles regarding access to health and education services, as well as in obtaining housing and employment, especially at the managerial and upper levels. Accordingly, the Commission concludes that persons of African descent face major obstacles for the exercise and guarantee of their civil and political, economic, social, and cultural rights. Similarly, underrepresentation and the scant participation of the Afro-descendant population in politics demonstrate the existence of further impediments to access to political power structures and to an active role in the design of public policies designed to improve their situation of structural discrimination.

12. In view of the above, the Commission expresses its concerns because the principles of equality and non-discrimination are still not completely guaranteed for persons of African descent in the Americas. What is more, persons of African descent are deeply affected by the persistence of racism, which strategically prevents them from enjoying and exercising their human rights.

13. The Commission also notes that the Afro-descendant population is adversely affected by multiple levels of discrimination, bearing in mind the close links between poverty and race and between race and social class, and how these categories are intertwined, thereby exacerbating the Afro-descendant population's vulnerability. In particular, the IACHR observes with concern the special vulnerability of Afro-descendant women, who have suffered triple historical discrimination based on their sex, extreme poverty, and race. This situation may get worse in particular socio-political contexts, such as armed conflicts, among others.

14. The Inter-American Commission considers it essential that States recognize the multiple discrimination endured by Afro-descendant women because of their gender and race, and that they compile disaggregated data on the situation and living conditions of Afro-descendant women. The IACHR also reiterates that States must mainstream the gender perspective in designing their public policies, taking into account the specific needs of Afro-descendant women and adopting a holistic approach to deal with issues directly affecting them.

15. The Commission points out that the structural discrimination suffered by the Afro-descendant population in the Americas must also be analyzed in light of the obstacles that those persons encounter when trying to access domestic judicial remedies. Accordingly, the IACHR acknowledges on a positive note that, given that the legislation designed to combat racial discrimination is recent, it is possible to glimpse at improvements ahead, which is why it is pertinent to insist on the adoption of measures designed to ensure effective progressive implementation of that legislation. Notwithstanding the foregoing, the Commission observes that the impossibility of accessing complaint and reparation mechanisms, be they administrative or judicial, is a factor contributing to the persistence of racism in the region. In addition, the absence of judicial guarantees and the lack of sensitivity of justice system operators with respect to racial discrimination contribute to even deeper resignation on the part of the discriminated groups and help perpetuate patterns of segregation and exclusion.

16. For that reason, the IACHR considers that States must adopt legal measures and policies to enhance their domestic laws and processes and guarantee effective access to justice for their Afro-descendant population. In order to do that, they must take into account material, economic, and juridical obstacles and the systematic exclusion to which persons of African descent are subjected.

17. With regard to racial profiling, the Inter-American Commission is concerned that, even if racial profiling is not expressly provided for, it is widely applied in the region as a selective and discretionary mechanism for detaining and investigating people, and directly affects the Afro-descendant population. In this regard, the IACHR points out that it is essential that States eliminate these practices, abolish the norms that establish a legal basis for them, draw up protocols to govern the behavior of the security forces that take ethnic and racial diversity into account, and implement appropriate mechanisms for monitoring and overseeing the activity of State agents, so as to detect and eradicate these practices in law enforcement agencies. To that end, the Commission considers it vital both to modify institutionalized stereotypes concerning the Afro-descendant population and to apply appropriate sanctions against security personnel who act on the basis of racial profiles.

18. The Commission further notes with concern the existence of policies of targeted institutional violence against the Afro-descendant population and regards it as essential that States, in addition to complying with standards requiring proportionality in the use of force, eliminate any kind of racist bias when defining their security policies.

19. The IACHR also observes with concern the impact of racism on the criminal justice system in the region and reiterates that using race and the color of a person's skin as grounds for establishing and determining a prison sentence is expressly prohibited by the instruments governing the inter-American human rights protection system.

20. The Commission takes note of the legislation passed by the States in the region to prevent and punish racial discrimination and points out that, in most cases, these are not general norms explicitly addressing racial discrimination. The IACHR issues a

reminder that States are obliged to undertake a comprehensive review of their domestic legislation, with a view to: i) identifying and abolishing provisions that entail direct or indirect discrimination, and ii) passing legislation that expressly and comprehensively punishes racial discrimination. That reform of existing norms is an obligation, and also an important tool for shedding light on the situation of Afro-descendants and one that helps to raise awareness and alter historical patterns of segregation and exclusion.

21. The Inter-American Commission appreciates the information provided in the responses to its questionnaire and takes note of the various measures adopted to combat racial discrimination and to help improve conditions for the Afro-descendant population in the region. As regards best practices, the information available shows that progress has been made with the implementation of measures aimed at diversifying curricula in favor of more inclusive education and with activities designed to protect and promote Afro-American culture in its various manifestations.

22. The IACHR considers it essential for States in the region to adopt positive measures to eradicate racial discrimination in the Hemisphere and provide effective guarantees of the rights of Afro-descendants. To that end, there has to be proper and disaggregated information, and sufficient and specific human and financial resources have to be devoted not only to neutralizing prejudice and racial stereotypes but also to improving the living conditions of persons of African descent with respect to health, housing, education, and work, paying particular attention to the multiple discrimination to which Afro-descendant women are exposed.

23. Human rights instruments in both the universal and the inter-American systems have specifically recognized the need to resort to affirmative action measures to remedy or offset structurally historical discrimination against certain groups and to prevent such discrimination from persisting. However diverse the terms used at the international level (“temporary special measures,” “positive discrimination,” “reverse discrimination”), the organs supervising the implementation of international treaties have regarded such measures as necessary to guarantee the substantive equality and enjoyment of fundamental rights of historically disadvantaged persons and social groups or victims of ongoing prejudice.

24. Indeed, affirmative action measures are an exceptional and temporary tool within the wider concept of positive measures. Through them, differential treatment is accorded to groups that have been systematically disadvantaged with a view to correcting structural inequalities and contributing to the overcoming of obstacles that prevent them from fully enjoying their human rights.

25. The Commission observes that, although it is true that in some States the norms establishing affirmative action measures have constitutional and legal status, the fact remains that these kinds of measures are not widely adopted.

26. The IACHR reiterates its commitment to cooperate with States in the region in the quest for solutions to the problems detected. Several measures that have been adopted to address this situation reveal that there is understanding and recognition

of the gravity of the issues involved, as well as the commitment of both the public and private sectors to effectively address the obstacles faced by the Afro-descendant population. In particular, the Inter-American Commission emphasizes that the strengthening of domestic judicial mechanisms and the adoption of measures for overcoming obstacles to access to judicial guarantees constitute the first line of defense in protecting the human rights of persons of African descent.

THE SITUATION OF PEOPLE OF AFRICAN DESCENT IN THE AMERICAS

I. INTRODUCTION

1. The Inter-American Commission on Human Rights (hereinafter “the Inter-American Commission”, “the Commission”, or the “IACHR”) has established that the principle of nondiscrimination is one of the pillars of any democratic system, and a fundamental basis of the Organization of American States (hereinafter “OAS”) system.² Despite that, Afro-descendants in the Americas have traditionally suffered and continue to suffer exclusion, racism, and racial discrimination,³ and have been rendered “invisible.”

2. In the region, the Regional Preparatory Conference for the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, held in Santiago, Chile, in December 2000, provoked the governments of the Americas to advance substantively toward the establishment of a conceptual framework in order to raise the visibility of afro-descendants, recognize the persistence of racism, racial discrimination, xenophobia and related intolerance that specifically affect the afro-descendant population and at the same time set forth a guide to fight social exclusion and racial discrimination in our Region.⁴ As a result, the Durban Declaration and Programme of Action (hereinafter “DDPA”) established the following:

We consider it essential for all countries in the region of the Americas [...] to recognize the existence of their population of African descent [...] and recognize the persistence of racism, racial discrimination, xenophobia and related intolerance.⁵

3. The difficulties encountered by persons of African descent in the Hemisphere, together with the scant importance attached to this issue, prompted the Commission -- in a follow-up to other activities it had embarked upon -- to prepare this thematic report. Its purpose is to conduct a diagnostic assessment of the situation of persons of African descent with a view to overcoming the historical “social invisibility” regarding this vulnerable group. The Commission notes that the circumstances in which the Afro-descendant population lives, and the problems it faces, differ from one country in the

² IACHR. *Considerations regarding the Compatibility of Affirmative Action Measures Designed to Promote the Political Participation of Women with the Principles of Equality and Non-Discrimination*, Annual Report of the Inter-American Commission on Human Rights, 1999, Chapter VI.

³ The IACHR uses the term “racial” not because it adheres to theories claiming the existence of different races in the human species, but rather in line with the nomenclature of Article 1 of the American Convention on Human Rights.

⁴ Speech by Commissioner Sir Clare K. Roberts, President of the Inter-American Commission on Human Rights, at the ceremony marking the granting of a donation by the Government of Brazil to the Special Rapporteurship for Afro-descendants and against Racial Discrimination, available at <http://www.cidh.oas.org/Disursos/02.28.05eng.htm>. See also: *Report of the Regional Conference of the Americas*, Santiago, Chile, December 5-7, 2000. A/CONF.189/PC.2/7, para. 31.

⁵ Durban Declaration and Programme of Action (DDPA), para. 33.

Americas to the other. Nevertheless, it is possible to point to a series of cross-cutting issues within the region, including structural discrimination and difficulties in gaining access to justice.

4. Likewise, the Commission considers that this report is necessary in order to draw attention to the plight of a human group that constitutes a significant portion of the population of the region but, despite that, is systematically thwarted in the enjoyment and exercise of its fundamental rights. Accordingly, the IACHR deems it appropriate to make a careful distinction between the situation confronting persons of African descent and that of other groups who are also victims of racial discrimination, and also to construct and delineate separate juridical categories that make it possible to address their needs adequately and overcome the obstacles they face, bearing in mind that, even within the collective category of persons of African descent, it is possible to single out groups that are particularly at risk, due to factors combined with their race or ethnic origin, such as their gender or religion.⁶

5. By means of this report, the Commission seeks to make a contribution to the ownership of human rights by persons of African descent in the Americas, to their strengthening, and to give persons of African descent a tool for empowerment. This report is also intended to support increasing “visibility” for this population *vis-à-vis* third parties; thereby sensitizing others regarding their existence and their contribution to the development of their own States. The IACHR expects that this report will be an effective tool for States to ensure full dignity for persons of African descent: children, women, men, the elderly, and the disabled. Moreover, the Commission seeks to insist in the inclusion of a cross-cutting ethnic-racial perspective in its reports.

6. Consequently, the purpose of this report is to underscore and focus on the situation of persons of African descent, on the understanding that the identification of this population, and its needs—even in those States where it makes up the majority of the population—is the initial step to be able to construct appropriate legal categories and embark on the legal measures and policies needed to protect and ensure their human rights. Accordingly, the Commission hopes that this report will make a substantive and positive contribution to the advancement and protection of the human rights of persons of African descent and will constitute a useful tool both for the protection of persons of African descent at the national level and for the utilization of the inter-American human rights system by all users. In addition, this report would allow the IACHR to comply with the mandate entrusted to it by the General Assembly of the OAS through operative paragraph 6 of resolution AG/RES. 2606 (XL-0/10) “Draft Inter-American Convention against Racism and All Forms of Discrimination and Intolerance.”⁷

⁶ See, *inter alia*, United Nations, Committee on the Elimination of Racial Discrimination (CERD), General Recommendation No. XXV, 56th session, United Nations Doc. HRI/GEN/1/Rev.7 at 250 (2000), and DDPA.

⁷ See also Resolution AG/RES. 1930 (XXXIII-O/ 03) -"Prevention of Racism and All Forms of Discrimination and Intolerance and Consideration of the Preparation of a Draft Inter-American Convention"; Resolution AG/RES. 2038 (XXXIV-O/ 04) -"Prevention of Racism and All Forms of Discrimination and Intolerance and Consideration of the Preparation of a Draft Inter-American Convention"; Resolution AG/RES. 2168 (XXXVI-O/06) – “Combating Racism and All Forms of Discrimination and Intolerance and Consideration of the Draft Inter-American Convention against Racism and All Forms of Discrimination and Intolerance”; Resolution AG/RES 2276

7. With those objectives in mind, this report is divided into five chapters. The first chapter deals with the activities of the Rapporteurship in connection with the International Year for People of African Descent and the importance of this report in the context of those activities. It also describes the methodology used in preparing this report. The second chapter refers to the situation of persons of African descent in the Americas in relation to racial self-identification questions and the living conditions of the Afro-descendant population. The third chapter takes the diagnostic assessment of chapter 2 as its starting point and examines the structural discrimination to which the Afro-descendant population is subjected, in the context of States' obligations to ensure equality and nondiscrimination. It also analyzes the dynamics of the Afro-descendant population and the obligation to provide appropriate judicial guarantees, in its two manifestations: on the one hand, the obstacles faced by the Afro-descendant population in accessing and obtaining justice, and on the other hand, racial profiling and racial bias in the criminal justice system. The fourth chapter gives an account of the various measures adopted by States in the region to comply with their guarantee and protection obligations. Accordingly, consideration is given to the legislative framework in relation to the prohibition of racial discrimination. This Chapter also examines the positive measures and affirmative action measures implemented by States. Finally, the Commission formulates conclusions and recommendations it deems appropriate for dealing with the issues raised in this report.

The regional report in the framework of the International Year for People of African Descent

8. During its 122nd Period of Session (February 23 to March 11, 2005), the Inter-American Commission created the Rapporteurship on the Rights of Afro-descendants and against Racial Discrimination (hereinafter "the Rapporteurship")⁸ with a view to raising awareness regarding the obligations of States to respect the human rights of persons of African descent and the elimination of all forms of racial discrimination. It also aimed at increasing knowledge in the region regarding the guarantees and mechanisms offered by the inter-American human rights system for protecting the rights of persons of African descent.

9. On December 18, 2009, the United Nations General Assembly adopted resolution A/RES/64/169, which proclaimed the year beginning on January 1, 2011 the "International Year for People of African Descent," with a view to strengthening national measures and regional and international cooperation on behalf of persons of African descent and full enjoyment of their human rights. Likewise, on June 8, 2010, the OAS

...continuation

(XXXVII-O/07), "Draft Inter-American Convention against Racism and All Forms of Discrimination and Intolerance"; resolution AG/RES. 2367 (XXXVIII-O/08); "Draft Inter-American Convention against Racism and All Forms of Discrimination and Intolerance"; Resolution AG/RES. 2501 (XXXIX-O/09), "Draft Inter-American Convention against Racism and All Forms of Discrimination and Intolerance." resolution AG/RES. 2606 (XL-O/10) - "Draft Inter-American Convention against Racism and All Forms of Discrimination and Intolerance."

⁸ IACHR, Press Release 3/05. *IACHR creates Special Rapporteurship on the Rights of Afro-descendants and on Racial Discrimination*, Washington D.C., February 25, 2005.

General Assembly adopted resolution AG/RES. 2550 (XL-O/10): "Recognition of the International Year for People of African Descent."

10. In that context, on March 14, 2011, the Rapporteurship, in collaboration with the organization Global Rights – Partners for Justice and the Office of the United Nations High Commissioner for Human Rights held a regional conference in Washington, D.C. on the International Year for People of African Descent: *The Situation of People of African Descent in the Americas: Prospects and Challenges*, with a view to disseminating and identifying the principal challenges facing persons of African descent in the Americas and to sharing best practices. The next day, the IACHR held a *Training Workshop on the Inter-American System of Human Rights for Afro-descendant Leaders* with a view to training the representatives of a number of civil society organizations in the use of the tools provided by the regional human rights system for protecting their human rights.

11. On both occasions, the Rapporteurship gave an account of the difficult situation endured by the Afro-descendant population in the Hemisphere; the close links between poverty, race, and discrimination; and the obstacles that people of African descent face in order to be able to fully enjoy their human rights and fundamental guarantees.

12. In May 2011, as the IACHR began preparing this report, it presented Member States and civil society with a questionnaire asking for information on the situation of persons of African descent in the Hemisphere. The questionnaire sought to identify main achievements and challenges for the Afro-descendant population in terms of self-identification, racial discrimination, socio-economic indicators, access to justice and judicial guarantees, political participation, racial profiling, the use of force and racism, and racism and the criminal justice system, among others. The Commission received replies from 13 Member States⁹ and 14 replies from civil society.¹⁰

13. The responses to the questionnaire provided useful input for this report. However, the Commission points out that the small number of replies received confirms and perpetuates the "social invisibility" of the Afro-descendant population, its scant participation in the formulation of policies and programs that affect them nationwide, and the little importance attached to this grave state of affairs.

14. Furthermore, in preparation of this report, on July 14 and 15, 2011 the IACHR convened a technical meeting of international experts at its headquarters to share experiences and analyze the information compiled with respect to the human rights of the

⁹ The IACHR received replies from the following States: Bolivia, Canada, Chile, Colombia, Costa Rica, Guyana, Honduras, Mexico, Peru, Saint Kitts and Nevis, United States, Uruguay and Venezuela.

¹⁰ The IACHR received the following replies: IARPRIDI (*Instituto Argentino para la Igualdad, Diversidad e Integración*), *Circuito 3* and *Circuito 8* (Costa Rica), ODECO (*Organización de Desarrollo Étnico Comunitario – Honduras*), *Ruda y Chocolate* (Uruguay), ONEGUA (Guatemala), *Movimiento Afrocultural* (Argentina), *Movimiento Nacional Cimarrón* (Colombia), *Red Paraguaya de Afrodescendientes* (Paraguay), UBUNTU (*Formación para la Transformación Social Afrodescendiente Montevideo* (Uruguay), Professor Adelle Blackett (Mc Gill University, Canada), *Observatorio de Discriminación Racial* (Colombia), Deiry Lizano Zamora (Costa Rica), and the Public Defender's Office of Rio de Janeiro (Brazil).

Afro-descendant population.¹¹ The outcomes of the technical meeting provided substantive inputs for the preparation of this report by identifying the principal challenges and best practices adopted by the countries of the region, in addition to examining other special topics that – although might go beyond the scope of this report – will guide the future work of the Commission and its Rapporteurship.

15. In conclusion, this report reveals the information that the Commission has analyzed and systematized regarding the situation of Afro-descendants in the Americas. To produce it, the IACHR has taken into account the replies to the questionnaire published in May 2011, the inputs of the technical meeting, information provided by States and civil society in the thematic hearings held before the Inter-American Commission¹², the cases and petitions submitted to the inter-American human rights system, and the country and thematic reports adopted by the Commission. In addition, the IACHR referred to international decisions and recommendations issued by specialized international organizations regarding the identification of standards in this field.

¹¹ The following experts participated in the technical meeting: Rose-Marie Belle Antoine (Belize), Sir Clare K. Roberts (Antigua and Barbuda), Claudia Mosquera (Colombia), Ignacio Cano (Brazil), Carlos Quesada (Costa Rica), and Carlos Viáfara (Colombia), the Rapporteur on the Rights of Afro-descendants and Against Racial Discrimination, María Silvia Guillén, the Executive Secretary of the IACHR, Santiago Canton, and two attorneys at the Executive Secretariat, Leonardo Hidaka and Tatiana Gos.

¹² IACHR, 127th Regular Period of Session, *Racial Discrimination in the Dominican Republic*, Center for Justice and International Law (CEJIL), the Jesuit Refugee and Migrant Service for the Dominican Republic, March 2, 2007; IACHR, 127th Regular Period of Session, *Situation of Afro-descendants in Colombia*, Asociación para la Promoción Social Alternativa (MINGA), Colombia, March 6, 2007; IACHR, 128th Regular Period of Session, *Situation of Afro-Brazilian Women*, Geledés – Instituto da Mulher Negra, Brazil, July 18, 2007; IACHR, 129th regular session, *Situation of Descendants of Fugitive Slaves of the Colonial Period (“Quilombolas”) in Brazil*, Center for Justice and International Law (CEJIL), Rede Social de Justicia e Direitos Humanos, Federação de Órgãos para la Asistencia Social y Educacional (FASE) Brazil, October 10, 2007; IACHR, 131st Regular Period of Session, *Situation of Discrimination of Afro-descendants in Labor, Education and Access to Justice in the Americas*, Inter-American Institute of Human Rights, March 7, 2008; IACHR, 131st Regular Period of Session, *Human Rights Situation of Internally Displaced Afro-Colombians*, Displaced Afro-Colombians, Colombia, March 12, 2008; IACHR, 131st Regular Period of Session, *Right to education of members of Afro-Descendent and Indigenous communities in the Americas*, Robert F. Kennedy Memorial Center for Human Rights, Cornell University Law School, University of Virginia Law School, March 12, 2008; IACHR, 133rd Regular Period of Session, *Racial discrimination and access to justice of Afro-descendants in Colombia*, University of the Andes, Observatory on Racial Discrimination, Rappaport Center for Human Rights and Justice, Colombia, October 23, 2008; IACHR, 137th Regular Period of Session, *Situation of Afro-Colombian, Indigenous and Peasant Communities of Northern Cauca, Colombia*, Proceso de Comunidades Negras (PCN), Colombia, November 5, 2009; IACHR, 140th Regular Period of Session, *Allegations on Excessive Use of Police Force against Afro-descendants in Brazil*, Geledés- Instituto da Mulher Negra, Global Rights, Brazil, October 25, 2010; IACHR, 140th Regular Period of Session, *Human Rights Situation of Peasants and Persons of Afro-Caribbean and Indigenous Descent in Cantón de Talamanca, Costa Rica*, Asociación de Desarrollo Integral de Manzanillo, Organizaciones comunales, Costa Rica, October 28, 2010; IACHR, 141st Regular Period of Session, *Human Rights Situation of Persons of African Descent in Uruguay*, Global Rights, Formación para la Transformación Social Afrodescendiente, Agrupación Salvador Betervide, Asamblea Afrodescendiente, Centro Umbandista “Reina da Mata”, Uruguay, March 25, 2011; IACHR, 141st Regular Period of Session, *Right to Prior, Free, and Informed Consultation of Indigenous Peoples and Afro-descendants in the Andean Region*, Coordinadora Nacional de Derechos Humanos (CNDDHH) of Peru, Centro sobre Derechos y Sociedad de Ecuador (CIDES), Fundación para el Debido Proceso Legal (DPLF), Fundación Construir, De Justicia, Cooperación, March 29, 2011; IACHR, 143rd Regular Period of Session, *Situation of Human Rights of the Afro-Peruvian Population*, Global Rights, Centro de Desarrollo de la Mujer Negra Peruana, Estado de Perú, October 25, 2011; IACHR, 143rd Regular Period of Session, *Situation of Human Rights of Women of African Descent in Latin America*, Global Rights, Red de Mujeres Afrolatinoamericanas, Afrocaribeñas y de la Diáspora, October 28, 2011, among others. Available at: <http://www.oas.org/es/IACHR/audiencias/TopicsList.aspx?Lang=en&Topic=18>.

16. In this context and, particularly, on the occasion of the International Year for People of African Descent, the Commission understands that this regional report is a first attempt to adopt a general and systemic approach to the situation of persons of African descent in the Americas, which will, moreover, pave the way for different future lines of work. Bearing in mind the foregoing, this report aims at identifying the principal trends in the region and making recommendations with a view to ensuring the human rights of persons of African descent.

II. THE GENERAL SITUATION OF PEOPLE OF AFRICAN DESCENT IN THE AMERICAS

17. Based on the information available, the Afro-descendant population in the region is made up of more than 150 million persons, i.e. approximately 30% of the total population, and it is among the poorest groups in the hemisphere. The studies carried out by the World Bank reveal that race and ethnicity are basic factors in determining the social exclusion and poverty with which Afro-descendants must contend. In addition, it should be noticed that there is a strong correlation between race and ethnicity and access to such vital social services as education, health, and social protection services.¹³

18. Consequently, the Commission has observed that in Brazil, one half of all Afro-descendants receive a monthly income of less than two minimum wages, and inversely, in the upper income brackets, while 16% of whites receive over 10 minimum wages, the proportion of Afro-descendants, at 6%, is considerably lower.¹⁴ Additionally, the IACHR has indicated that, in Colombia, the infant mortality rate (number of deaths of children aged one year or younger per 1,000 live births) in the Afro-descendant population is nearly twice the national average;¹⁵ and, as regards life expectancy at birth, for Afro-descendant men is 64.6 years as opposed to 70.3 years for the population overall. In the case of Afro-descendant women, this indicator is 66.7 years, compared with 77.5 years for women in the country as a whole.¹⁶

¹³ IACHR, *Access to Justice for Women Victims of Violence in the Americas*, OAS/Ser.L/V/II., Doc. 68, January 20 2007, para. 209.

¹⁴ IACHR, *Report on the Situation of Human Rights in Brazil*, OAS/Ser.L/V/II.97, Doc. 29 rev.1, September 29 1997, Chapter IX, para. 2. The Commission notes that, according to the preliminary results of Brazil's most recent (2010) population census, for the first time in the country's history less than 50% (47,73%) of the population identified themselves as whites (*brancos*), and the number of people who identified themselves as blacks (*pretos*) increased by 4 million from 2000 to 2010, totaling 14.517.961 persons. The census thus indicated that *pretos*, *pardos* (brown), *amarelos* (yellow) and *indigenous* together are the majority of Brazil's population, available at <http://oglobo.globo.com/politica/censo-2010-populacao-do-brasil-deixa-de-ser-predominantemente-branca-2789597> (citing the preliminary results of the census, according to the Brazilian Institute of Geography and Statistics – IBGE: http://www.ibge.gov.br/home/estatistica/populacao/censo2010/primeiros_resultados/default_tabelas_zip.shtml)

¹⁵ IACHR, *Preliminary Observations of the Inter-American Commission on Human Rights after the visit of the Rapporteurship on the Rights of Afro-descendants and Against Racial Discrimination to the Republic of Colombia*, OEA/Ser.L/V/II.134, Doc. 66, March 27 2009, para. 36.

¹⁶ IACHR, *Preliminary Observations of the Inter-American Commission on Human Rights after the visit of the Rapporteurship on the Rights of Afro-descendants and Against Racial Discrimination to the Republic of Colombia*, OEA/Ser.L/V/II.134, Doc. 66, March 27 2009, para. 37.

19. In this context, the States of the region took an important step to address this issue and affirmed their commitment to fighting and eradicating racism in the Americas at the Santiago Conference in the year 2000, which was a preparatory meeting for the Third World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance in Durban, South Africa, in the year 2001. On that occasion, the States of the Americas agreed on the definition of the term “Afro-descendant” as the person of African origin who lives in the Americas and in the region of the African Diaspora as a result of slavery, who have been denied the exercise of their fundamental rights¹⁷.

20. Similarly, the States of the region agreed on certain guidelines and principles that should direct their actions to adequately address the situation of Afro-descendants in the Hemisphere.¹⁸

21. Nonetheless, the Commission has noted that the Afro-descendant population have endured a history of neglect, exclusion, and social and economic disadvantage that impair their enjoyment of fundamental rights.¹⁹

A. Identifying the Afro-descendant population in the Americas

22. From the sociological point of view, it has been argued that “it is precisely in light of the economic and demographic importance of the enslaved [Africans] and their descendants for the development of the region that the very widespread notion of a supposed absence of this community at present is surprising.”²⁰

¹⁷ See elements of the definition of the term Afro-descendant in the Conference of Santiago 2000. See also, OEA, Department of International Law. Secretariat for Legal Affairs. Roberto Rojas Dávila, *Introduction to the Afro-descendant Topic*. Available at: http://www.oas.org/dil/esp/afrodescendientes_ejecutadas_taller_transversalizacion_usa_2011_presentaciones_Roberto_Rojas.ppt. More recently, the CERD has stated that people of African descent are those referred to as such by the Durban Declaration and Programme of Action and who identify themselves as people of African descent. United Nations, CERD, General Recommendation XXXIV, CERD/C/GC/34, 3 October 2011, para. 1.

¹⁸ *Report of the Regional Conference of the Americas*, Santiago, Chile, 5-7 December 2000. A/CONF.189/PC.2/7.

¹⁹ IACHR, *Preliminary Observations of the Inter-American Commission on Human Rights after the visit of the Rapporteurship on the Rights of Afro-descendants and Against Racial Discrimination to the Republic of Colombia*, OEA/Ser.L/V/II.134, Doc. 66, March 27 2009, para. 1.

²⁰ UNDP, *The Rights of Afro-descendants in Latin America: Challenges Regarding its Implementation*, p. 17.

23. Despite the fact that the Afro-descendant population represents 0.1%,²¹ 0.45%,²² 1.9%,²³ 2.5%,²⁴ 5%,²⁵ 9.1%,²⁶ 10.62%,²⁷ 13.6%,²⁸ 30.2%,²⁹ 50%,³⁰ 80%,³¹ and up to 92%³² of the total population of some countries, there is no systematic and reliable information about the self-identification and living conditions of the Afro-descendant population in the Americas.³³

24. Indeed, while it is possible to identify the presence of Afro-descendant population in each of the countries of the Hemisphere, the questions that make it possible to identify not only the existence of ancestors but also the self-recognition of the Afro-descendant population have only recently been included in the censuses³⁴ or other mechanisms for surveying the population. This contradiction has also been indicated as the best example of the situation of invisibilization suffered by this group in the region.³⁵

25. Similarly, this lack of information has been related to the persistent conception of “racial democracies” in the region. Thus, it has been observed that it is important to indentify and de-construct the myth of racial democracies, which consists in

²¹ Chile’s reply.

²² Mexico’s reply.

²³ Costa Rica’s reply.

²⁴ Canada’s reply.

²⁵ IARPRIDI’s reply (Argentine Institution for Equality, Diversity and Integration). ONEGUA’s reply. (Organization of Guatemalan Black).

²⁶ Uruguay’s reply

²⁷ Racial Discrimination Observatory’s reply. National Movement Cimarrón’s reply. Colombia’s reply.

²⁸ Census 2010. United States’s reply.

²⁹ Guyana’s reply.

³⁰ Information corresponding to Brazil, 2006. UNDP, *The Rights of Afro-descendants in Latin America: Challenges Regarding its Implementation*, p. 178.

³¹ CERD, Ninth Report of the Dominican Republic to the Committee on the Elimination of Racial Discrimination. CERD/C/DOM/12, June 8 2007, para. 3.

³² St. Kitts & Nevis’s reply.

³³ See, *inter alia*, Venezuela’s reply. UNDP, *The Rights of Afro-descendants in Latin America: Challenges Regarding its Implementation*, p. 128 (“...in Venezuela there is no official statistics on social indicators of Afro-descendants”). Peru Ombudsperson, *Afrodescendants in Peru. An Approach to their Reality and the Exercise of their Rights*, Report no. 003-2011-DP-ADHPD, February 2011, p. 43 (“In Peru there is no update statistics on the number of Afro-peruvians, their geographic location or their socioeconomic situation”). Costa Rica’s reply (“Up-to-date, in the country, there exist perceptions and studies of perceptions in this regard, but definitively, disaggregated statistics to visibilize the real situation of the right enjoyment of the Afro-descendant population are needed).

³⁴ Peru’s reply. Hondura’s reply. Bolivia’s reply. Chile’s reply.

³⁵ Peru Ombudsperson, *cit.*, p. 112.

“the idea according to which [...] there is no racism because [...] all races and cultures melted into a happy combination.”³⁶

26. In this respect, in recent tests including the variable “Afro-descendance” in censuses, different mechanisms have been used to account for the ethnicity of the person polled, namely: (i) the “voluntary” nature of the question, (ii) the impression of the person who fills out the survey form, (iii) the self-identification of the person surveyed, and (iv) identification by cultural or ethnic group. The IACHR has received information about the following types of questions in censuses carried out in the region to date:

- Question 13. Does any member of this home consider himself or herself to be an Afro-descendant? Question 14. Do you know or does any member of this household know whether your parents, grandparents, or other ancestors are of black African origin? Question 15. Does any member of this household, based on his or her CULTURE, PEOPLE, or PHYSICAL CHARACTERISTICS, recognize himself or herself as:...? 1. Black 2. *Kamba* 3. Mulatto 4. *Pardos libres* 5. Afro-descendants 6. *Kamba Cua* 7. *Kamba Kokue*. Question 16. Characteristic features (based on the interviewer’s observation) Color of skin: brown, yellowish, dark brown, ebony black Color of eyes: fluctuates between dark brown and black. Body: slim, slender with broad shoulders, snub hips and little hair on the skin. Height: average 1.75 meters, greater tendency to sweat. Head: elongated, vertical and slightly inclined forehead. Nose: wide, wide nasal cavities separated by cartilaginous bridge, straight or slightly concave. Lips: thick, large, reverted Hair: wooly, curly, generally short, black Interviewer: Observe some or one of these characteristics for including or not including persons as Afro-descendants.³⁷
- Question 44. Do you believe you have ancestry as follows ...? 1. Afro or black 1 2 2. Asian or yellow 1 2 3. White 1 2 4. Indigenous 1 2 5. Other 1 2 If you answer only one, skip to question 46. If you answer more than one, go on to question 45. Question 45. Of those which you have declared, which do you consider to be the principal one? 1. Afro or black 2. Asian or yellow 3. White 4. Indigenous 5. Other Question 46. Which group do you consider yourself part of? 1. Afro or black 2. Asian or yellow 3. White 4. Indigenous 5. Other...³⁸

³⁶ Rodríguez Garavito, Alfonso Sierra and Cavalier Adarve, 2009, cited in UNDP, *The Rights of Afro-descendants in Latin America: Challenges regarding its implementation*, p. 124.

³⁷ First Afro-descendants census in Paraguay, conducted in July 2006 by the Afroparaguayan civil society organization *Kamba Cua*, with the technical support of the General Direction of Statistics, Surveys and Census (GEEC) of Paraguay. UNDP, *The Rights of Afro-descendants in Latin America: Challenges Regarding its Implementation*, p. 65.

³⁸ Draft questions regarding Afro-descendants for 2010 census in Uruguay. UNDP, *The Rights of Afro-descendants in Latin America: Challenges Regarding its Implementation*, p. 66.

- Which race do you believe you belong to? (mark only one) 1. Yellow 2. White 3. Indigenous 4. Black 5. Mestizo if the answer was “Mestizo,” one asks: What races do you believe you have blood of?³⁹
- Do you believe your ancestors are...? (multiple option question) 1. Afro or black Yes No 2. Yellow Yes No 3. White Yes No 4. Indigenous Yes No 5. Other.... Yes No (Specify) 6. Do not know Yes Of those declared, which one do you consider to be the principal one?⁴⁰
- “Based on your culture, people, or physical characteristics, are you or do you recognize yourself as: (a) indigenous (To which indigenous people do you belong?); (b) Roma; (c) *Raizal* (Afro-descendant) from the Archipelago of San Andrés and Providencia; (d) *Palenquero* (member of the community of Palenque de San Basilio)?; (e) Black, mulatto, Afro-Colombian or Afro-descendant?; None of the above.”⁴¹
- Do you recognize yourself as: Black, Afro-descendant. *Moreno*, Indigenous, Any other.⁴²
- Do you belong to the: 1. Indigenous culture 2. Afro-Costa Rican or black culture 3. Chinese culture 4. None of the above.⁴³
- Are you: (a) 1. White, 2. Mestizo (mix of white and indigenous), 3. Indigenous (ANSWER b) 4. Black (by race), 5. Other. (b) If you are indigenous, what group do you belong to? (b) 6. *Lenca* 7. *Kakawira* (*Cacaopera*) 8. *Nahua-Pipil* 9. Other (Specify).⁴⁴
- Which ethnic group (people) do you belong to? The list includes *Garifuna*, *Ladino*, and others.⁴⁵

³⁹ Race Module 1996-1997. Racial identification questions in the Race Module, National Expanded Home Survey (ENHA) and Permanent Home Survey (ECH), Uruguay. UNDP, *The Rights of Afro-descendants in Latin America: Challenges Regarding its Implementation*, p. 69.

⁴⁰ ENHA 2006 AND ECH 2007-2009, Racial identification questions in the Race Module, National Expanded Home Survey (ENHA) and Permanent Home Survey (ECH), Uruguay. UNDP, *The Rights of Afro-descendants in Latin America: Challenges Regarding its Implementation*, p. 69.

⁴¹ Census 2005, Colombia, question 33. UNDP, *The Rights of Afro-descendants in Latin America: Challenges Regarding its Implementation*, p. 98.

⁴² Draft ethnic self-identification question to be included in 2011 census, for people over 15 years old, Venezuela. UNDP, *The Rights of Afro-descendants in Latin America: Challenges Regarding its Implementation*, p. 111.

⁴³ Census 2000, Costa Rica. UNDP, *The Rights of Afro-descendants in Latin America: Challenges Regarding its Implementation*, p. 309.

⁴⁴ Census 2007, El Salvador. UNDP, *The Rights of Afro-descendants in Latin America: Challenges Regarding its Implementation*, p. 309.

⁴⁵ Census 2002, Guatemala. UNDP, *The Rights of Afro-descendants in Latin America: Challenges Regarding its Implementation*, p. 309.

- What population group do you belong to? 1. *Garifuna* 2. English-speaking Black 3. *Tolupán* 4. *Pech* (iPaya) 5. *Miskitu* 6. *Lenca* 7. *Tawahka* (*Sumo*) 8. *Chortí* 9. Other.⁴⁶
- Is (name) *Nahuatl*, *Maya*, *Zapotec*, *Mixtec*, or of another indigenous group? Yes No.⁴⁷
- Do you consider yourself the member of an indigenous people or an ethnic group? 1. Yes 2. No. For those who answered Yes: P7 To which of the indigenous peoples or ethnicities do you belong? P7 13 categories of indigenous peoples, Afro-descendants (Creole and *Garifuna*), and other ethnic groups are listed.⁴⁸
- Are you or is any member of this household Afro-descendant or do you have ancestors of Afro-descendant or African origin (father, mother, grandparents, great grandparents)? Yes (Indicate the number of persons) No Don't know.⁴⁹

⁴⁶ Census 2001, Honduras. UNDP, *The Rights of Afro-descendants in Latin America: Challenges Regarding its Implementation*, p. 309.

⁴⁷ Census 2000, México. UNDP, *The Rights of Afro-descendants in Latin America: Challenges Regarding its Implementation*, p. 309.

⁴⁸ Census 2005, Nicaragua. UNDP, *The Rights of Afro-descendants in Latin America: Challenges Regarding its Implementation*, p. 309.

⁴⁹ Census 2010, Argentina, question 6. The pilot study of the self-perception of Afro-descendants in Argentina was carried out in April 2005 by the National University of Tres de Febrero with the advice of the Instituto Nacional de Estadística y Censos (Argentine National Statistics and Censuses Institute) and Afro-descendant organizations in Argentina, with funding from the World Bank. These two questions about household data were included in the questionnaire about household data, as well as in each of the sheets in the questionnaire that was asked to the household members. UNDP, *Rights of Afro-descendants in Latin America: Challenges Regarding its Implementation*, p. 62. Later, a Validation Survey was carried out which included 17 questions on this issue: "1. Is or was ...'s father of African descent? 2. Is or was ...'s mother of African descent? 3. Are or were ...'s grandparents on the mother's side of African descent? 4. Are or were ...'s grandparents on the father's side of African descent? 5. Are or were ...'s great grandparents of African descent? 6. Did any of ...'s ancestors belong to Afro-argentinean or African institutions called *Naciones, del siglo XIX*? 7. Are or were ...'s ancestors devotees of San Baltasar, San Juan, Santa Bárbara, San Benito (patron saint of the Africans in Río de la Plata)? 8. Are they known by...the names of the following Nations: Angola, Conga, Lugola, Quipara, Benguela, Cabunda (or Cabinda)? 9. Does ...'s family keep information about the activities carried out in the *Naciones* (e.g. Mass for dead people, "Purchase of freedom" during slavery, celebrations, meetings, *candombes* (African dance), street parades, *comparsa* (Afro-Cuban dance), coronation ceremonies, etc)? 10. Does the family keep...African musical manifestations? (e.g. dancing *Candombe*, playing the African drums, reciting *payadas* (improvised musical dialogues), singing songs, cradle songs, playing the violin or teaching music, other African expressions). 11. In...'s family environment, ...do they use expressions such as 'Negro Che' or 'Negro Usted' (according to the social class), belonging to the (Afro descendant) "Race" or "Class"? 12. Did any member of ...'s family go dancing at Jimmy Club (or Casa Suiza), or was a member of the *Comparsa de los Negros Santafesinos*? 13. Did any member of...'s family join the *Regimientos 7º y 8º de Infantería* (Infantry Regiment), or the famous *Batallones de Pardos y Morenos* (Battalions of Pardos and Morenos)? 14. Any ...'s ancestor performed the typical job of Africans or Afro-descendants in Argentina (silversmith, leather worker, shoe maker)? 15. Is any of ...'s ancestors of black African descent? 16. Was any of...'s ancestor brought as a slave? 17. Did any ...'s ancestor arrive as a black African descent migrant?" The criteria used in this survey was that any affirmative answer in questions 1 to 5 or 15 to 17 determined if the person was Afro-descendant, while negative answers to all the questions determined that the person was not Afro-descendant.

- What were the ethnic or cultural origins of this person's ancestors?⁵⁰ Is this person? Chinese, South Asian, Black, Arab, West Asian, Filipino, Southeast Asian, Latin American, Japanese, Korean, Pacific Islanders.⁵¹
- What is this person's race? White, Black, African Am., or Negro, American Indian or Alaska Native, Asian Indian, Japanese, Native Hawaiian, Chinese, Korean, Guamanian or Chamorro, Other Asian, Vietnamese, Filipino, Samoan, Pacific Islander.⁵²

27. Similarly, apart from the censuses, in the region there have been experiences aimed at including the "Afro-descendance" variable in educational areas,⁵³ health areas,⁵⁴ at the moment of death,⁵⁵ especially in the cases of violent death,⁵⁶ and, in general, it has been established that self-identification be set forth in legally-valid identification papers.⁵⁷

28. In the technical meeting, the experts tackled different aspects related to the processes of self-identification in the Afro-descendant population. On the one hand, as regards the design and asking of the question on self-identification, the experts pointed out the confusion of ethnic-racial variables in the official categories, and indicated the importance of distinguishing ethnic questions from racial questions, to identify the centrality of the "color" as the base of social inequalities. In addition, the experts mentioned certain limitations that the term "Afro-descendent" would present, since there are indicia that the individuals do not feel so identified with such term⁵⁸, and the claims by the civil society related to the need that the censuses include categories that facilitate self-identification such as "black", "Latin black", "moreno"⁵⁹ or "mestizo" and categories that are only regional or local within a country, such as "*renacientes*" (reborn) or "*libres*" (free)

⁵⁰ Ethnic question, census 2006, Canada. Canada's reply.

⁵¹ Question of population group (visible minorities), census 2006, Canada. Canada's reply.

⁵² Census 2010, United States, question 6. United States' reply.

⁵³ See, *inter alia*, CERD. Reports submitted by the States according to Article 9 of the Convention. Periodic reports 16th to 20th due in 2008, Uruguay. CERD/C/URY/16-20, January 7 2010, para. 31. ("On September 7, 2009, la Universidad de la República [the National University] decided that the question on self-identification and racial descent should be included in 2010 in the record of people in the new Sistema de Gestión de la Enseñanza (Teaching Management System) which is in effect in 2011").

⁵⁴ See, *inter alia*, Peru Ombudsperson, *cit.*, p. 15. CERD. Report submitted by Uruguay, *cit.*, para. 98. Peru's reply. Colombia's reply. Uruguay's reply.

⁵⁵ See, *inter alia*, UNDP, *The Rights of Afro-descendants in Latin America: Challenges Regarding its Implementation*, p. 70.

⁵⁶ See, *inter alia*, Geledés Institute of Black Women & Global Rights Partners for Justice. *Racial Violence I. A report about homicides data in Brazil. Book I*, p. 29.

⁵⁷ Article 30 paragraph II, section 3 of the Constitution of Bolivia establishes the right to "the cultural identity of each member, if desired, can be recorded with Bolivian citizenship in his identity card, passport or other identification documents with legal validity".

⁵⁸ Racial Discrimination Observatory's reply.

⁵⁹ Racial Discrimination Observatory's reply.

in the Colombian South Pacific. As regards the situation in the Caribbean, the experts stated that even though the majority of the population in these countries is Afro-descendant, difficulties also can be seen when including the variable “afro-descendent” and the categories used.

29. On the other hand, as regards the location of the self-identification question, experts mentioned the validity problems that can arise from including the question in extended forms, as regards the design of the sampling universe. That is why they considered it is best to include the self-identification question in the basic forms and at the beginning to provide it with the pertinent importance.

30. Regarding the conditions previous to the census itself, the experts pointed out the importance of creating conditions and incentives to favor and stimulate self-identification in the Afro-descendant population. The Commission has received information about the lack or little coverage of sensitization and socialization campaigns in the census categories, in order to promote self-perception.⁶⁰

31. As regards the process of census conduction, the experts emphasized that, in some cases, the self-identification question is not asked (being considered of little importance or “offensive”), or the interviewer is the one who answers it, according to his/her own judgment, without asking the question to the interviewee. Precisely in this regard, the experts mentioned the impact that the color of the interviewer’s skin has on the answer of self-identification by the interviewee. The Commission has also received information about the lack of funding to include the self-identification question in the census, electrical equipment failures, technical errors, and the lack of training for the interviewers.⁶¹

32. With regard to the results of these experiences, the experts pointed out the differences in the percentages of Afro-descendant population if compared to the results coming from the question of self-identification and the phenotypic characteristics observed by the interviewer; they also highlighted the importance of carrying out post-census studies in order to spread and analyze the results.

33. The experts reiterated that, apart from the censuses, it is essential that the States systematically collect information on the variable “Afro-descendance”, in a disaggregated way, from the registries and government entities.

34. As regards these issues, the Committee on the Elimination of Racial Discrimination (hereinafter “CERD”) has verified “the considerable variance in the information available on the percentage of the population that identifies itself as [Afro-descendant], and it has also observed that the results from the census [...] differ from other population surveys.”⁶²

⁶⁰ Afro-Cultural Movement’s reply.

⁶¹ Racial Discrimination Observatory’s reply.

⁶² See, *inter alia*, CERD, Concluding Observations from the Committee on the Elimination of Racial Discrimination, Colombia. CERD/C/COL/CO/14, August 28 2009, para..24. IACHR, *Preliminary Observations from*
Continues...

35. In this regard, the Commission has held that “when the variable race or color is investigated, the respondent is pegged to other factors, such as income level, level of education, awareness of being black, the “none-of-the-above” tendency, all of which makes it difficult if not impossible to compare data between countries.”⁶³

36. Regarding advances, the experts identified that, in some countries the progressively increasing percentage of the population which identifies itself as Afro-descendant -- that cannot be explained by similar increasing demographic variations -- would reveal the perspectives for improvement of these processes. In addition, experts came to the conclusion that to address the variable “Afro-descendance”, self-identification is the best option, since other processes would mean State paternalism.

37. The IACHR values the practices adopted by the States to include the “Afro-descendance” variable in the censuses, household surveys and other studies about the population. The Commission states that, according to what is described, the incipient advances in this regard confirm the need to deepen the process and improve its development.⁶⁴

38. The Commission considers that the States must implement appropriate mechanisms to favor self-identification in the Afro-descendant population, regardless the fact that that population group is a majority or not. Therefore, the IACHR has held that the issue of figures is essential, since “without reliable data, without indicators and periodic measurements, the kinds of political decisions calculated to deal with the discrimination problem cannot be taken. The figures also have an unmistakable political element, since for those affected it means that their invisibility is being reversed and they are being recognized along with everyone else.”⁶⁵

39. The Inter-American Commission observes that, regarding good practices, the States should carry out consultation with civil society by means of institutionalized and sustained mechanisms of cooperation, coordination and incidence that reflect their expectations as regards the design and categories used in the self-identification question, in order to have technically appropriate tools and to strengthen the process of sensitization, awareness-raising and empowerment of Afro-descendants in the region. As a complement to this, the IACHR considers that the States should implement awareness-

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the Inter-American Commission of Human Rights after the visit of the Rapporteur on Afro-descendant Rights and against Racial Discrimination to Colombia, OAS/Ser.L/V/II.134, Doc. 66, March 27 2009, para. 21.

⁶³ See, *inter alia*, IACHR, *Access to Justice for Women Victims of Violence in the Americas*, OAS/Ser.L/V/II., Doc. 68, 20 January 2007, para. 210 citing the United Nations, *Los Pueblos Indígenas y Afrodescendientes ante el Nuevo Milenio (Indigenous and Afro descendant Peoples before the New Millennium)* ECLA, Division for Sustainable Development. Social Politics Series, Santiago de Chile, April 2006. p. 25.

⁶⁴ United Nations, CERD, General Recommendation XXXIV, CERD/C/GC/34, 3 October 2011, para. 9.

⁶⁵ See, *inter alia*, , IACHR *Access to Justice for Women Victims of Violence in the Americas*, OAS/Ser.L/V/II., Doc. 68, 20 January 2007, para. 210 citing the United Nations, *Los Pueblos Indígenas y Afrodescendientes ante el Nuevo Milenio,(Indigenous and Afro descendant Peoples before the New Millennium)* ECLAL, Division for Sustainable Development. Serie Políticas Sociales, Santiago de Chile, April 2006. p. 25.

raising campaigns and training on the categories of self-identification that encourage the Afro-descendant population to self-identify and sensitize the interviewers.

40. Similarly, the Commission considers that, regarding the censuses, the question of being descent from or belonging to Afro-descendant population should be included in the first questions of the basic form, and the questions should be answered exclusively according to the self-identification of the interviewee.

41. The IACHR reiterates that including the variable “Afro-descendance”, in educational, health, employment and State instances, among others, is a State obligation according to the Durban Programme of Action.⁶⁶ In addition, the identification and mainstreaming of the variable “Afro-descendance” contributes to the visibility and awareness of this group, and also provides essential information for the action of the States as regards their obligations to promote and protect human rights, taking into account the concrete needs and the percentage of population they represent. The Commission also reminds the States that they should make sure that this information, highly valuable for the statistics and the design of government policies, is not used to stigmatize and revictimize the Afro-descendant population.

B. Living conditions of the Afro-descendant population in the Americas

42. In general terms, the statistical information suggests that the Afro-descendant population is present in both urban⁶⁷ and rural areas; in some cases it has taken on some forms of community life and accounts for different percentages of the total population of the countries of the region. Despite these differences, the information consistently suggests that the Afro-descendant population in the Americas suffers from a situation of structural discrimination.⁶⁸

43. The Commission does not have detailed information on the geographical distribution of the Afro-descendant population in most countries of the region, either because of the few responses to the questionnaire or due to the lack of information surveys by the States. Notwithstanding the foregoing, the answers to the IACHR

⁶⁶ Durban Programme of Action, para. 92.

⁶⁷ See, *inter alia*, United Nations, Human Rights Council, *Report of the Independent Expert on Minority Issues, Addendum, Mission to Canada*, (October 13 to 23 2009), A/HRC/12/23/Add.2., March 8 2010 (“In Canada, in 2006, 95.5% of “visible minorities” was living in metropolitan areas”). CERD, Periodic Reports submitted by State Parties according to Article 9 of the Convention. 17th, 18th and 19th periodic reports due in 2006. Addendum. Ecuador, CERD/C/ECU/19, October 23 2006,, para. 86 (“Most Afroecuadorian people are urban, accounting for 68.7%”). United Nations, CERD, General Recommendation XXXIV, CERD/C/GC/34, 3 October 2011, para. 4.

⁶⁸ See, *inter alia*, Stavenhagen Rodolfo, *The Right to Survival: the Struggle of Indigenous Peoples in Latin America against racism and discrimination*, BID/IIDH, 2001 (“The structural discrimination against an ethnic or racial community is verified when the positions deemed as low or inferior continue for generations or centuries and this is considered “normal”). Peru Ombudsperson, *cit.*, p. 69. CERD. Periodic Reports submitted by State Parties according to Article 9 of the Convention. 16th to 20th periodic reports due in 2008. Uruguay, CERD/C/URY/16-20, August 9 2010, para. 12 and *Report of the Regional Conference of the Americas*, Santiago, Chile, December 5-7 2000. A/CONF.189/PC.2/7, paras. 28, 31. United Nations, CERD, General Recommendation XXXIV, CERD/C/GC/34, 3 October 2011, para. 6.

questionnaire showed that the concentration of the Afro-descendant population is as follows: in Peru, in 39 coastal districts of the regions of Arequipa, Ancash, Ica, Lambayeque, Lima, Callao, Piura, Tacna and Tumbes;⁶⁹ in Honduras, in the Atlantic Coast, Puerto Cortés, Marka as far as Plapaya, Department of Cortés and Gracias a Dios, and on Bahía Islands;⁷⁰ in Costa Rica, in the provinces of Limón and San José;⁷¹ in Colombia, in Valle del Cauca, Antioquia, Bolívar, Chocó, Nariño, Cauca, Atlántico, Córdoba,⁷² Cali, Medellín, Bogotá, Cartagena, Barranquilla, Riohacha, Montería, Quibdó, Tubo, Buenaventura and Tumaco,⁷³ Archipelago of San Andrés, Providencia and Santa Catalina, San Basilio de Palenque;⁷⁴ in Guatemala, in the departments of Izabal, Zacapa, Mazatenango, Escuintla and Guatemala;⁷⁵ in Paraguay, in Emboscada, Fernando de la Mora and Paraguari;⁷⁶ in Uruguay, in the departments of Artigas, Rivera, Paysandú, Salto, Cerro Largo and in the cities of Montevideo and Rocha;⁷⁷ in México, in the regions of Costa Chica de Guerrero and Oaxaca, in the Central-Gulf region of the state of Veracruz, Costa Grande de Oaxaca, the area of Tierra Caliente in Michoacán in the High Lands and the Coast-Isthmus in Chiapas, in the state of Quintana Roo, as well as in the district of Múzquis in the state of Coahuila;⁷⁸ in the United States, in the District of Columbia and the states of Mississippi, Louisiana, Georgia, Maryland, South Carolina and Alabama;⁷⁹ in Guyana, in the Administrative Areas 4, 6 and 10;⁸⁰ and in Chile, in the Region of Arica and Parinacota.⁸¹

44. During the technical meeting, the experts made reference to the existence of “racialized geographies” phenomena in some countries and pointed out that the regions with high percentages of Afro-descendant population usually hold a subordinate position in public policies.⁸²

⁶⁹ Peru’s reply. In the reply, it is shown that the Geoethnic Map from which this information arises does not consider the Afroperuvian presence in Sierra and Amazonía.

⁷⁰ Honduras’s reply.

⁷¹ Costa Rica’s reply.

⁷² Racial Discrimination Observatory’s reply.

⁷³ National Movement Cimarrón’s reply.

⁷⁴ Colombia’s reply.

⁷⁵ ONEGUA’s reply.

⁷⁶ Paraguay Afro-descendants Network’s reply.

⁷⁷ Uruguay’s reply.

⁷⁸ Mexico’s reply.

⁷⁹ The United States’ reply.

⁸⁰ Guyana’s reply.

⁸¹ Chile’s reply.

⁸² Racial Discrimination Observatory’s reply.

45. According to the available information, the Afro-descendant population is disproportionately concentrated in the poorest areas⁸³ and with the highest housing deficit,⁸⁴ almost inaccessible, with improper means of transportation,⁸⁵ and suffers a greater exposure to crime and violence.⁸⁶ The Commission has received information that points out that Afro-descendant people usually do not inform about their true address at the time of applying for a job, because it “would exclude them automatically”.⁸⁷

46. In addition, the situation of structural discrimination is verified in the indicators of access to housing,⁸⁸ loans,⁸⁹ quality health care⁹⁰ and education,⁹¹ life

⁸³ See, *inter alia*. Honduras’s reply. National Movement Cimarrón’s reply. United Nations, CERD, General Recommendation XXXIV, CERD/C/GC/34, 3 October 2011, para. 6.

⁸⁴ Racial Discrimination Observatory’s reply.

⁸⁵ Honduras’s reply. Ruda y Chocolate’s reply.

⁸⁶ See, *inter alia*, CERD. Concluding Observations of the Committee on the Elimination of Racial Discrimination. United States, CERD/C/USA/CO/6, May 8 2008, para. 16. Mexico’s reply.

⁸⁷ See, *inter alia*, IACHR, Report No. 26/09 (Admissibility and Merits, Case 12.440, *Wallace de Almeida* (Brazil), 20 March 2009, paras. 61-67; IACHR, Report No. 33/04 (Merits), Case 11.634, *Jailton Neri da Fonseca* (Brazil), March 20 2009, paras. 35-38; and IACHR, Thematic Hearing, 140th Regular Period of Session, *Allegations on Excessive Use of Police Force against Afro-descendants in Brazil*, Geledés- Instituto da Mulher Negra, Global Rights, Brazil, October 25, 2010. Ruda y Chocolate’s reply (“Afro-descendants also live in the so called ‘ch’ or ‘inve’ complexes, which are generally located in the so-called ‘red light districts’. This information is not generally furnished in job applications forms and another address is given, because providing these addresses means being excluded despite not having any records and being a worker”).

⁸⁸ See, *inter alia*, UNDP, *The Rights of Afro-descendants in Latin America: Challenges regarding its implementation* p. 140 (“Thirty-eight percent of the Afroecuadorian population has no dwelling, either their own or leased. (...) According to the 2006 Living Standards Survey, barely 39% of homes where the heads of household identified themselves as Afroecuadorian have mains water supply in the house”). United Nations, Human Rights Council, Report of the independent expert on minority issues. Addendum. Mission to Guyana (28 July to 1 August 2008), A/HRC/10/11/Add.2, 27 February 2009, para. 50. CERD. Reports submitted by States Party according to Article 9 of the Convention. Sixth periodic report to be presented in 2005. Addendum. United States, CERD/C/USA/6, May 1 2007, para. 244. CERD. Report submitted by Uruguay, *cit.*, para. 82. Canada’s reply.

⁸⁹ See, *inter alia*, United Nations, Human Rights Council, Mission to Guyana, *cit.*, para. 37.

⁹⁰ See, *inter alia*, CERD. Ninth Report of the Dominican Republic, *cit.*, para. 56 (“Most Afro-descendants are in the lowest levels of society and thus they are pushed to demand most for public services...”). UNDP, *The Rights of Afro-descendants in Latin America: Challenges Regarding its Implementation*, p. 137 (“Ten out of 100 Ecuadorians have some kind of social security. Among Afro-ecuadorians this rate is 7 out of 100, while white people show a ratio of 12 out of 100”). CERD, Concluding observations, United States, *cit.*, para. 32. Mexico’s reply.

⁹¹ See, *inter alia*, UNDP, *The Rights of Afro-descendants in Latin America: Challenges Regarding its Implementation*, p. 132 (“Data shows that, for all ages, the illiteracy rates are higher among Afro-colombian communities than in the “mestiza” population. For most age groups, illiteracy indexes in the black people community is up about twofold on that of the “mestiza” population. (Rodríguez Garavito, Alfonso Sierra and Cavalier Adarve, 2008:42)”). UNDP, *The Rights of Afro-descendants in Latin America: Challenges Regarding its Implementation*, p. 190 (“In Brazil, in 2006 illiteracy affected 14.4 million 15-year-olds or over. Out of that figure, (...) 9.7 million were dark-skinned or “pardos” (67.4%)”). UNDP, *The Rights of Afro-descendants in Latin America: Challenges Regarding its Implementation*, p. 197 (“[I]n 2006 the situation of dark-skinned and pardos children was almost the same as that of eleven-year-olds before. In other words, in 2006 little over half of dark-skinned or pardos children aged between 7 and 10 were studying in the year that corresponded to their age”). UNDP, *The Rights of Afro-descendants in Latin America: Challenges Regarding its Implementation*, p. 204 (“When making a comparative analysis of the grades got in the exams of the [Basic Education Assessment System] in all years, white
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expectancy⁹² and nutrition rate,⁹³ and in the difficulties in using public facilities⁹⁴ or accessing certain places of recreation.⁹⁵

47. As regards the right to work, the statistics indicate that the Afro-descendant population occupies the lowest positions in the job hierarchy⁹⁶ and mostly perform informal-sector and low-grade tasks⁹⁷ or work that is poorly remunerated⁹⁸ -- even when comparing wages of non-Afrodescendants people who perform the same tasks⁹⁹ -- they lack the social security benefits and the rate of unemployment of this community is greater than for the population as a whole.¹⁰⁰ Similarly, the Commission has received

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students were observed to get higher grades than dark-skinned and pardo ones"). UNDP, *The Rights of Afro-descendants in Latin America: Challenges Regarding its Implementation*, p. 206 ("Between 1995 and 2006, the gross schooling rate of the white population in higher studies rose from 13.1% to 30.7%. However, considering the dark-skinned and parda population, this rate increased from a risible 3.3% in 1995 to a not less risible 12.1% in 2006"). United Nations, Human Rights Council. Report by the Work Team of Experts in Afro-descendants. Visit to the United States of America (January 25 to 29 2010). A/HRC/15/18, August 6 2010, para. 7 ("The 2004 American Community Survey shows that about 80% of Afro-descendants aged 25 or over had graduated from high school and about 17% of that age group had a degree or a higher level from higher studies institutions"). Uruguay's reply. IACHR, Thematic Hearing, 131st Regular Period of Session, *Right to the Education of Afro-descendants and Members of Indigenous Communities in the Americas*, Robert F. Kennedy Memorial Center for Human Rights, Cornell University Law School, University of Virginia Law School, March 12, 2008. United Nations, CERD, General Recommendation XXXIV, CERD/C/GC/34, 3 October 2011, para. 6.

⁹² See, *inter alia*, UNDP, *The Rights of Afro-descendants in Latin America: Challenges Regarding its Implementation*, p. 135 ("The Afrocolombian population shows a higher infant mortality rate than non-Afrocolombian, and the differences are equally evident in the rate of life expectancy at birth").

⁹³ National Movement Cimarrón's reply. Mexico's reply.

⁹⁴ See, *inter alia*, UNDP, *The Rights of Afro-descendants in Latin America: Challenges Regarding its Implementation*, p. 125 ("In Ecuador, normally, Afroecuadorian males and females are not present in ordinary places such as banks, mass media, supermarkets, courts, etc"). CERD. Final Observations of the Committee on the Elimination of Racial Discrimination. Dominican Republic. CERD/C/DOM/CO/12, May 16, 2008, para. 12. CERD. Report submitted by the United States, *cit.*, para. 277. CERD. Concluding observations, Colombia, *cit.*, para. 26.

⁹⁵ See, *inter alia*, CERD, Ninth report of the Dominican Republic, *cit.*, para. 29.

⁹⁶ United Nations, CERD, General Recommendation XXXIV, CERD/C/GC/34, 3 October 2011, para. 6.

⁹⁷ See, *inter alia*, CERD, Ninth report of the Dominican Republic, *cit.*, para. 3. United Nations, Human Rights Council, Mission to Canada, *cit.*, para. 43. CERD. Observations made to the United States, *cit.*, para. 28. Peru Ombudsperson, *cit.*, p. 40. IARPRIDI (Argentine Institute for Equality, Diversity and Integration)'s reply. Ruda y Chocolate's reply. Afro-cultural Movement's reply. National Movement Cimarrón's reply. Paraguay Afro-descendants Network's reply. Uruguay's reply.

⁹⁸ See, *inter alia*, Ñopo, Hugo, Atal, Juan Pablo and Zinder, Natalia. *New Century, Old Disparities: Gender and Ethnic Wage Gaps in Latin America*. Inter-American Development Bank (IDB), 2009. CERD. Report submitted by Uruguay, *cit.*, para. 71. UNDP, *The Rights of Afro-descendants in Latin America: Challenges Regarding its Implementation*, pp. 138 and 218 ("This lack of opportunities is increased not just by the poor schooling conditions and education levels among Afro-descendants but the racial discrimination factor also plays a deciding role").

⁹⁹ See, *inter alia*, Racial Discrimination Observatory's reply ("Incomes of Afro-descendants with non-manual and specialized works account for 69.75% of incomes of mestizos in the same employment category; incomes of Afro-descendants with non-manual and non-specialized work get 71.62% of the incomes received by mestizos in this employment category"). National Movement Cimarrón's reply.

¹⁰⁰ See, *inter alia*, CERD, Report submitted by the United States, *cit.*, para. 220. Canada's reply. Costa Rica's reply.

information on the under-representation of Afro-descendant population in public services, compared with their labor force availability.¹⁰¹

48. Some studies have concluded that employers usually discriminate the Afro-descendant population in sales and managerial positions, using terms like "good appearance" to express their preference for white candidates.¹⁰² In this respect, The Commission has declared admissible a petition in which female petitioners alleged that they had been excluded from an employment opportunity for being Afro-descendants, because this was the only reason that could justify such a different treatment, considering that the candidate who got the position, a colleague of the petitioners' that was non-Afro-descendant, had very similar professional background.¹⁰³ Moreover, in a merits report, the Commission came to the conclusion that excluding a person from accessing the labor market because of his/her race constitutes an act of racial discrimination¹⁰⁴ and that if the State allows such behavior to remain unpunished, thus implicitly giving its consent or approval, the IACHR understands it is violating Article 24 of the American Convention, in conjunction with Article 1(1).¹⁰⁵

49. According to the replies given, Colombia identified the following problems: i) low productivity and competitiveness in productive activities, ii) low education levels due to difficulties in access to, continuance in and quality of the education cycle, which take their toll on overcoming poverty, iii) fragmentation of the social stratum due to forced displacement, iv) insufficient policies, plans, programs and rules or its inadequate implementation, v) social practices of racial discrimination.¹⁰⁶ Canada informed that the 2009 General Social Survey on Discrimination showed that 52% of Afro-descendants aged 15 or over said to have suffered from discrimination at work or in employment application or promotion processes in the last 5 years prior to the survey.¹⁰⁷ Mexico stated that the ENADIS (National Survey on Discrimination) (2010) pointed out that one out of ten Mexican people has felt that his/her rights were not respected because of his/her skin color.¹⁰⁸ Chile claimed that, according to the Survey "*¿Legislar contra la discriminación?*" ("Shall we

¹⁰¹ Canada's reply.

¹⁰² Cottrol, Robert J., *Developing Effective Legal Tools against Racial Discrimination: Lessons from the U.S. Experience with Employment Discrimination*, in OAS, Workshop of Experts in Afro-Descendant Issues in the Americas, Chapter 2, p. 51.

¹⁰³ See also IACHR, Report No. 84/06 (Admissibility), Petition 1068-03, *Neusa dos Santos Nascimento and Gisele Ana Ferreira* (Brazil), October 21 2006, paras. 7, 8 and 12.

¹⁰⁴ IACHR, Report No. 66/06 (Merits), Case 12.001, *Simone André Diniz* (Brazil), October 21, 2006, para. 99.

¹⁰⁵ IACHR, Report No. 66/06 (Merits), Case 12.001, *Simone André Diniz* (Brazil), October 21, 2006, para. 100.

¹⁰⁶ Colombia's reply.

¹⁰⁷ Canada' reply. The General Social Survey on Discrimination is carried out in 10 provinces by means of telephone interviews; therefore, those who have no landline telephone service or those who only have cellular telephone service were excluded.

¹⁰⁸ Mexico's reply.

legislate against discrimination?") carried out by IDEAS foundation in March 2009, 13.3% of those polled said that the main reason for discrimination in Chile was race or ethnicity.¹⁰⁹

50. At the technical meeting, the experts highlighted the importance of one's position in the labor market, considering that incomes impact on social promotion¹¹⁰ and sustainability. Similarly, they made reference to the problems of informal workers and, especially, of migrant workers that must face serious difficulties and obstacles to be able to move to other countries and obtain work permits.

51. In addition, the experts referred to intra-family transfer of resources and "kinship ethics" phenomena, according to which Afro-descendants who have access to a better employment or receive better wages transfer resources to their core and extended family. The experts pointed out that this resource transfer could hinder individual savings and intergenerational social mobility.

52. In terms of access to health services, the "low level of assistance to a medical center of [Afro-descendants] could be due to any number of factors, such as the lack of availability, or accessibility, quality of the service, or acceptability.¹¹¹ The Commission has been provided with information on the low level of affiliation of Afro-descendants to the health care system,¹¹² the lack of an intercultural approach to medical treatment¹¹³ and policies that specifically tackle those diseases that mostly affect Afro-descendants¹¹⁴ or that provide them with specific medication.¹¹⁵

53. As for access to education, the information shows that the educational infrastructure in those areas where the residing population is mostly Afro-descendant is not sufficient,¹¹⁶ illiteracy is higher,¹¹⁷ indexes of schooling are lower,¹¹⁸ and the children

¹⁰⁹ Chile's reply.

¹¹⁰ United Nations, CERD, General Recommendation XXXIV, CERD/C/GC/34, 3 October 2011, para. 6.

¹¹¹ See, *inter alia*, Peru Ombudsperson, *cit.*, p. 50.

¹¹² Racial Discrimination Observatory's reply. Paraguay Afro-descendants Network's reply.

¹¹³ See, *inter alia*, Peru's reply ("The 2010 'Institutional Operative Plan' 2010 of the Intercultural Health National Center (CENSI) has scheduled intercultural dialog processes to improve the approach to services").

¹¹⁴ See, *inter alia*, Peru Ombudsperson, *cit.*, pp. 53, 59, 139 ("In this sense, it has been claimed that although Afro-descendants suffer from diseases such as cholesterol, diabetes, sickle-cell disease, cancer, intrauterine myoma and malaria more frequently, there are no specific plans to collect information or proper measures that set focalized treatments in this group").

¹¹⁵ Ruda y Chocolate's reply.

¹¹⁶ Racial Discrimination Observatory's reply. Colombia's reply.

¹¹⁷ See, *inter alia*, CERD. Report submitted by Ecuador, *cit.*, para. 12. CERD. Reports submitted by States Parties under Article 9 of the Convention. Twelfth periodic reports of States parties due in 2007. Addendum. Suriname. CERD/C/SUR/12, January 31, 2008, para. 16. CERD. Concluding Observations, Colombia, *cit.*, para. 23. CERD. Concluding Observations Peru, *cit.*, para. 18. National Movement Cimarrón's reply.

¹¹⁸ See, *inter alia*, CERD, Report submitted by Ecuador, *cit.*, para. 13. Peru Ombudsperson, *cit.*, p. 60. Afro-cultural Movement's reply.

and youths have fewer years of education.¹¹⁹ These circumstances result in only a very small percentage of the Afro-descendant population being able to enter and/or complete higher education or university studies.¹²⁰ The information received also refers to the use of inappropriate studies programs and educational methods,¹²¹ the economic difficulties in affording education costs¹²² and the gap in incomes between Afro-descendant and non-Afro-descendant people as the education level increases.¹²³

54. During the technical meeting, the experts concluded that most societies in the Americas have a poor social mobility and this has contributed to perpetuate inequality of Afro-descendants since slavery times to date. Therefore, experts highlighted the importance of the universal access to education – even the most prestigious programs and institutions – and its impact on the labor aspect. However, they also claimed that racial discrimination “absorbs” the education achievements; while more trained Afro-descendants do not get any jobs, according to the employers’ preferences, based on racial prejudice.

55. As regards political participation, the available information shows an under-representation of the Afro-descendant population in public service positions.¹²⁴ This means that the amount of Afro-descendant representatives who hold elective,¹²⁵ executive positions¹²⁶ or in political parties is substantially lower than the percentage of the

¹¹⁹ See, *inter alia*, CERD, Report submitted by Uruguay, *cit.*, para. 112. National Movement Cimarrón’s reply. Paraguay Afro-descendants Network’s reply. Mexico’s reply

¹²⁰ See, *inter alia*, Peru Ombudsperson, *cit.*, p. 61. IACHR, Thematic Hearing, 131st Regular Period of Session, *Right to Education of Afro-descendants and Members of Indigenous Communities in the Americas*, Robert F. Kennedy Memorial Center for Human Rights, Cornell University Law School, University of Virginia Law School, March 12, 2008.

¹²¹ Honduras’s reply.

¹²² Ruda y Chocolate’s reply.

¹²³ National Movement Cimarrón’s reply.

¹²⁴ See, *inter alia*, CERD, Report submitted by Uruguay, *cit.*, para. 70 (“There are no specific Studies on the racial ancestry of elected representatives. However, it can be stated that in the case of Afro-descendants, there is a strong disparity between its presence in the whole population and its representation at the legislative body”). United Nations, CERD, General Recommendation XXXIV, CERD/C/GC/34, 3 October 2011, para. 6.

¹²⁵ See, *inter alia*, UNDP, *The Rights of Afro-descendants in Latin America: Challenges Regarding its Implementation*, p. 74 (“Uruguay has an Afro-descendant representative in Parliament, deputy Edgardo Ortuño”). CERD, Report submitted by United States, *cit.*, para. 215 (“In the case of the United States, out of the 535 members of the 109th Congress, 41 were Afro-descendants (8%)” CERD. Report submitted by Ecuador, *cit.*, para. 97 and 98 (“In 2000, out of the national total figure, 2.15% of candidates were Afroecuadorian according to the Superior Electoral Court. Meanwhile, at the elections held on October 20 2002, out of the national figure, 8% of Afroecuadorians ran for the position on the Coast, 1.5% in the Hills and 0.5% in the Amazon area. Out of these percentages, only 0.25% of Afroecuadorian people were elected in the country. As regards the representation of ministers, undersecretaries and provincial mayors, the percentage in 2002 was 0.5% and 0.15% in 2003”). United Nations, CERD, Concluding observations of the Committee on the Elimination of Racial Discrimination. Plurinational State of Bolivia. CERD/C/BOL/CO/17-20, March 10 2011, para. 14.

¹²⁶ See, *inter alia*, United Nations, CERD, Periodic Reports submitted by State Parties according to Article 9 of the Convention. 6th periodic reports due in 2006. United States of America, CERD/C/USA/6, May 1 2007,, para. 217 (“Through June 2006, two Afro-descendants were members of the US Cabinet”). CERD, Report submitted by Ecuador, *cit.*, para. 136 (“The Afro-descendant population had two international representatives, Continues...

population they represent.¹²⁷ What is more, in those countries that have implemented policies or programs aimed at fighting racial discrimination, it is not uncommon that the staff of those entities has no Afro-descendant members.

56. In the replies to the IACHR questionnaire it was stated that: i) the possibility to run for and compete for public office depended on the investment of large amounts of money,¹²⁸ ii) campaigns are organized with leaflets and graffiti that incite people not to vote for Afro-descendants to be elected for public office,¹²⁹ iii) the Afro-descendant population only takes part as rank-and-file members and, in general, there are no specific partisan policies,¹³⁰ iv) there are no Afro-descendants in leading positions or management of political parties nor an agenda in favor of Afro-descendant people in the political parties' programs.¹³¹

57. On the other hand, the structural discrimination is not only observed in statistics or indicators, but it is also reflected in the collective mindset¹³² and the continuity of Afro-descendants stereotyping,¹³³ depicted with pejorative and disrespectful adjectives towards their personal dignity.¹³⁴ In this sense, it has been highlighted that Afro-descendant people do not take part in mass media or they intervene by means of representations that contribute to perpetuating these stereotypes and prejudices,¹³⁵ through the "folklorization" and "exotization"¹³⁶ of Afro-descendants.

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one in Venezuela and the other in the Ecuadorian Mission before the United Nations Educational, Scientific and Cultural Organization (UNESCO)").

¹²⁷ IARPRIDI (Argentine Institute for Equality, Diversity and Integration)'s reply.

¹²⁸ Racial Discrimination Observatory's reply.

¹²⁹ Racial Discrimination Observatory's reply.

¹³⁰ Ruda y Chocolate's reply.

¹³¹ National Movement Cimarrón's reply.

¹³² See, *inter alia*, LUNDÚ (*Center for Afroperuvian Studies and Promotion*), "Sign in against Racism" Campaign, cited in UNDP, *The Rights of Afro-descendants in Latin America: Challenges Regarding its Implementation*, p. 127 ("Racism exists in Peru and it is one of the main reasons for underdevelopment, poverty, violence and exclusion. Little has been said about the 54.5% of Afroperuvians that feel discriminated and verbally assaulted in the street, mainly women, about the 44% that feels marginalized in consumption stores and the 39% in their work places").

¹³³ See, *inter alia*, CERD, Report submitted by Ecuador, *cit.*, para. 87. UNDP, *The Rights of Afro-descendants in Latin America: Challenges Regarding its Implementation*, p. 127 ("The Ishibashi investigation shows how stereotyped exclusion and inclusion practices predominate in mass media, for example, thus fostering endoracism and discrimination because of skin color"). CERD. Final Observations of the Committee on the Elimination of Racial Discrimination, Peru, CERD/C/PER/CO/14-17, September 3 2009, para. 19.

¹³⁴ See, *inter alia*, United Nations, Human Rights Council, Mission to Guyana, *cit.*, para. 37. United Nations, Human Rights Council, Mission to Canada, *cit.*, para. 23. National Movement Cimarrón's reply.

¹³⁵ IACHR, 127th Period of Session, Thematic Hearing, *Racial Discrimination in the Dominican Republic*, Center for Justice and International Law (CEJIL), Jesuit Refugee Service (JRS), March 2, 2007.

¹³⁶ Afro-cultural Movement's reply.

58. According to what arises from the foregoing diagnosis, the Commission is concerned about the deeply rooted racial discrimination and racism in the Americas and because, consequently, the Afro-descendant population – either constituting the minority or majority percentage of the population – is affected by structural discrimination in all aspects and levels, which deprives them from enjoying and exercising their human rights.

C. Intersectionality of various discrimination factors

59. According to the information disclosed and the conclusions of the technical meeting, the IACHR concludes that the Afro-descendant population is also affected by other multiple discrimination levels. In this regard, although it is true that racial discrimination is different from the concept of social inequality, experts highlighted the strong connection between poverty and race and between race and class, and how these categories intertwine and deepen the serious situation of Afro-descendant people.

60. In particular, the CEDAW has claimed that intersectionality is a basic concept for understanding the scope of the general obligations of States parties, while the discrimination of women based on sex and gender is inextricably linked with other factors that affect women, such as race, ethnicity, religion or belief, health, status, age, class, caste, sexual orientation and gender identity.¹³⁷

61. The Commission notes with concern the particular risky situation of Afro-descendant women.¹³⁸ In effect, Afro-descendant women have suffered a triple historical discrimination based on their gender, extreme poverty and race.¹³⁹ This situation may become worse in special socio-political contexts such as armed conflicts or natural catastrophes, among others.

62. In this respect, the CEDAW has defined the concept of gender equality as the ability of “all human beings, regardless of sex, are free to develop their personal abilities, pursue their professional careers and make choices without the limitations set by

¹³⁷ See, United Nations, Committee on the Elimination of Discrimination against Women (CEDAW), *General Recommendation 28 on the Obligations of States Parties under Section 2 of the CEDAW*, October 19, 2010, para. 18.

¹³⁸ IACHR, 128th Regular Period of Session, Thematic Hearing, *Situation of AfroBrazilian Women*, Geledés – Instituto da Mulher Negra (*Black Women Institute*), Brazil, July 18 2007; IACHR, 143rd Regular Period of Session, Thematic Hearing, *Situation of Human Rights of the Afro-Peruvian Population*, Global Rights, Centro de Desarrollo de la Mujer Negra Peruana, Estado de Perú, October 25, 2011; IACHR, 143rd Regular Period of Session, Thematic Hearing, *Situation of Human Rights of Women of African Descent in Latin America*, Global Rights, Red de Mujeres Afrolatinoamericanas, Afrocaribeñas y de la Diáspora, October 28, 2011.

¹³⁹ “The IACHR could verify that the situation of indigenous and Afrocolombian women is especially critical as they are victims of multiple discrimination due to their race, ethnic group and for being women; this situation is worse within the framework of an armed conflict. They face two discrimination levels since birth: the first one because of belonging to their racial and ethnic group and the second one because of their sex”. IACHR, *Women against Violence and Discrimination Derived from Armed Conflicts in Colombia*, OAS/Ser.L/V/II, Doc. 67, October 18 2006, para. 102.

stereotypes, rigid gender roles and prejudices”.¹⁴⁰ The States must meet this goal by means of an immediate, comprehensive and multisectorial policy aimed at eliminating discrimination against women,¹⁴¹ appropriately considering the multiple factors that may expose a woman to have her human rights violated.¹⁴²

63. However, statistics show that Afro-descendant women are even poorer¹⁴³ and have fewer possibilities to have access to housing,¹⁴⁴ health and education¹⁴⁵ than Afro-descendant men and non-Afro-descendant women, and that they have fewer labor¹⁴⁶ and political participation opportunities. Moreover, the scarce disaggregated studies indicate that Afro-descendant women are more numerous than Afro-descendant men¹⁴⁷ and Afro-descendant girls are less likely to attend school than Afro-descendant boys.¹⁴⁸

64. The Inter-American Commission has considered that the Afro-descendant community, as a whole, lives in the poorest regions and has the lowest paid jobs, the burden of discrimination is even heavier for Afro-descendant women because their multiple roles both inside and outside the home are not adequately reflected in their social status, employment and wages.¹⁴⁹

¹⁴⁰ United Nations, Committee on the Elimination of Discrimination against Women (CEDAW), *General Recommendation 28* on the Obligations of States Parties under Section 2 of the CEDAW, October 19 2010, para. 22.

¹⁴¹ United Nations, Committee on the Elimination of Discrimination against Women (CEDAW), *General Recommendation 28* on the Obligations of States Parties under Section 2 of the CEDAW, October 19 2010, para. 22.

¹⁴² See, United Nations, Committee on the Elimination of Discrimination against Women (CEDAW), *General Recommendation 28* on the Obligations of States Parties under Section 2 of the CEDAW, October 19 2010, para. 18.

¹⁴³ See, *inter alia*, CERD, Ninth Report of the Dominican Republic *cit.*, para. 66 (“According to investigations, Afro-descendants, especially women, are found in duty free areas, domestic jobs and informal economy”). UNDP, *The Rights of Afro-descendants in Latin America: Challenges Regarding its Implementation*, p. 130 (“The level of poverty of an Afroecuadorian woman living in rural areas accounts for 87.3% per UBN (Unsatisfied Basic Needs) while the average of UBN of a urban Afroecuadorian woman is 62.2%...”). United Nations, CERD, Concluding observations of the Committee on the Elimination of Racial Discrimination. Dominican Republic, CERD/C/DOM/CO/12, May 16 2008, para. 19. CERD, Concluding observations, Uruguay, *cit.*, para. 15. CERD, Concluding observations, Bolivia, *cit.*, para. 13.

¹⁴⁴ See, *inter alia*, UNDP, *The Rights of Afro-descendants in Latin America: Challenges Regarding its Implementation*, p. 140 (“Barely 15.3% of Afroecuadorian women have a house, but among men this percentage is over 47%”).

¹⁴⁵ See, *inter alia*, IACHR, *The Road to Substantive Democracy: Women’s Political Participation in the Americas*, OAS/Ser.L/V/II., Doc. 79, April 18 2011, para. 94.

¹⁴⁶ See, *inter alia*, UNDP, *The Rights of Afro-descendants in Latin America: Challenges Regarding its Implementation*, p. 138 (“The survey on urban employment and unemployment of 2005 (INEC) reveals that urban unemployment rate in the country accounts for 7.9%. But this rate is the highest among Afroecuadorian in Ecuador with 11%. If broken down according to sex, Afroecuadorian women bear the worst: the unemployment rate reaches the unusual percentage of 17.5%”).

¹⁴⁷ Canada’s reply. Racial Discrimination Observatory’s reply. Colombia’s reply. Uruguay’s reply.

¹⁴⁸ Colombia’s reply.

¹⁴⁹ IACHR, *Access to Justice for Women Victims of Violence in the Americas*, OAS/Ser.L/V/II., Doc. 68, January 20 2007, para. 211.

65. The Commission has established that a variety of sources confirm that Afro-descendant women are notoriously under-represented in decision-making bodies as compared to other women; in fact, “[i]n the political sphere, only a handful of Afro-descendant women have achieved positions of power”.¹⁵⁰ Similarly, the Commission has also deemed it alarming that “the participation of Afro-descendants women barely reaches 1% of total legislators, virtually a third of the population in the region, and women in Latin America of African descent claim only 0.03 percent participation in legislatures”.¹⁵¹

66. During the technical meeting, the experts stated that although some investigations compare the situation between white men and women and between Afro-descendant men and women, there are no studies that contrast the situation between white and Afro-descendant women. They specially informed that if we compare the situation of Afro-descendant and white women: i) life expectancy in Afro-descendant women is 8 years lower, ii) labor and wage conditions are worse,¹⁵² iii) unemployment rates are higher,¹⁵³ iv) they do not have access to managerial positions.

67. The experts stated that most Afro-descendant women carry out domestic tasks, with low wages and precarious labor conditions, with no social security benefits, and they find difficulties in getting access to work permits, especially those who are migrant workers.

68. Similarly, the information suggests that racial discrimination also covers sexual and reproductive health areas,¹⁵⁴ where higher rates of infant and maternal mortality are registered for Afro-descendant women.¹⁵⁵ The experts also noted the persistent racist and sexist attitudes of health staff, and even the practice of forced sterilizations.

69. As regards the perception of the role of Afro-descendant women, the experts warned that, from a social point of view, Afro-descendant women are portrayed as sexual objects; this relationship is closely related to prostitution and human trafficking. Now, from an individual point of view, the experts made reference to phenomena of

¹⁵⁰ See, *inter alia*, IACHR, *The Road to Substantive Democracy: Women’s Political Participation in the Americas*, OAS/Ser.L/V/II., Doc. 79, April 18 2011, para. 90, citing Mayra Buvinic, Vivian Roza, “Women, Politics and Democratic Prospects in Latin America, Inter-American Development Bank”, August 2004, p. 17.

¹⁵¹ See, *inter alia*, IACHR, *The Road to Substantive Democracy: Women’s Political Participation in the Americas*, OAS/Ser.L/V/II., Doc. 79, April 18 2011, para. 91, citing Epsy Campbell Barr, “Leadership and Political Participation of Afro-descendant Women”, essay prepared by the conference *Women in the Americas: Paths to Political Power*, Inter-American Development Bank, Inter-American Dialog, League of Voting Women in the United States and the Organization of American States, March 2007, p. 7.

¹⁵² National Movement Cimarrón’s reply.

¹⁵³ Uruguay’s reply.

¹⁵⁴ See, *inter alia*, IACHR, *Access to Maternal Health Care from a Human Rights Perspective*, OAS/Ser.L/V/II., Doc. 69, June 7 2010, para. 87.

¹⁵⁵ See, *inter alia*, CERD, Concluding observations, United States, *cit.*, para. 32.

“hypermasculinity” or “reinforced male chauvinism” by Afro-descendant men, which may result in harmful intra-family discrimination for Afro-descendant women because they prevent the development of education and labor activities, and establish female roles only related to housewife duties. The experts also highlighted the rise in sexual violence in relation with Afro-descendant women and current situations of domestic slavery, sexual violence and femicide,¹⁵⁶ which is exacerbated by the stigmatization suffered by displaced women.

70. The Commission has claimed that according to the information and testimonies gathered, displacement leads Afro-descendant women to suffer various forms of discrimination in addition to being women – because they are Afro-descendant and because they are displaced. Similarly, displaced Afro-descendant women indicate suffer acts of racism, ridicule and stigmatization by the receiving communities. This situation is aggravated by the low levels of education and poverty of the displaced women, which along with their race challenge their adequate access to work and to different forms of economic subsistence.¹⁵⁷

71. As regards violence and access to justice, the Commission has argued that:

Afro-descendant women who live in marginalized, rural areas in small, tightly clustered social groups that still preserve their languages, traditions and customs and sometimes even their own systems of justice, will have to contend with problems of geographic accessibility, an inability to communicate with judicial authorities in their own languages, a knowledge of the process, and a lack of economic means. These are the very same problems that indigenous women face. And like indigenous women, Afro-descendant women will have to contend with discrimination on two levels: one based on their gender and the other based on their race.¹⁵⁸

Theirs is not unlike the situation of Afro-descendant women in urban areas, where the difficulties they will face in availing themselves of effective judicial remedies, have to do with their economic disadvantage and skin color. In those areas where the economic factor and social exclusion have been conquered, the difficulties are generally related to skin color.¹⁵⁹

¹⁵⁶ See, *inter alia*, *Recent Violations of Afrocolombian Human Rights*, A Dossier of the Afrocolombian Communities Solidarity Network (ACSN), March 17 2011.

¹⁵⁷ See, *inter alia*, IACHR, *Women against Violence and Discrimination Derived from the Armed Conflict in Colombia*, OAS/Ser.L/V/II., Doc. 67, October 18 2006, para. 121

¹⁵⁸ IACHR, *Access to Justice for Women Victims of Violence in the Americas*, OAS/Ser.L/V/II., Doc. 68, January 20 2007, para. 213.

¹⁵⁹ IACHR, *Access to Justice for Women Victims of Violence in the Americas*, OAS/Ser.L/V/II., Doc. 68, January 20 2007, para 214 citing the World Bank, Analysis Group for Development, (AGRADE), *Beyond the Afro-descendant Averages in Latin America. Poverty, Social Discrimination and Identity. The Case of the Afro-*Continues...

72. In the same sense, the Commission has verified that:

[Afro-descendant] women may face unique challenges when seeking judicial protection. The history of [Afro-descendants] has been one of discrimination, exclusion, invisibility and social disadvantage, a combination of problems compounded in the case of women.[...] Public authorities discriminate against these women because of their gender, their race and their poverty, a situation described as follows:

Discrimination is a control device to keep disadvantaged groups in a position of subordination. It is a critical mechanism in controlling these groups... Violence is central to discrimination, since violence is one of the worst consequences of discrimination and also one of its key factors. All forms of discrimination have to be rejected in order to make headway in eradicating gender base discrimination.¹⁶⁰

73. Moreover, the IACHR has considered that “[a]mong the challenges faced by Afro-descendant women, are the institutional violence perpetrated by judicial authorities who do not understand their vision of the natural order, and their traditions and culture. A judicial culture needs to be fostered that is tolerant of difference and diversity. Poverty is particularly prevalent among these women, which means that States must be ready to provide them with *pro bono* legal services to enable them to access the judicial protective bodies. They also need more information about the recourses available to them within the justice system and about their rights.”¹⁶¹

74. Experts concluded that the States of the region have not adopted the concept of "differentiated approach" in a proper way in their public policies; therefore, it is necessary to go forward in the development of this term and its effective incorporation so that State measures consider them and provide a solution to the particular situation of Afro-descendant women.

...continuation

descendant Population in Peru, Washington D.C., February 2006. In this study, some interviews were carried out and those interviewed concluded that discrimination is based on skin color and not on poverty. One of the interviewees commented that once he tried to enter a luxurious restaurant with a group of friends and they had some difficulties for being Afro-descendants; once they were allowed in, they were given the most hidden table. This study points out that the places where Peruvian Afro-descendants feel discrimination most are exclusive ones, where “despite having money, we would not be allowed to enter for being black”. One of the participants said that “if we go to Lima, they will not necessarily know we are poor, but they will surely know we are black and treatment is different”.

¹⁶⁰ IACHR, *Access to Justice for Women Victims of Violence in the Americas*, OAS/Ser.L/V/II., Doc. 68, January 20 2007, para. 208, citing IACHR, *Women against Violence and Discrimination Derived from the Armed Conflict in Colombia*, OAS/Ser.L/V/II. Doc. 67, October 18 2006, para. 112.

¹⁶¹ IACHR, *Access to Justice for Women Victims of Violence in the Americas*, OAS/Ser.L/V/II., Doc. 68, January 20 2007, para. 215.

75. The Commission deems it very important that the States acknowledge the situation of multiple discrimination undergone by Afro-descendant women because of their gender and race, and that they gather disaggregated information about the situation and life conditions of Afro-descendant women. Similarly, the IACHR reiterates that the States must incorporate a gender perspective upon designing their public policies, considering the particular needs of Afro-descendant women and adopting a comprehensive vision to tackle all aspects that directly affect them.¹⁶²

76. Moreover, the IACHR observes that there is no disaggregated information about the situation of Afro-descendant boys and girls. The Commission observes the impact of the structural discrimination and the obstacles to access education and health in the case of Afro-descendant boys and girls and reminds that, considering their especially situation of vulnerability,¹⁶³ the States must take the necessary action to ensure their rights.

77. As regards other levels of discrimination, the Commission notes that, frequently, the States of the region provide information about policies, entities, statistics and problems common to both "indigenous peoples and people of African-descent."¹⁶⁴ In this sense, although the IACHR appreciates that the States identify indigenous and Afro-descendant people as discriminated and are able to identify their common needs, it also considers it important to highlight that the needs of the Afro-descendant population in the Americas cannot be completely subsumed within policies for indigenous peoples.

78. In this sense, civil society has insisted that the Afro-descendant population must have its own legal definition and categories, suitable for their characteristics, culture, needs, past, tradition and current obstacles. In effect, Afro-descendant organizations have sustained that one of the invisibility mechanisms has been precisely to subsume or compare their needs with those of other groups affected by discrimination.

79. Notwithstanding the foregoing, the available information shows that some countries of the region have gone forward in recognizing the Afro-descendant community and their collective rights in domestic legislation. Thus, for example, the provisional section 55, regulated by Act No.70 of 1993, of the 1991 Constitution of Colombia determined the collective titling of the traditional lands of "black communities" that inhabited the Pacific Basin. In this context, through Decree No. 1745 of 1995, the State developed a process of collective titling to 5,600,000 hectares of land for

¹⁶² See, also, United Nations, CERD, General Recommendation XXXIV, CERD/C/GC/34, 3 October 2011, paras. 16 and 22.

¹⁶³ See, also, United Nations, CERD, General Recommendation XXXIV, CERD/C/GC/34, 3 October 2011, para. 25.

¹⁶⁴ See, *inter alia*, UNDP, *The Rights of Afro-descendants in Latin America: Challenges Regarding its Implementation*, p. 275 (In Guatemala "the Afro-descendant population is still considered part of the indigenous population, thus restricting the veracity of specific data").

Afrocolombian communities of the Pacific.”¹⁶⁵ Similarly, section 68 of the Constitution of the Federative Republic of Brazil recognized the definitive title of the “quilombolas” to their lands; these communities must demand it before the Palmares Cultural Foundation and the National Institute for Colonization and Agrarian Reform (INCRA).¹⁶⁶ In Nicaragua, Act No. 445 of 2002 established the Communal Property Regime for Indigenous and Ethnic Communities on the Atlantic Coast of Nicaragua and the Bocay, Coco, Indio and Maíz Rivers. Also, in Ecuador, the National Institute for Agrarian Development (INDA) has handed in 69,986.73 hectares to 38 ancient communities; 56% of the surface of those lands belongs to “black communities” and on 29 May 1996 it gave title deeds to communities in Arenales, Río Onzole, Río Bogotá, La Peñita and Playa de Oro.¹⁶⁷

80. Moreover, the IACHR has received information about the situation of Afro-descendant peoples and has followed it up and it had the special opportunity to analyze the situation of the *quilombolas*¹⁶⁸ in Brazil¹⁶⁹ and the situation of displaced Afro-descendants in Colombia.¹⁷⁰

¹⁶⁵ See, *inter alia*, UNDP, *The Rights of Afro-descendants in Latin America: Challenges Regarding its Implementation*, p. 99. IACHR, *Preliminary Observations of the Inter-American Commission on Human Rights after the visit of the Rapporteurship on the Rights of Afro-descendants and against Racial Discrimination to the Republic of Colombia*, OAS/Ser.L/V/II.134, Doc. 66, March 27 2009, paras. 27,28.

¹⁶⁶ See, *inter alia*, UNDP, *The Rights of Afro-descendants in Latin America: Challenges Regarding its Implementation*, p. 250.

¹⁶⁷ See, *inter alia*, CERD, Report submitted by Ecuador, *cit.*, paras. 56-57.

¹⁶⁸ The quilombos are estates made up of fugitive or freed slaves, based on collective production and sharing tradition, culture, dialects, production forms and their own internal rules. See also, IACHR, Thematic Hearing, 129th period of sessions, *Situation of Descendants of Slaves Escaped during the Colonial Period (“Quilombolas”)* in Brazil, Center for Justice and International Law (CEJIL), Rede Social de Justiça e Direitos Humanos, Federación de Órganos para la Asistencia Social y Educativa (FASE), Brazil, October 10, 2007.

¹⁶⁹ The IACHR declared admissible a petition about the socio-cultural disintegration and the violation of the right to property of traditional communities of Alcântara, in virtue of the process of expropriation carried out by the State and of the failure to hand in the corresponding definitive title deeds. IACHR, Report No. 82/06 (Admissibility), Petition 555-01, *Alcântara Communities (Brazil)*, October 21 2006, para. 1.

¹⁷⁰ See, *inter alia*, IACHR, Application before the Inter-American Court of Human Rights, *Marino López and others (Genesis Operation) v. Colombia*, July 2011 and IACHR, Report No. 64/11 (Merits), Case 12.573 *Marino López and others (Genesis Operation)*, Colombia.. See also, IACHR, Annual Report 2009, OAS/Ser.L/V/II, Doc. 51 corr. 1, December 30 2009, Chapter. IV, para. 115; IACHR, 127th Regular Period of Session, Thematic Hearing, *Situation of Afro-descendants in Colombia*, the Association for Alternative Social Promotion (MINGA), Colombia, March 6 2007. IACHR, 131st Regular Period of Session, Thematic Hearing, *Situation of the Human Rights of Afrocolombians displaced in Colombia*, Displaced Afrocolombians, Colombia, March 12 2008.

III. THE HUMAN RIGHTS SITUATION OF PEOPLE OF AFRICAN DESCENT IN THE AMERICAS

A. Principle of equality and non-discrimination

81. Article II of the American Declaration of the Rights and Duties of Men states that:

All persons are equal before the law and have the rights and duties established in this Declaration, without distinction as to race, sex, language, creed or any other factor.

82. Article 1 of the American Convention on Human Rights sets forth that:

The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.

83. Similarly, this international instrument stipulates in its Article 24 that:

All persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law.

84. Article 3.I of the OAS Charter establishes that:

The American States proclaim the fundamental rights of the individual without distinction as to race, nationality, creed or sex.

85. Article 9 of the Inter-American Democratic Charter establishes that:

The elimination of all forms of discrimination, especially gender, ethnic and race discrimination, as well as diverse forms of intolerance, the promotion and protection of human rights of indigenous peoples and migrants, and respect for ethnic, cultural and religious diversity in the Americas contribute to strengthening democracy and citizen participation.

86. Article 1 of the International Convention on the Elimination of All Forms of Racial Discrimination states that:

In this Convention, the term "racial discrimination" shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an

equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

87. Article 13 of the Durban Declaration and Programme of Action establishes that:

We acknowledge that slavery and the slave trade, including the transatlantic slave trade, were appalling tragedies in the history of humanity not only because of their abhorrent barbarism but also in terms of their magnitude, organized nature and especially their negation of the essence of the victims, and further acknowledge that slavery and the slave trade are a crime against humanity and should always have been so, especially the transatlantic slave trade and are among the major sources and manifestations of racism, racial discrimination, xenophobia and related intolerance, and that Africans and people of African descent, Asians and people of Asian descent and indigenous peoples were victims of these acts and continue to be victims of their consequences...

88. In its Declaration on Race and Racial Prejudice (Article 2.2), UNESCO approved that:

Racism includes racist ideologies, prejudiced attitudes, discriminatory behavior, structural arrangements and institutionalized practices resulting in racial inequality as well as the fallacious notion that discriminatory relations between groups are morally and scientifically justifiable; it is reflected in discriminatory provisions in legislation or regulations and discriminatory practices as well as in anti-social beliefs and acts; it hinders the development of its victims, perverts those who practice it, divides nations internally, impedes international cooperation and gives rise to political tensions between peoples; it is contrary to the fundamental principles of international law and, consequently, seriously disturbs international peace and security.

89. On these principles, the IACHR and the Court have repeatedly maintained that the right to equality and nondiscrimination is the central, basic axis of the inter-American human rights system.¹⁷¹ Similarly, the Commission has pointed that the development of the right to equal treatment and nondiscrimination points to the existence of several conceptions of it.¹⁷² One conception is related to the prohibition of arbitrarily different treatment – with different treatment being understood as meaning distinction,

¹⁷¹ IACHR, Application before Inter-American Court of Human Rights, *Case Karen Atala and Daughters v. Chile*, 17 September 2010, para. 74. I/A Court H. R., *Juridical Condition and Rights of the Undocumented Migrants*. Advisory Opinion OC-18 of September 17, 2003. Series A No. 18, para. 173.5.

¹⁷² See, *inter alia*, IACHR, Application before Inter-American Court of Human Rights, *Case Karen Atala and Daughters v. Chile*, 17 September 2010, para. 80.

exclusion, restriction, or preference¹⁷³ – and another is related to the obligation of ensuring conditions of true equality for groups that have historically been excluded and are at greater risk of discrimination.¹⁷⁴ Although both views may be present in certain cases, each warrants a different response from the State and a different treatment under the American Convention. Moreover, under the different conceptions of the right to equality, a State's actions and failures to act may be related to rights enshrined in the American Convention¹⁷⁵ or they may be related to any undertaking of the State that has no effect in the enjoyment of Convention-protected rights.¹⁷⁶

90. Similarly, as regards the prohibition against arbitrary different treatment, the Commission has sustained that:

While the doctrine of the Inter-American human rights system, like that of other human rights regimes, does not prohibit all distinctions in treatment in the enjoyment of protected rights and freedoms, it requires at base that any permissible distinctions be based upon objective and reasonable justification, that they further a legitimate objective, regard being had to the principles which normally prevail in democratic societies, and that the means are reasonable and proportionate to the end sought.¹⁷⁷ Distinctions based on grounds explicitly enumerated under pertinent articles of international human rights instruments are subject to a particularly strict level of scrutiny whereby states must provide an especially weighty interest and compelling justification for the distinction.¹⁷⁸

91. Therefore, the IACHR has considered that a race-based restriction must be based on very compelling reasons; and that the burden of proof rests with the State.

¹⁷³ See, *inter alia*, United Nations, Commission on Human Rights, General Comment 18, No discrimination, 10/11/89, CCPR/C/37, para. 7; I/A Court H. R., *Juridical Condition and Rights of the Undocumented Migrants*. Advisory Opinion OC-18 of September 17, 2003. Series A No. 18, para. 92; Fourth Progress Report of the Rapporteur on Migrant Workers and Their Families in the Hemisphere, OAS/Ser.L/V/II.117, Doc. 1 rev. 1, Annual Report IACHR 2002, 7 March 2003, para. 87.

¹⁷⁴ See, IACHR, Application before Inter-American Court of Human Rights, *Case Karen Atala and Daughters v. Chile*, 17 September 2010, para 80.

¹⁷⁵ See, *inter alia*, IACHR Application before Inter-American Court of Human Rights, *Case Karen Atala and Daughters v. Chile*, 17 September 2010, para 80.

¹⁷⁶ See, *inter alia*, IACHR, Application before Inter-American Court of Human Rights, *Case Karen Atala and Daughters v. Chile*, 17 September 2010, para. 80.

¹⁷⁷ See, *inter alia*, IACHR, Report No 51/01, Case 9903, *Ferrer-Mazorra and others* (United States), IACHR Annual Report 2000, OEA/Ser./L/V/II.111, doc. 20, rev., 16 April 2001, para. 238.

¹⁷⁸ See, *inter alia*, IACHR, *Report on Terrorism and Human Rights*, OAS/Ser.L/V/II.116 Doc. 5 rev. 1 corr., 22 October de 2002, para. 338, citing, *inter alia*, Repetto, Inés, Argentinean Supreme Court of Justice (Argentina), 8 November 1988, Judges Petracchi y Baqué, para 6; *Loving c. Virginia*, 388 US 1, 87 (1967) European Court on Human rights, *Abdulaziz c. United Kingdom*, 28 May 1985, Series A Nº 94, para. 79.

Hence, when a restriction is premised on a "suspect category," the Commission accepts the "reversal of the burden of proof" and the "presumption of invalidity."¹⁷⁹

92. As regards the obligation to create conditions of real equality, the IACHR has established that the examination of laws and policies based on the principle of effective equality and non-discrimination also includes their potential discriminatory impact, even when their formulation seems neutral, or they apply to everyone, without distinction.¹⁸⁰

93. In this regard, the Court held that:

The notion of equality springs directly from the oneness of the human family and is linked to the essential dignity of the individual. That principle cannot be reconciled with the notion that a given group has the right to privileged treatment because of its perceived superiority. It is equally irreconcilable with that notion to characterize a group as inferior and treat it with hostility or otherwise subject it to discrimination in the enjoyment of rights which are accorded to others not so classified. It is impermissible to subject human beings to differences in treatment that are inconsistent with their unique and congenerous character.¹⁸¹

94. The Court has also established that

the principle of equality before the law, equal protection before the law and non-discrimination belongs to *jus cogens*, because the whole legal structure of national and international public order rests on it and it is a fundamental principle that permeates all laws. Nowadays, no legal act that is in conflict with this fundamental principle is acceptable, and discriminatory treatment of any person, owing to gender, race, color, language, religion or belief, political or other opinion, national, ethnic or social origin, nationality, age, economic situation, property, civil status, birth or any other status is unacceptable. This principle (equality and non-discrimination) forms part of general international law. At the existing

¹⁷⁹ See, *inter alia*, IACHR, *Access to Justice for Women Victims of Violence in the Americas*, OEA/Ser. L/V/II. doc.68, 20 January 2007, para. 58.

¹⁸⁰ See, *inter alia*, IACHR, *Access to Maternal Health Services from a Human right Perspective*, OAS/Ser.L/V/II. Doc. 69, 7 June 2010, para. 58; Inter-American Court of Human Rights. *Case of the Girls Yean and Bosico v. Dominican Republic*. Preliminary Objections, Merits, Reparations and Costs. Judgment of 8 September 2005. Series C No. 130, para. 141. CERD, Concluding observations, United States, *cit.*, para. 10 ("The CERD notes that indirect, or de facto, – discrimination occurs where an apparently neutral provision, criterion or practice would put persons of a particular racial, ethnic or national origin at a disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary").

¹⁸¹ See, *inter alia*, I/A Court H.R., *Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica*. Advisory Opinion OC-4/84 of January 19, 1984. Series A No. 4, para. 55.

stage of the development of international law, the fundamental principle of equality and non-discrimination has entered the realm of *jus cogens*.¹⁸²

95. Similarly, as regards the interpretation of the American Convention, the Court has stated that in a more specific sense, Article 24 of the Convention protects the principle of equality before the law. Thus, the general prohibition against discrimination set forth in Article 1(1) extends to the domestic law of the States Parties, permitting the conclusion that according to these provisions the States Parties, by acceding to the Convention, have undertaken to maintain their laws free from discriminatory regulations.¹⁸³

96. In a similar sense, the Human Rights Committee, construing Articles 2.1 and 26 of the International Covenant of Civil and Political Rights, similar to Articles 1.1 and 24 of the American Convention, held that “[w]hile Article 2 limits the scope of the rights to be protected against discrimination to those provided for in the Covenant, Article 26 does not specify such limitations. That is to say, Article 26 provides that all persons are equal before the law and are entitled to equal protection of the law without discrimination, and that the law shall guarantee to all persons equal and effective protection against discrimination on any of the enumerated grounds. In the view of the Committee, Article 26 does not merely duplicate the guarantee already provided for in Article 2 but provides in itself an autonomous right. It prohibits discrimination in law or in fact in any field regulated and protected by public authorities. Article 26 is therefore concerned with the obligations imposed on States parties in regard to their legislation and the application thereof. Thus, when legislation is adopted by a State party, it must comply with the requirement of Article 26 that its content should not be discriminatory. In other words, the application of the principle of non-discrimination contained in Article 26 is not limited to those rights which are provided for in the Covenant.”¹⁸⁴

97. The information available shows the pattern of racial discrimination and historical and systematic exclusion that affects the Afro-descendants in the Americas. Therefore, it is possible to see that the phenomenon of slavery and the subsequent lack of positive actions adopted in order to neutralize and change their effect, resulted in the perpetuation of mechanisms of direct and indirect discrimination towards Afro-descendants.¹⁸⁵

¹⁸² See, *inter alia*, I/A Court H. R., *Judicial Condition and Rights of the Undocumented Migrants*. Advisory Opinion OC-18 of September 17, 2003. Series A No. 18, para. 101.

¹⁸³ See, *inter alia*, I/A Court H.R., *Judicial Condition and Human Rights of the Child*. Advisory Opinion OC-17/02 of August 28, 2002. Series A No. 17, para. 44.

¹⁸⁴ See, *inter alia*, United Nations, Human Rights Committee, General Observation No. 18, General comments adopted by Human Rights Committee, No discrimination, 37TH Period of Sessions, U.N. Doc. HRI/GEN/1/Rev.7 at 168 (1989), para 12. United Nations., Human Rights Committee, Case *Rosalind Williams Lecraft v. Spain*, 11 September 2006.

¹⁸⁵ DPAD, para. 33.

98. During the technical meeting, the experts pointed out that even if it is difficult to identify legal barriers that openly and expressively promote racial discrimination, in practice, *the facto* segregation continues existing related to Afro-descendants, and this is reflected in the neighborhoods where they live, the jobs they can have access to, and the access to economic resources, among other factors.

99. The experts specifically indicated that, even if the Afro-descendant population is not a minority in the Caribbean, for example, it is also subject to discrimination, since the darker the person's skin is, the fewer opportunities of personal and economic development they have. Similarly, they said that while these persons do lead or take part¹⁸⁶ in political management – taking into account the colonial past and slavery – the ownership of the economic resources belong to white people, especially white men.

100. That is why the experts concluded that, in the Caribbean, racial discrimination towards Afro-descendant people is linked to the darkness of the skin, poverty, and the control of economic resources. As an example, the experts noted that the tourism industry – one of the most profitable in the region – is managed by non Afro-descendant people, not only as regards capital and ownership, but also as regards managerial level, and most of Afro-descendants have lower-ranked and less paid jobs in this activity.

101. The Commission observes with concern that the principles of equality and non-discrimination are still not guaranteed for Afro-descendants in the Americas. Even more, Afro-descendants are deeply affected by the persistence of racism, which prevents them from the exercise and enjoyment of human rights.

102. Therefore, the information described reveals that Afro-descendants face important obstacles as regards their civil, political, economic, social and cultural rights. Similarly, the under-presentation and little participation of Afro-descendants in politics indicate additional impediments to actively take part in the design of public policies directed at improving their situation of structural discrimination. Therefore, such deficiencies must be tackled by the States through measures specifically designed to ensure equality and non-discrimination of people of African descent.

B. Access to justice and judicial guarantees

103. Article XVIII of the American Declaration of the Rights and Duties of Man states:

Every person may resort to the courts to ensure respect for his legal rights. There should likewise be available to him a simple, brief procedure whereby the courts will protect him from acts of authority that, to his prejudice, violate any fundamental constitutional rights.

¹⁸⁶ Guyana's reply.

104. Article 25 of the American Convention states:

Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties.

105. As regards the scope of the right to judicial protection, the Commission as well as the Court have reiterated that this is applied not only to the rights in the Convention, but also in those which are recognized by the Constitution or laws.¹⁸⁷

106. The Court has also pointed out that Article 25(1) of the Convention states that it is an obligation of the States to provide to all persons within their jurisdiction, an effective judicial remedy for violations of their fundamental rights. The very existence of this guarantee “is one of the fundamental pillars not only of the American Convention, but of the very rule of law in a democratic society in the terms of the Convention.”¹⁸⁸ Moreover, “for such a remedy to exist, it is not sufficient that it be provided for by the Constitution or by law or that it be formally recognized, but rather it must be truly effective in establishing whether there has been a violation of human rights and in providing redress.”¹⁸⁹ A remedy which proves illusory because of the general conditions prevailing in the country, or even in the particular circumstances of a given case, cannot be considered effective.¹⁹⁰

107. As regards the relationship between the right enshrined in Article 25 of the Convention and the duties in its Articles 1(1) and 2, that Court has stated that

Article 25 of the Convention is intimately linked to the general obligation of Article 1(1) of the same, which attributes duties of protection of the domestic law of the States Parties, from which it can be concluded that

¹⁸⁷ See, *inter alia*, *Dismissed Congressional Employees (Aguado - Alfaro et al.) v. Peru Case*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 24, 2006. Series C No. 158, para. 122; *Claude-Reyes et al. v. Chile Case*. Merits, Reparations and Costs. Judgment of September 19, 2006. Series C No. 151, para.128; and *Yatama v. Nicaragua Case*. Judgment of June 23, 2005. Series C No. 127, para. 167; IACHR, Application before Inter-American Court of Human Rights. Case The Union of Employees, Professionals and Technicians of the Lima Water and Sewage Alcantarillado v. Peru. 16 January 2010, para. 57.

¹⁸⁸ See, *inter alia*, I/A Court H.R., *Castillo Páez v. Peru Case*. Judgment of November 3, 1997. Series C No. 34, para. 82; *Claude-Reyes et al. v. Chile Case*. Merits, Reparations and Costs. Judgment of September 19, 2006. Series C No. 151, para. 131, and *Castañeda-Gutman v. Mexico Case*. Preliminary Objections, Merits, Reparations, and Costs. Judgment of August 6, 2008. Series C No. 184, para. 78.

¹⁸⁹ See, *inter alia*, I/A Court H.R., *Judicial Guarantees in States of Emergency* (Arts. 27(2), 25 and 8 American Convention on Human Rights). Advisory Opinion OC-9/87 of October 6, 1987. Series A No. 9, para. 24; *Five Pensioners” v. Peru Case*. Judgment of February 28, 2003. Series C No. 98, para. 136.

¹⁹⁰ See, *inter alia*, I/A Court H. R., *Baldeón García v. Peru Case*. Judgment of April 6, 2006. Series C No. 147, para. 145, and *Almonacid-Arellano et al. v. Chile Case*. Preliminary Objections, Merits, Reparations and Costs. Judgment of September 26, 2006. Series C No. 154, para. 111.

the State has the responsibility to design and through instruments enshrine an effective remedy, as well as guarantee the correct application of that remedy by its judicial authorities.¹⁹¹ At the same time, the State's general duty to adapt its domestic law to the stipulations of said Convention in order to guarantee the rights enshrined in it, established in Article 2, includes the enactment of regulations and the development of practices that seek to achieve an effective observation of the rights and liberties enshrined in it, as well as the adoption of measures to suppress the regulations and practices of any nature that imply a violation to the guarantees established in the Convention.¹⁹²

108. Similarly, the Court has indicated that according to the principle of nondiscrimination enshrined in Article 1(1) of the American Convention, to ensure the members of the groups at risk access to justice, "it is indispensable that States offer effective protection that considers the particularities, social and economic characteristics, as well as the situation of special vulnerability, customary law, values, customs, and traditions."¹⁹³

1. Administrative and judicial cases of racial discrimination

109. According to the investigation conducted by the IACHR and the information derived from the answers to the questionnaire, the Commission has learnt about the following illustrative cases of racial discrimination which have taken place in different administrative and judicial instances of the countries in the region. In order to facilitate the presentation, the information is systematized according to issues.

110. Regarding access to housing, the IACHR has received information about the following cases: i) a sales agent that asked if the buyers of a real property were Afro-descendants, and later rejected the offer;¹⁹⁴ ii) the practice of the owner of an apartment complex who selectively evicted Afro-descendants, and forced them to move out of the apartment to make "renovation work" and refused to provide proper maintenance, according to what was requested by the Afro-descendant tenants;¹⁹⁵ iii) a manager who

¹⁹¹ See, *inter alia*, I/A Court H.R., *The "Street Children" v. Guatemala Case (Villagrán Morales et al.)*. Judgment of November 19, 1999. Series C No. 63, para. 237; *The Mayagna (Sumo) Awas Tingni Community v. Nicaragua Case*. Judgment of August 31, 2001. Series C No. 79, para. 135, and *Indigenous Community Yakye Axa v. Paraguay Case*. Judgment of June 17, 2005. Series C No. 125, para. 99.

¹⁹² See, *inter alia*, *Reverón-Trujillo v. Venezuela Case*. Preliminary Objection, Merits, Reparations, and Costs. Judgment of June 30, 2009. Series C No. 197, para. 60, citing *Castillo Petruzzi et al. v. Peru Case*. Judgment of May 30, 1999. Series C No. 52, para. 207.

¹⁹³ I/A Court H.R., *Case of Rosendo Cantú and other v. Mexico*. Preliminary Objections, Merits, Reparations and Costs. Judgment of August 31 2010. Series C No. 216, para. 184; *Case of Fernández Ortega et al. v. Mexico*. Preliminary Objections, Merits, Reparations and Costs. Judgment of August 30 2010. Series C No. 215, para. 200.

¹⁹⁴ Benton, et al. V. Arnett et al. available at : http://portal.hud.gov/hudportal/documents/huddoc?id=DOC_7746.pdf.

¹⁹⁵ United States v. Kreisler, Jr., a/k/a/Bob Peterson, No. 03-cv-3599 (D. Minn.).

increased the amount of the security deposit when he learnt that the tenants were Afro-descendants, and warned them that the amount might be returned “if they did not destroy the house;”¹⁹⁶ iv) existing ordinances that prevented Afro-descendants from living in neighborhoods where the majority of residents were white people.¹⁹⁷

111. As regards the right to employment, the IACHR has received information about the following cases: i) a constructor who disciplined an Afro-descendant supervisor and dismissed him due to his race;¹⁹⁸ ii) differentiated tests to have access to jobs to the detriment of Afro-descendants;¹⁹⁹ iii) a recruitment agency that categorized and chose applicants according to race and sex;²⁰⁰ iv) the denial of jobs to Afro-descendants due to their race;²⁰¹ v) the use of job selection tests with negative impact for Afro-descendant applicants;²⁰² vi) the racial considerations when choosing an applicant in a selection process for a job position.²⁰³

112. With regard to access to education, IACHR has received information about the following cases: i) the practice of segregationist selection of students, when choosing a disproportionate number of white students in classes where minorities are predominant, or when granting prizes according to race;²⁰⁴ ii) situations of *de facto* racial discrimination at schools;²⁰⁵ iii) limitations to have access to some university programs;²⁰⁶ iv) discriminatory policies when designating students;²⁰⁷ v) over-representation of Afro-descendants in special classes;²⁰⁸ vi) disproportionate rates of disciplinary actions for Afro-descendants;²⁰⁹ vii) under-representation of Afro-descendants in advanced or high level

¹⁹⁶ See CERD, Report submitted by the United States, *cit.*, para. 253.

¹⁹⁷ United States’ reply.

¹⁹⁸ EEOC v. Bob Ward New Homes. United Nations, CERD, Report submitted by the United States, *cit.*, para. 61.

¹⁹⁹ EEOC v. Ford Motor Co. and United Automobile Workers of America, No. 1:04-CV-00854 (S.D. Ohio 2005).

²⁰⁰ EEOC v. EGW Temps., Inc, No. 00 CIV 833S (W.D.N.Y. 2005).

²⁰¹ EEOC v. Carl Budding & Co. (N.D.Ill.2004).

²⁰² U.S. v. State of Delaware, 2004 WL 609331 (D. Del. 2004).

²⁰³ Canadian Human Rights Tribunal, Brooks v. Canada (Department of Fisheries & Oceans), 2006 FC 1244. Canada’s reply.

²⁰⁴ U.S. v. Bertie County Board of Education. Final decision pending.

²⁰⁵ See, *inter alia*, in the Supreme Court of Justice rulings, *Parents Involved in Community Schools v. Seattle School District No. 1 (2007)* and *Meredith v. Jefferson County Board of Education (2007)*, the Supreme Court of the United States overturned what established in the precedent *Brown v. Board of Education (1954)* and limited the powers of district public schools to tackle *de facto* segregation problem, when prohibiting measures with a racial approach as a tool to promote integration. CERD, Concluding observations, United States, *cit.*, para. 17.

²⁰⁶ Constitutional Court of Colombia, Judgment T-375 de 2006. Colombia’s reply.

²⁰⁷ United States’ reply.

²⁰⁸ United States’ reply.

²⁰⁹ United States’ reply.

courses and programs;²¹⁰ viii) racial harassment;²¹¹ ix) under-representation of Afro-descendant teachers or administrative staff in educational establishments;²¹² x) lack of inclusion of the contribution of the Afro-descendant population in History classes.²¹³

113. As regards access to loans, the Commission has received information about a settlement agreement signed with a banking entity for having utilized discriminatory patterns regarding Afro-descendants, since the entity overcharged them upon granting a loan.²¹⁴

114. Regarding political participation, the Commission has received information about a judicial sentence which forced a Mayor to appoint a representative of the black community.²¹⁵

115. Regarding access to justice and the conduct of judicial authorities, the Commission has received information related to a case in which the appellate court determined that the judge did not hear the defendant's case with an open-minded and impartially, and that he showed probable bias when rejecting the claim of racial discrimination.²¹⁶

116. As regards racial profiling, the Commission has received information about the following cases: i) an officer who, based on racial profiling, carried out a deeper investigation, including verbal aggressions to an Afro-descendant woman, regarding an investigation of shop-lifting;²¹⁷ ii) selective detention of Afro-descendant drivers;²¹⁸ iii) detention of two Afro-descendants due to the fact that the vehicle they drove was "too expensive" for the driver's "appearance;"²¹⁹ iv) detention of a person due to his/her color;²²⁰ v) selective monitoring of street vendors due to the color of their skin.²²¹

²¹⁰ United States' reply.

²¹¹ United States' reply.

²¹² See CERD. Report submitted by the United States, *cit.*, para. 62.

²¹³ See, *inter alia*, CERD, Report submitted by the United States, *cit.*, para. 62. Peru Ombudsperson, *cit.*, p. 66.

²¹⁴ Justice Department – American International Group Inc. United States' reply.

²¹⁵ Colombian Constitutional Court, Judgment T-422 of 1996. Colombia's reply.

²¹⁶ Ontario Appellate Court, *R. v. Brown*, (2003) 64 O.R. (3d) 161. Canada's reply.

²¹⁷ Ontario Court of Appeal, *Nassiah v. Peel (Regional Municipality) Services Board* 2007 HRTO 14. The remedy included payments for damages, and the obligation to develop educational materials related to *racial profiling*, and the hiring of an external consultant.

²¹⁸ Court of Québec (Civil Division), *Pelletier v. Simard*, 2007 QCCQ 9847.

²¹⁹ Ontario Court of Appeal, *R. v. Calderon*, [2004] O.J. 3474. Canada's reply. The Court considered that in this case, there had been violation of the rights to freedom and protection against arbitrary arrest.

²²⁰ Ontario Court of Appeal, *R. v. Brown*, (2003) 64 O.R. (3d) 161. Canada's reply.

²²¹ Tribunal Superior de Justicia de la Ciudad Autónoma de Buenos Aires (Buenos Aires Superior Court of Justice), File No. 6925/09 "Bara, Sakho on denied inconstitucional recourse in Mbaye, Ibrahima s/inf. Articles 23.095". IARPRIDI's (Argentine Institution for Equality, Diversity and Integration) reply.

117. As regards the relationship between racism and the criminal justice system, the Commission has received information about a judicial case in which it was considered that systematic factors that affect Afro-descendant youths could be considered as mitigating elements for criminal sentences. However, in this case, the judges considered that the seriousness of the facts prevented them from taking into account the mitigating factors.²²² On the other hand, as regards the situations of persons deprived of liberty, it has been sustained that maintaining racial segregation of the detainees is a form of racial classification, and therefore it should be under a stricter constitutionality standard (strict scrutiny), that is to say, these prisons must show that this practice is designed to reach a governmental interest and that it is adequate to meet that interest.²²³

118. As regards grievances and discriminatory comments, the IACHR has received information about i) prosecution of many persons who, in the pursuit of national-socialist ideas, published and placed posters inciting contempt towards certain persons due to their religion or national origin;²²⁴ ii) prosecution of a person who insulted by the phone or sent e-mails with “jokes about blacks” to another person of “black race;”²²⁵ iii) claim for damages by an employee of a medical institution against a medical professional who harassed the plaintiff with discriminatory behavior;²²⁶ iv) dismissal of an employee of the judicial branch who committed improper expressions – some of which were discriminatory;²²⁷ v) justified dismissal of an employee who harassed her/his workmate with racist jokes and comments.²²⁸

119. Finally the Commission has received information related to limitations that impede Afro-descendant people from entering bars²²⁹ and discos.²³⁰ The IACHR has

²²² Ontario Court of Appeal, *R. v. Borde* (2003), 63 O.R. (3d) 417. Canada’s reply.

²²³ *Johnson v. California*, 543 U.S. 499 (2005).

²²⁴ First Instance Criminal Court of Term 17°, Judgment 1505/2000; and Criminal First Instance Court of Term 17°, Judgment 81/200. United Nations, CERD, Report submitted by Uruguay, *cit.* para. 132. Uruguay’s reply.

²²⁵ Criminal Court of Term 20°, judgment 1014/2004; and Criminal Appellate Court and Tribunal of Term 2°, Judgment 224/2005). United Nations, CERD, Report submitted by Uruguay, *cit.*, para. 132. Uruguay’s reply.

²²⁶ Civil First Instance Court of Term 1st, Judgment October 15 2004. CERD, Report submitted by Uruguay, *cit.*, para. 132. Uruguay’s reply.

²²⁷ Supreme Court of Justice, Resolution 203/08. United Nations, CERD, Report submitted by Uruguay, *cit.*, para. 132. Uruguay’s reply.

²²⁸ Labor First Instance Court 3rd Term, Judgment 30/2009. United Nations, CERD, Report submitted by Uruguay, *cit.*, para. 132. Uruguay’s reply.

²²⁹ Human Rights Tribunal of Québec. *Commission des droits de la personne et des droits de la jeunesse v. 2314-4207 Québec Inc.* Canada’s reply. Colombia’s Constitutional Court, Judgment T-1090 de 2005. Colombia’s reply.

²³⁰ See, “Report on Race and Human Rights in Colombia”, p. 287, attached document to Racial Discrimination Observatory’s reply.

also received information about a company that deliberately preferred not to hire Afro-descendant women models for its catalogs.²³¹

120. The Commission observes that the number of complaints being processed for acts of discrimination is not consistent with the situation of structural discrimination of the Afro-descendant population in the Americas verified *supra*, the close relationship between poverty, exclusion and racism, and the limitations on the effective enjoyment of their civil and political rights, as well as their economic, social and cultural rights.

121. In this regard, it has been sustained that the lack of complaints or cases of discrimination does not prove the lack of situations of racial discrimination, but it may also reveal that victims have inadequate information concerning their rights, or that there is a lack of trust in the police and judicial authorities, or that the authorities are insufficiently alert to or aware of offences involving racism²³², or that they fear social censure or reprisals, or that victims with limited resources fear the cost and complexity of the judicial process²³³, among other barriers related to access to justice.

122. Indeed, notwithstanding the multiplicity of state agencies and institutions in charge of fighting discrimination, the records or lack thereof²³⁴ show that these cases do not come to the attention of the justice system, nor have they been taken up by the courts.²³⁵ These circumstances denote obstacles in the access to justice and lack of effective judicial guarantees for the Afro-descendant population in the Americas.

²³¹ Rio de Janeiro Public Defender's Office's reply.

²³² See, *inter alia*, United Nations, CERD, Concluding observations, Uruguay, *cit.*, para. 18.

²³³ See, *inter alia*, United Nations, CERD, General Comment No. XXXI, U.N. Doc. CERD/C/GC/31/Rev.4 (2005).

²³⁴ Afro-Cultural Movement's reply. Chile's reply.

²³⁵ See, *inter alia*. CERD. Report submitted by Ecuador, *cit.*, para. 147 ("The Supreme Court of Justice, the Superior Courts of Justice and the Tribunals have reported no concrete case of punishable acts of racial discrimination against Afro-ecuadorian and/or indigenous persons, or cases that have been reported according to the Código Penal (Criminal Code)". Bolivia's reply ("According to a Note DP-PE-1794/2011 of 13 June 2011, the Ombudsperson of the Plurinational State of Bolivia has reported that since the enforcement of No. 45 Act [Law Against Racism and all Forms of Discrimination], he has known about 24 complaints for discrimination and racism [...] According to Note CITE: SG-TC No. 353/2011 of 30 May 2011, the Constitutional Court of Bolivia has reported that there is no constitutional resolution against racial discrimination"). United Nations, Human Rights Council, Mission to Guyana, *cit.*, para. 32 ("In Guyana, the Ethnic Relations Commission has investigated cases of discrimination, but none has been substantiated"). United Nations, CERD, Concluding observations, Colombia, *cit.*, para. 21 ("[T]he Fiscalía General de la Nación (District Attorney's office) does not hav[e] complete data about the victims' ethnic belonging, and the findings of the investigations of the corresponding cases"). United Nations, CERD, Report submitted by Uruguay, *cit.*, para. 57 and 62 ("[L]a Comisión Honoraria de Lucha contra el Racismo, la Xenofobia y Toda otra Forma de Discriminación (The Honorary Commission Against Racism, Xenophobia and All Forms of Discrimination) has studied the performance over the years, highlighting the reception of 52 complaints and cases to be considered. [However, consulted] the Dirección de Seguridad de la Jefatura de Policía de Montevideo (Montevideo's Security Management of the Police Department) explained that after revising the files in the last 12 months, there have been no complaints for discrimination that could be reported to the competent authority"). Uruguay's reply ("La Comisión Honoraria de Lucha contra el Racismo, la Xenofobia y Toda otra Forma de Discriminación [The Honorary Commission against Racism, Xenophobia and all Forms of Discrimination] received information about behavior that could be considered racist, discriminatory or xenophobic; these were
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123. The information available leads to the conclusion that the obstacles to access to justice are associated with a wide array of factors. On the one hand, from the point of view of the victims, the information available shows that the affected persons do not report or make the pertinent complaints, due to lack of awareness, lack of reliability in State instances²³⁶ or simply because of their fear of being re-victimized.²³⁷

124. Thus, the answers to the questionnaire referred to the Afro-descendants' perception of not having judicial protection,²³⁸ as a consequence of a process of "cultural adaptation of their resignation as regards historical and endemic injustice", since there is "no feedback in complaint procedures that implies a ruling to the person reporting the

...continuation

shown in reports, and in 4 opportunities, they were submitted to the corresponding person in the Judicial Power"). United Nations, CERD. Report submitted by the United States, *cit.*, para. 62 ("The Department of Justice of the Civil Rights Division must investigate patterns or practices of employment discrimination, but historically, it has only dealt with one case a year, and in 2006, 3 cases). United Nations, CERD. Reports submitted by the States Parties according to Article 9 of the Convention. Twentieth periodic reports that the States Parties had to submit in 2008. Add. Argentina. CERD/C/ARG/19-20, June 8 2009, para. 56 and 61 ("in Argentina, inhabitants have a 24-hour toll-free phone number for public service, working every day of the year, even national holidays. Since the implementation of an on-line legal advisor in INADI [National Institute against Discrimination, Xenophobia and Racism] about 5.5 daily and 165.5 monthly enquiries were received. However, there has been no information related to complaints or judicial rulings regarding racial discrimination against Afro-descendants". United Nations, CERD. Concluding observations of the Committee on the Elimination of Racial Discrimination. Guatemala. CERD/C/GTM/CO/12-13, March 16 2010, para. 16 (Regarding Guatemala, the CERD has expressed its concern because, according to official information, out of 412 cases on discriminations presented before the Public Ministry, at present, only four ended up in judgments, one of them for summary proceedings and three in judgments of oral and public trial. Similarly, The Committee observed that lack of clarity on complaints on racial discrimination and about the monitoring provided to the complaints before the corresponding judicial body). Peru's reply, based on the report "*The State's performance as regards discrimination. Cases known by the Ombudsperson's Office*" Adjuntia Report No. 005-2009-DP/ADHPD. Lima: Ombudsperson' Office, 2010, pp.45-50 ("The Ombudsperson's Office has received 19 complaints about race or ethnic identity [... but it only includes the adjective "black"] that at the same time leads to the denial or lack of recognition of a right or access to a good quality service"). Honduras's reply. Costa Rica's reply ("[The Ombudsperson's Office for the Inhabitants indicated that] only a few complaint have been received in which an Afro-descendant person claims for racial discrimination"). México's reply ("La Dirección General Adjunta de Quejas y Reclamaciones (Central Claim and Complaints Office) Since 2004 until June 16th 2010, it has dealt with 3537 cases for alleged discrimination acts, out of which 1581 were among private individuals and 1956 in which federal public officers were involved. Out of this figure, 37 discrimination complaints for racial or ethnic origin issues were carried out. Similarly, more than 8924 advisory and consulting services on this matter were carried out"). Canada's reply (The Canadian Charter of Rights establishes that it can receive individual or group discrimination complaints, for which the Standards of proof of balance of probabilities are required. In these cases, it is not necessary to prove that the act had the intention of discriminating, but it led to a discriminatory practice. The remedies are related to cease and desist undertakings of the discriminatory act, as well as compensations). Guyana's reply ("Between January 1st and December 31st 2001 the Investigative Unit of the Ethnic Relations Commission received 80 claims during the regional visits, dialogues inter and intra community and complaints. Out of these complaints, 59 were investigated and completed"). CERD, Report submitted by United States, *cit.*, para. 60 (in The United States, *Equal Employment Opportunity Commission* is in charge of enforcing civil rights as regards employment discrimination in the public and private sectors. Since 2000, this Commission has received 80,000 cases a year. In 2006, the Commission initiated 371 claims, recovered u\$44.3 million dollars in litigation, and more than u\$2299 million dollars in settlement agreements).

²³⁶ Honduras's reply.

²³⁷ See, *inter alia*. Peru Ombudsperson, *cit.*, pp. 63, 64.

²³⁸ Racial Discrimination Observatory's reply. ODECO's reply.

crime.”²³⁹ In this regard, the Commission has received information that indicates that “it is very difficult [for Afro-descendants] to have access to an effective judicial protection because they are stigmatized and discriminated against,” and that “the complaint often does not lead to economic redress and, on the contrary, it might mean a waste of time and economic expenses.”²⁴⁰

125. The following statement can be useful in order to illustrate the situation:

“Not o[n]ly is it costly, since time and money which we do not have must be spent, but the authorities do not help at all. Discrimination facts are difficult to prove, in the end it is my word against somebody else’s. That is why it is better to do nothing about it and not to get distressed.”²⁴¹

126. During the technical meeting, the experts pointed out that Afro-descendants perceive that, “justice is not ready for them,” but rather it is used “against them,” as a particularly affected group. The experts mentioned the Afro-descendants’ lack of reliability on the justice system, the lack of incentives to complain about racial discrimination cases and the disincentive that the perception of impunity and corruption cause.

127. To these circumstances, we should also add the material difficulties of the access to justice associated with the geographic distance from the courts and the lack of free and adequate legal representation, among others.

128. The answers to the questionnaire indicated as obstacles: the bureaucratization in the justice system, the lack of an immediate information system, the language used in the judicial system, the bad management and organization of judicial instances, the lack of training of justice operators, the insufficiency of public defenders,²⁴² the high costs of hiring a lawyer and of the judicial process, the lack of knowledge about the actions,²⁴³ and the instances before which one must appeal,²⁴⁴ the exercise mechanisms,²⁴⁵ and the lack of judicial recourses.²⁴⁶

129. The Commission has established that procedural costs and the location of tribunals are factors that may also render access to justice impossible and, therefore, result

²³⁹ Ruda y Chocolate’ reply.

²⁴⁰ Peru’s reply.

²⁴¹ Paulo’s testimony, 34 years of age, Callao, cited in Peru Ombudsperson, *cit.*, p. 64.

²⁴² Honduras’s reply.

²⁴³ Racial Discrimination Observatory’s reply.

²⁴⁴ Canada’s reply.

²⁴⁵ Ruda y Chocolate’s reply.

²⁴⁶ Racial Discrimination Observatory’s reply. ODECO’s reply.

in a violation of the right to a fair trial.²⁴⁷ Similarly, the IACHR and the Court have found that any proceeding in which the costs are prohibitive is an outright violation of Article 8 of the American Convention. On this point, the Inter-American Commission has held that judicial remedies created to review administrative decisions must be not only prompt and effective, but also “inexpensive.”²⁴⁸

130. Specifically with regard to the existence of economic obstacles in access to the courts in order to institute proceedings for the crime of racism, the IACHR noted:

[The perpetrator of *injuria racista* [...] enjoys impunity in most cases. According to attorneys of [] organizations, the fact that a *insulto racial* is not covered by [law] creates a hindrance to the administration of justice, as *injuria*, according to the [...] Criminal Code, is a crime of private action, and so opening an investigation depends on the initiative of the victim. Yet most victims of racism [...] are poor and have no way to hire an attorney.²⁴⁹

131. Similarly, the IACHR has underscored the obligation of the State to provide free legal services and to strengthen community mechanisms for this purpose, in order to enable these groups to access the judicial protective bodies. They also need more information about the resources available to them within the justice system and about their rights.²⁵⁰

132. The Commission and the Court have established that States must be ready to provide disadvantaged people with *pro bono* legal services to enable them to access the judicial protective bodies.²⁵¹ Bearing that in mind, the Commission has identified certain guidelines for determining the propriety of free legal counsel in specific cases. These are: a) the resources available to the person concerned; b) the complexity of the issues involved; and, c) the significance of the rights involved.²⁵²

²⁴⁷ IACHR, *Access to Justice as a Guarantee of Economic, Social, and Cultural rights. Study on the standards fixed by the Inter-American Human Rights System*, OAS/Ser.L/V/II.129, Doc. 4, September 7 2007, para. 92.

²⁴⁸ IACHR, *Access to Justice as a Guarantee of Economic, Social, and Cultural rights. Study on the Standards fixed by the Inter-American Human Rights System*, OAS/Ser.L/V/II.129, Doc. 4, September 7 2007, para. 93.

²⁴⁹ IACHR, *Access to Justice as a Guarantee of Economic, Social, and Cultural rights. Study on the Standards fixed by the Inter-American Human Rights System*, OAS/Ser.L/V/II.129, Doc. 4, September 7 2007, para. 84, citing IACHR, Report No. 66/06, Case 12.001, Merits, *Simone André Diniz*, (Brazil), October 21 2006, para. 89.

²⁵⁰ IACHR, *Access to Justice as a Guarantee of Economic, Social, and Cultural rights. Study on the Standards fixed by the Inter-American Human Rights System*, OAS/Ser.L/V/II.129, Doc. 4, September 7 2007, para. 94.

²⁵¹ See, *inter alia*, IACHR, *Access to Justice for Women Victims of Violence in the Americas*, OAS/Ser.L/V/II., Doc. 68, January 20 2007, para. 215; I/A Court H.R., *Exceptions to the Exhaustion of Domestic Remedies* (Arts. 46(1), 46(2)(a) and 46(2)(b), American Convention on Human Rights). Advisory Opinion OC-11/90 of August 10, 1990. Series A No. 11, para. 29,30.

²⁵² IACHR, *Access to Justice as a Guarantee of Economic, Social, and Cultural rights. Study on the standards fixed by the Inter-American Human Rights System*, OAS/Ser. L/V/II.129, Doc. 4, September 7 2007, para. 90.

133. On the other hand, the obstacles to effective access to justice are associated with the very attitude of the State *vis-à-vis* such situations. In general, it is not uncommon for the police to refuse to receive and register such claims, as they consider them not very important.²⁵³ The same conduct is replicated in the judicial sphere, insofar as judicial authorities do not process complaints of discrimination at their own initiative, nor do they appear to be open to receiving such complaints.²⁵⁴ Moreover, lower courts often dismiss such complaints, generally due to the perception that they are of scant importance, evidentiary difficulties²⁵⁵ and the lack of adequate investigation, failure to criminalize or adequately define certain conduct in law. Also, there have been complaints about discriminatory or degrading conduct by various national and local administrations officials.²⁵⁶

134. In this regard, it has been sustained that it is essential to make sure that the police and other State entities have adequate and accessible presence in areas where Afro-descendants live, so that complaints from such persons can be expeditiously received.²⁵⁷ In line with the foregoing, it has been indicated that prosecutors must be trained about the relevance of persecuting racist acts, even minor ones, and must ensure that the victims have participation and possibilities of promoting the cases where racial discrimination is being investigate. In order to do that, States must grant victims effective judicial cooperation, legal aid, and must keep them informed of the progress of the proceedings.²⁵⁸

135. In this order of ideas, the Commission has received information about the lack of Afro-descendant professionals in the High Courts of Justice, and a reduced number of judges and judicial officers of African descent.²⁵⁹

136. As regards evidentiary issues, the Human Rights Committee has established that in indirect or *de facto* discrimination cases, the complainant must establish a *prima facie* case of discrimination – a showing that the application of the norm at issue has produced disproportionately negative effects for members of a particular group. Then,

²⁵³ IACHR, 133^o Regular Period of Session, Thematic Hearing, *Racial Discrimination and Access to Justice of Afro-descendants in Colombia*, Los Andes University, Racial Discrimination Observatory, Rappaport Center for Human Rights and Justice, Colombia, October 23, 2008.

²⁵⁴ See, *inter alia*, United Nations, CERD, Report submitted by Ecuador, *cit.*, para. 20 (“The ordinary judicial system and the Prosecution have not reported any complaints on the [crime of discrimination], probably because some prejudice and racial behavior, especially towards [...] black community, is not openly shown...”).

²⁵⁵ See, *inter alia*, United Nations, CERD, Concluding observations, United States, *cit.*, para. 35 (As regards the procedural aspects in cases of discrimination, it is possible to note that, in some cases, the proof of the subjective aspect is required, i.e. the intention to discriminate which imposes an excessive burden of the proof for the victims).

²⁵⁶ See, *inter alia*, CERD, Comments made to Dominican Republic, *cit.*, para. 21.

²⁵⁷ See, *inter alia*, CERD, General Observation No. XXXI, U.N. Doc. CERD/C/GC/31/Rev.4 (2005).

²⁵⁸ See, *inter alia*, CERD, General Recommendation No. XXXI, U.N. Doc. CERD/C/GC/31/Rev.4 (2005).

²⁵⁹ National Movement Cimarrón’s reply.

once a *prima facie* case is established, the burden of proof shifts to the defendant to show either (a) that there is in fact no discriminatory impact, or (b) that the discriminatory impact is objectively and reasonably justified.²⁶⁰ Moreover, the Committee has established that the intent to a finding of discrimination.²⁶¹

137. Additionally, the experts highlighted that the lack of adequate institutionalization is one of the most important obstacles for the Afro-descendants to have access to justice, and they recommended adequate and specific training campaigns for justice operators, aimed at sensitizing judges and judicial officers, and favoring the understanding of the scope and dimension of racial discrimination against Afro-descendants. Regarding advances, the experts noted that, since the legislation against discrimination is recent, it is possible to improve these laws in the future, so it would be convenient to insist on the adoption of measures aimed at its progressive effective application.

138. The Commission observes that there is a close link between poverty, racial discrimination and the obstacles to have access to justice, which affect the Afro-descendant population, especially Afro-descendant women. Moreover, the impossibility to have access to complaint and remedy mechanisms, (administrative or judicial ones) is a factor that contributes to the persistence of racism in the region.

139. Additionally, the lack of judicial guarantees and the lack of sensitivity by the justice operators as regards racial discrimination contribute to the deepening of the resignation of discriminated groups, and to the perpetuation of segregation and exclusion patterns.

140. The Commission expects that the examples mentioned *supra* stresses the difficult situation that Afro-descendants endure, and also become an incentive for the victims, so that they complain and compel the justice system, as well as the justice operators, to improve and promote the access to justice in racial discrimination cases.

141. The Commission considers that States must adopt juridical and political measures to adapt the legislation and internal processes, and guarantee the effective access of Afro-descendants to justice²⁶². States must also take into account the material, economic and juridical obstacles, and the systematic exclusion from which Afro-descendants suffer.

142. In particular, the Commission understands that awareness-raising and dissemination campaigns are important in order to allow the Afro-descendant population to have information about the different ways and actions they can take to demand respect

²⁶⁰ See, *inter alia*, United Nations, Human Rights Committee, *Rosalind Williams Lecraft v. Spain*, para. IV.A.7.

²⁶¹ See, *inter alia*, United Nations, Human Rights Committee, *Rosalind Williams Lecraft v. Spain*, para. IV.A.8.

²⁶² See, also, United Nations, CERD, General Recommendation XXXIV, CERD/C/GC/34, 3 October 2011, para. 35.

for their human rights and to complain about situations of racial discrimination and abuse. Additionally, the Commission considers appropriate that the States implement training courses and sensitization campaigns aimed at informing the justice operators about the consequences of their acting, apparently in a neutral way, on the Afro-descendant population.

C. Racial profiling

143. The Commission has defined “racial profiling” as a “tactic [] adopted for supposed reasons of public safety and protection and is motivated by stereotypes based on race, color, ethnicity, language, descent, religion, nationality, place of birth, or a combination of these factors, rather than on objective suspicions, and it tends to single out individuals or groups in a discriminatory way based on the erroneous assumption that people with such characteristics are prone to engage in specific types of crimes.”²⁶³

144. According to the Durban Declaration and Programme of Action, racial profiling comprises “the practice of police and other law enforcement officers relying, to any degree, on race, colour, descent or national or ethnic origin as the basis for subjecting persons to investigatory activities or for determining whether an individual is engaged in criminal activity.”²⁶⁴

145. Along the same lines, in its General Recommendation No. XXXI, the CERD maintained that States parties should take the necessary steps to prevent questioning, arrests and searches which are in reality based solely on the physical appearance of a person, that person’s color or features or membership of a racial or ethnic group, or any profiling which exposes him or her to greater suspicion.²⁶⁵

146. On the other hand, the Human Rights Committee stated that the fulfillment of the right to non-discrimination “very much depends upon national law enforcement officials who exercise police powers, especially the powers of detention or arrest.”²⁶⁶

147. Similarly, this phenomenon has been said to derive from a number of combined factors. These include: the range of powers given to the police to combat crime and ensure order and security, the inadequate means put at their disposal, the type of supervision under which the police operate and the existence or absence of efficient remedies and positive measures to prevent and punish violations of human rights.²⁶⁷

²⁶³ See, *inter alia*, IACHR, Report No. 26/09 (Admissibility and Merits), Case 12.440, *Wallace de Almeida* (Brazil), March 20 2009, para. 143.

²⁶⁴ DDPA, para. III.A.72.

²⁶⁵ See, *inter alia*, CERD, General Comment No XXXI, U.N. Doc. CERD/C/GC/31/Rev.4 (2005), para. 20.

²⁶⁶ See, *inter alia*, United Nations, Human Rights Committee, *Rosalind Williams Lecraft v. Spain*, para. IV.A.12.

²⁶⁷ See, *inter alia*, United Nations, Economic and Social Council, Human Rights Commission, Subcommission on the Promotion and Protection of Human Rights, 57th period of sessions. Administration of
Continues...

148. The Commission has established that “the [Afro-descendant] people were more sensitive to be suspicious, chased, prosecuted and condemned, compared with the rest of the population.”²⁶⁸ Effectively, the IACHR has received information on the selective detention of Afro-descendant people, on the grounds of racial profiling,²⁶⁹ unjustified police surveillance and negative interactions with the police,²⁷⁰ disproportionate arrest rates and over-representation of Afro-descendants in the criminal justice system.²⁷¹

149. The available information gives way to the conclusion that as regards the Afro-descendant population, “suspect” mechanisms are usually resorted to, for their investigation, detention and prosecution,²⁷² as well as selective inspections.²⁷³ Likewise, it has been highlighted that there exists a situation of impunity towards security force officials accused of carrying out these practices.²⁷⁴

150. In particular, the Commission has learnt about violent massive detention practices, which included whole communities for being characterized as criminals,²⁷⁵ and it has also been said that police officers would rather detain Afro-descendants in virtue of

...continuation

Justice, rule of law and democracy. Discrimination in the Criminal Justice System. Progress Report by Leila Zerrougui, Special Rapporteur, E/CN.4/Sub.2/2005/7, July 14 2005, para. 55.

²⁶⁸ See, *inter alia*, IACHR, Report No. 26/09 (Admissibility and Merits), Case 12.440, *Wallace de Almeida* (Brazil), March 20 2009., para. 61.

²⁶⁹ See, *inter alia*, IACHR, 124th Regular Period of Session. Thematic Hearing, *Situation of Human Rights in Afro-descendant Communities in Brazil*, October 13, 2005. CERD, Concluding observations, United States, *cit.*, para. 14. The United States’ reply.

²⁷⁰ See, *inter alia*, United Nations, Human Rights Council, Mission to Canada, *cit.*, para. 53.

²⁷¹ See, *inter alia*, United Nations, Human Rights Council, Mission to Canada, *cit.*, paras. 54 and 61 (Between 1994 and 2004, Afro-descendant in federal prisons accounted for about 6%, while the Afro-descendant population in the country amounted to 2% of the total population).

²⁷² See, *inter alia*, National Coordinator of Human Rights, Peru, 2009:14, cited in the UNDP, *The Rights of Afro-descendants in Latin America: Challenges Regarding its Implementation*, p. 142 (“The Peruvian police usually makes use of racial profiling as an identification criterion of those suspicious of having committed a crime. This practice substantially affects the indigenous and Afroperuvian population and those with Andean traits, who frequently face groundless accusations related to common crimes, and the Andean indigenous population who is usually groundlessly charged with terrorist actions”).

²⁷³ See, *inter alia*, Geledés Black Women’s Institute & Global Rights Partners for Justice. *Racial Violence. A work on data about homicides in Brazil. Book I*, p. 41.

²⁷⁴ See, *inter alia*, CERD, Comments made to the United States, *cit.*, para. 25.

²⁷⁵ See, *inter alia*, Amnesty International, “They come in shooting. Police control in socially excluded communities”. AMR/19/025/2005; IACHR, Report No. 126/10 (Admissibility), Petitions P-1448-06 – Roberto Carlos Pereira de Souza and Cristiano da Silva Souza; P-1452-06- Fábio Eduardo Soares Santos de Souza and Rodrigo Abilio; P-1548-06- Leandro dos Santos Ventura, Fabio dos Santos da Silva and Adriano Paulino Martiniano; P-65-07- Wallace Damião Gonçalves Miranda, Flavio Moraes de Andrade, Eduardo Moraes de Andrade, Julio César Pereira de Jesús, José Manuel da Silva and William Borges dos Reis, (Brazil), October 23 2010, para. 57 and 61.

problematic experiences with white interlocutors that, at the time of the detention, asked: "Do you know who you are talking to?"²⁷⁶

151. During the technical meeting, the experts dealt with this problematic from different points of view. Firstly, they pointed out the importance of collecting data and doing research into racial profiling, considering the lack of information on the people (not even their self-identification) detained by the police, and that the greater the agent's discretion, the greater the use of stereotypes.

152. They also stated that, despite the difficulties in documenting this practice, its effects are evident in other aspects such as: the impossibility to access certain places, illegal detentions – even for some hours-, transfer conditions, legal assistance services, quality of legal aid, due process and equal protection guarantees and imposition of sentences.

153. In particular, the experts indicated that Afro-descendants, particularly young people, invest important sums of money in their appearance and clothes in order to avoid negative interactions with security officers. Likewise, it was said that private security in stores exercises more intense attention to Afro-descendants, even by asking for identification documents and carrying out inspections.²⁷⁷

154. Consequently, the experts emphasized the dilemma that Afro-descendants are facing. On one hand, if Afro-descendants live in poor neighborhoods, wear cheap clothes and do not drive or drive vehicles of low economic value, they help perpetuating the stereotype that links race and poverty. On the other hand, Afro-descendants with better economic resources that could have access to other neighborhoods, other kind of clothes or to driving more expensive cars would rather not do so, because that "ostentation" would only mean more problems of detention or police inquiries as those officers assume that those are stolen articles.

155. In this sense, the experts emphasized that the profile of a "suspicious person" is a young Afro-descendant male, and it is essential to eliminate than concept. Therefore, they stressed the importance of working with police academies on this idea of "suspicious individual" and of not using categories based on "intuition", "experience", "feeling", or "face bearing", as well as eliminating the notion according to which the hard life conditions Afro-descendants must face would make them more prone to committing crimes.

²⁷⁶ See, *inter alia*, Geledés Black Women's Institute & *Global Rights- Partners for Justice. Racial Violence. A work on data about homicides in Brazil. Extermination of Brazilian Young Black People. Book II.* 2009, p. 64.

²⁷⁷ In the replies to questionnaire, the Commission received information that Afro-descendants are generally more thoroughly controlled by the private stores security and, in general, they do not take part in social activities that may involve a chance of clashing. See, for instance, Ruda y Chocolate's reply.

156. The experts concluded that racial profiling is not just a discriminatory practice, but it is also inefficient,²⁷⁸ and that its use is made easier because the police must carry out a certain number of detentions to show successful indicators in the prevention activity, which seems to be fulfilled by detaining the most vulnerable people.

157. In that regard, the experts referred to the lack of legislation to condemn racial profiling and the importance of the police as a social transformation equality promotion component, so as to favor a perspective by means of which security forces understand their role as human rights protectors.

158. Therefore, the experts recommended adopting measures aimed at modifying institutional patterns and not just separating the agents that carry out these practices from the security forces, because it has been verified that those officers incorporate and reproduce institutionalized values and stereotypes that may be even contrary to their own racial self-identification.

159. Based on the foregoing, the experts observed that establishing guidelines and performance protocols is not only necessary, but it is also fundamental to follow up and control the practices carried out by security forces every day. In particular, they warned that most sensitization programs are applied to "desk" employees of security forces, so this training is not extended to the officers "in the streets,"²⁷⁹ which is why the contents of these courses are not sufficiently multiplied.

160. In this respect, the experts mentioned the "Guidance regarding the use of race by federal law enforcement agencies" of the US Department of Justice as a good practice.²⁸⁰ This guide establishes mechanisms of action and states that racial profiling in law enforcement is not merely wrong but also ineffective. As regards routine or spontaneous law enforcement decisions, the guide sets forth that Federal law enforcement officers may not use race or ethnicity to any degree, except that officers may rely on race and ethnicity in a specific suspect description. In conducting activities in connection with a specific investigation, Federal law enforcement officers may consider race and ethnicity only to the extent that: (i) there is trustworthy information, (ii) the information is relevant to the locality or time frame, (iii) the information links persons of a particular race or ethnicity to an identified criminal incident, scheme, or organization. Lastly, with regard to investigations or situations of threat to national security, catastrophic events or border

²⁷⁸ See, *inter alia*, Open Society Justice Initiative, *Ethnic Profiling in the Moscow Metro*, June 2006. Available at: http://www.soros.org/initiatives/justice/articles_publications/publications/profiling_20060613.

²⁷⁹ See, *inter alia*, Canada's reply (The police train their officers so that those on the streets and researchers are sensitive to cultural and gender differences. This training consists of the specific incorporation of the topic in the apprentices' training program, as well as the use of online material which shows over 100 cultural profiles, dozens of religious summaries and contact with local coordinators and sensitization workshops). United Nations, CERD, Report submitted by Argentina, *cit.* ("National Training Program, Support to Professional Training and Updating of Police and Security Forces (PRONACAP)". United Nations, CERD, Report submitted by Uruguay, *cit.*, para. 135 (The National Police School (ENP) includes the elimination of racial discrimination in the subject called Human Rights of the first year course for Apprentices).

²⁸⁰ See, "Guidance Regarding the Use of Race by Federal Law Enforcement Agencies", June 2003. Available at: http://www.justice.gov/crt/about/spl/documents/guidance_on_race.pdf.

control, federal law enforcement officers may not consider race or ethnicity except to the extent permitted by the Constitution and laws.

161. The Commission observes with concern that, whether it is expressly provided for or not, racial profiling as a selective and discretionary mechanism for detention and investigation of persons is still a general practice throughout the region, which directly affects the Afro-descendant population in a discriminatory way.

162. In this regard, the Commission notes that it is essential for States to accept that they are using these practices, abolish the rules that establish them, design behavioral protocols for security forces which take into account ethnic and racial diversity, and implement proper mechanisms to follow-up and control the activity of State agents in order to identify and eliminate these practices in security agencies. For that purpose, the Commission considers it essential to modify the institutionalized stereotypes towards Afro-descendant people and to take proper disciplinary measures against those security agents who use racial profiling.²⁸¹

1. Excessive use of force and racism

163. The Inter-American Commission has pointed out that the use of force is a last resort that is to be limited both qualitatively and quantitatively, employed solely to prevent a more serious occurrence than the one that prompted the State to intervene. Law enforcement officials may not, under any circumstances, resort to illegal practices to obtain the objectives entrusted to them. The IACHR has stated categorically that the means that the State may employ to protect its security or that of its citizens are not without limits.²⁸²

164. Additionally, the IACHR has established that the legitimate use of public force implies, *inter alia*, that it must be both necessary and proportional to the situation; in other words, that it must be exercised with moderation and in proportion to the legitimate end being sought, while at the same time endeavoring to keep personal injury and loss of human life to an absolute minimum.²⁸³ The degree of force exercised by state agents must not exceed what is “absolutely necessary.” The State must not use force disproportionately and immoderately against individuals who, because they are under its control, do not represent a threat; in such cases, the use of force is disproportional.²⁸⁴

²⁸¹ See, also, United Nations, CERD, General Recommendation XXXIV, CERD/C/GC/34, 3 October 2011, paras. 31-33.

²⁸² See, *inter alia*, IACHR, Report No. 57/02 (Merits), Case 11.382, *Finca La Exacta* (Guatemala), October 21, 2002, para. 35 and following; IACHR, Report No. 32/04 (Merits), Case 11.556, *Masacre de Corumbiara* (*Massacre in Corumbiara*), Brazil, March 11, 2004, para. 164 and following. IACHR, *Report on Terrorism and Human Rights*, OAS/Ser.L/V/II.116 Doc. 5 rev. 1 corr., 22 October 2002, para. 89.

²⁸³ See, *inter alia*, IACHR, *Report on the Situation of Human Rights Defenders in the Americas*, OAS/Ser.L/V/II.124, Doc. 5 rev.1, March 7 2006, para. 65, citing ECHR, *Case Ribitsch v. Austria*, Judgement of December 4 1995, Series A No. 336, para. 38.

²⁸⁴ See, *inter alia*, IACHR, *Report on the Situation of Human Rights Defenders in the Americas*, OAS/Ser.L/V/II.124, Doc. 5 rev.1, March 7 2006, para. 65.

165. The Commission observes that Principle 5 of the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials states that, “whenever the lawful use of force and firearms is unavoidable, law enforcement officials shall: (a) exercise restraint in such use and act in proportion to the seriousness of the offence and the legitimate objective to be achieved; and (b) minimize damage and injury, and respect and preserve human life...”²⁸⁵. What is more, Article 3 of the Code of Conduct for Law Enforcement Officials states that, “law enforcement officials may use force only when strictly necessary and to the extent required for the performance of their duty.”²⁸⁶

166. The Commission has indicated that even when the State has the right and the obligation to offer protection against threats – and thus may use lethal force on certain occasions – this capacity must be restricted to cases of strict necessity and proportionality. If it does not correspond to these principles, the lethal use of force may constitute an arbitrary deprivation of life or a summary execution. This is the same as saying that the lethal use of force must necessarily be justified by the right of the State to project everyone’s security.²⁸⁷

167. Moreover, Principles 4 and 9 of the Basic Principles respectively set forth that:

Law enforcement officials, in carrying out their duty, shall, as far as possible, apply non-violent means before resorting to the use of force

²⁸⁵ See, United Nations, *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials* Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana (Cuba), August 27 to September 7 1990.

²⁸⁶ See, United Nations, *Code of Conduct for Law Enforcement Officials*. Adopted by General Assembly Resolution 34/169 of December 17 1979. The commentary on this article states that:

a) This provision emphasizes that the use of force by law enforcement officials should be exceptional; while it implies that law enforcement officials may be authorized to use force as is reasonably necessary under the circumstances for the prevention of crime or in effecting or assisting in the lawful arrest of offenders or suspected offenders, no force going beyond that may be used.

b) National law ordinarily restricts the use of force by law enforcement officials in accordance with a principle of proportionality. It is to be understood that such national principles of proportionality are to be respected in the interpretation of this provision. In no case should this provision be interpreted to authorize the use of force which is disproportionate to the legitimate objective to be achieved.

c) The use of firearms is considered an extreme measure. Every effort should be made to exclude the use of firearms, especially against children. In general, firearms should not be used except when a suspected offender offers armed resistance or otherwise jeopardizes the lives of others and less extreme measures are not sufficient to restrain or apprehend the suspected offender. In every instance in which a firearm is discharged, a report should be made promptly to the competent authorities.

²⁸⁷ See, *inter alia*, IACHR, Report No. 11/10, Case 12.488, *Members of the Barrios Family* (Venezuela), March 16, 2010, para. 91 (submitted to the Inter-American Court on July 26 2010); IACHR, Report No. 34/00, Case 11.291, *Carandiru* (Brazil), April 13 2000, paras. 62, 63 and 91; IACHR, Report No. 1/96, Case 10.559, *Chumbivilcas* (Peru), March 1 1996, V.2.

and firearms. They may use force and firearms only if other means remain ineffective or without any promise of achieving the intended result.

Law enforcement officials shall not use firearms against persons except in self-defence or defence of others against the imminent threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest a person presenting such a danger and resisting their authority, or to prevent his or her escape, and only when less extreme means are insufficient to achieve these objectives. In any event, intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life.²⁸⁸

168. The Inter-American Court has specified in detail the standards that rule the use of force as follows: exceptionality, necessity, proportionality and humanity:

The use of force by law enforcement officials must be defined by exceptionality and must be planned and proportionally limited by the authorities. As such, the Tribunal has considered that force or coercive means can only be used once all other methods of control have been exhausted and have failed.[...] The use of lethal force and firearms against individuals by law enforcement officials – which must be forbidden as a general rule – is only justified in even more extraordinary cases. The exceptional circumstances under which firearms and lethal force may be used shall be determined by the law and restrictively construed, so that they are used to the minimum extent possible in all circumstances and never exceed the use which is "absolutely necessary" in relation to the force or threat to be repealed.[...] When excessive force is used, any resulting deprivation of life is arbitrary. [...] The use of force must be limited by the principles of proportionality, necessity and humanity. Excessive or disproportionate use of force by law enforcement officials that result in the loss of life may therefore amount to arbitrary deprivations of life. The principle of necessity justifies only those measures of military violence which are not forbidden by international law and which are relevant and proportionate to ensure the prompt subjugation of the enemy with the least possible cost of human and economic resources. The principle of humanity complements and inherently limits the principle of necessity by forbidding those measures of violence which are not necessary (i.e. relevant and proportionate) to the achievement of a definitive military advantage. In peacetime situations, state agents must distinguish between persons who, by their actions, constitute an imminent threat of death or serious injury and

²⁸⁸ See, Principles 4 and 9 of the United Nations, *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*. Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana (Cuba), August 27 to September 7 1990.

persons who do not present such a threat, and use force only against the former.²⁸⁹

169. In this respect, The European Court of Human Rights has established that:

when investigating violent incidents and, in particular, deaths at the hands of State agents, State authorities have the additional duty to take all reasonable steps to unmask any racist motive and to establish whether or not ethnic hatred or prejudice may have played a role in the events. Failing to do so and treating racially induced violence and brutality on an equal footing with cases that have no racist overtones would be to turn a blind eye to the specific nature of acts that are particularly destructive of fundamental rights.²⁹⁰

170. Likewise, the IACHR has determined that:

when there are suspicions that racial attitudes led to a violent act, it is particularly important that an official investigation be conducted vigorously and impartially, considering the need to continuously reaffirm society's condemnation of racism, and to retain minorities' trust in the ability of the authorities to protect them from the threat of racial violence. The State's performance of its positive obligation under Article 2 of the Convention requires that the domestic legal system demonstrate its ability to apply criminal laws against anyone who arbitrarily kills someone, regardless of the victim's ethnic or racial origin.²⁹¹

171. For its part, the CERD has indicated that States Parties should prevent and most severely punish violence, acts of torture, cruel, inhuman or degrading treatment and all violations of human rights affecting persons belonging to these particular groups which are committed by State officials, particularly police and army personnel, customs authorities, persons working in airports, penal institutions, and social, medical and psychiatric services. Meanwhile, States Parties should ensure the observance of the general principle of proportionality and strict necessity in recourse to force against persons belonging to these groups, in accordance with the "Basic Principles on the Use of Force and Firearms by Law Enforcement Officials."²⁹²

²⁸⁹ See, *inter alia*, I/A Court H.R., *Zambrano-Vélez et al. v. Ecuador Case*. Merits, Reparations and Costs. Judgment of July 4, 2007. Series C No. 166, paraS. 83-85; I/A Court H. R., *Montero Aranguren et al. (Detention Center of Catia) v. Venezuela Case*. Judgment of July 5, 2006. Series C No. 150, paraS. 67-69.

²⁹⁰ See, *inter alia*, IACHR, Report No. 26/09 (Admissibility and Merits), Case 12.440, *Wallace de Almeida* (Brazil), March 20 2009, para. 140, citing ECHR, *mutatis mutandi*, *Thlimmenos v. Greece*, [GC], no. 34369/97, #44, ECHR 2000-IV.

²⁹¹ See, *inter alia*, IACHR, Report No. 26/09 (Admissibility and Merits), Case 12.440, *Wallace de Almeida* (Brazil), March 20 2009, *cit.*, para. 139, citing ECHR, *Menson and others v. United Kingdom* (dec.), no. 47916/99, ECHR2003-V.

²⁹² See, *inter alia*, CERD, General Comment No. XXXI, U.N. Doc. CERD/C/GC/31/Rev.4 (2005).

172. The disclosed information shows that the Afro-descendant population has been affected by a double victimization, as it has been excluded from the protection of the State's security forces,²⁹³ and has also been a victim of violent acts,²⁹⁴ disproportionate use of force²⁹⁵ and lethal force,²⁹⁶ and police corruption, committed with total impunity.²⁹⁷

173. In this respect, the Commission has declared petitions admissible as regards the existence of a public security policy that intentionally and disproportionately targets young, poor Afro-descendants as victims of police violence, thus allegedly demonstrating a trend of social and/or racial profiling.²⁹⁸

174. In addition, the IACHR has sustained that the bias of the State police, according to existing studies, indicates the use of unnecessary violence towards those subject to their procedures, particularly Afro-descendants who reside in marginal areas. This conduct often leads to the death of the subject.²⁹⁹

175. During the technical meeting, the experts indicated that young Afro-descendants are most exposed to violence, both in their own communities and before

²⁹³ See, *inter alia*, Amnesty International, "They come in shooting. Policing socially excluded communities." AMR/19/025/2005, p. 10.

²⁹⁴ See, *inter alia*, United Nations, CERD, Concluding observations, United States, *cit.*, para. 25. Report on Human Development Brazil 2005. *Racism, Poverty and Violence*. Geledés Book I, p. 39.

²⁹⁵ Racial Discrimination Observatory's reply.

²⁹⁶ See, *inter alia*, United Nations, Human Rights Council, Mission to Guyana, *cit.*, para. 65 (In Guyana, between 1980 and 2001, out of a total of 239 lethal shots, 78% were against Afro-descendants). Waiselfisz Julio Jacobo, *Map of violence 2011. The youth of Brazil* (In Brazil, between 2002 and 2008 the amount of victims of Afro-descendants homicides increased by 20.2%).

²⁹⁷ See, *inter alia*, Amnesty International, "They come in shooting. Policing socially excluded communities". AMR/19/025/2005, p. 10.

²⁹⁸ See, *inter alia*, IACHR, Report No. 126/10 (Admissibility), Petitions P-1448-06 – *Roberto Carlos Pereira de Souza and Cristiano da Silva Souza*; P-1452-06- *Fábio Eduardo Soares Santos de Souza and Rodrigo Abilio*; P-1548-06- *Leandro dos Santos Ventura, Fabio dos Santos da Silva and Adriano Paulino Martiniano*; P-65-07- *Wallace Damião Gonçalves Miranda, Flavio Moraes de Andrade, Eduardo Moraes de Andrade, Julio César Pereira de Jesús, José Manuel da Silva and William Borges dos Reis*, (Brazil), October 23 2010, para. 57. IACHR, Report No. 8/03 (Admissibility). Petition 191-02 *Michael Gayle* (Jamaica), February 20, 2003, para. 53. In this same sense, see, *inter alia*, Amnesty International, "They come in shooting. Policing socially excluded communities". AMR/19/025/2005, p. 19.

²⁹⁹ See, *inter alia*, IACHR, Report No. 26/09 (Admissibility and Merits), Case 12.440, *Wallace de Almeida* (Brazil), March 20 2009, para. 148. See, *inter alia*, Amnesty International, "They come in shooting. Policing socially excluded communities". AMR/19/025/2005, pp. 8, 38 (According to statistics, in Brazil, in 2003, the police officers of the states of Rio de Janeiro and São Paulo killed 2110 people in situations officially reported as "resistance followed by death". In this respect, the information shows that between 1995 and 1998, the administration of Marcelo Alencar in Rio de Janeiro created financial incentives for those police officers with the highest amount of murders. Between 1979 and 2003, the victims of firearms rose by 461.8%, while the population increased by 51.8%. Out of this percentage, 44.1% of the victims were young people aged between 15 and 24"). Geledés Black Women's Institute & Global Rights Partners for Justice. *Racial violence. A report on homicides in Brazil*. Book I, p. 23.

security forces. For these reasons, they highlighted the importance of recording the race, not only of those who get killed but also of those who get injured.

176. As regards the gender approach, the experts pointed out that when the security forces interact with Afro-descendant men, treatment is aggressive; they insult and hit them. On the other hand, in the case of Afro-descendant women, security forces humiliate them, hit them and subject them to sexual violence, even through sexual abuse before their respective partners.³⁰⁰

177. The Commission observes with concern the existence of focused violence policies towards Afro-descendant people and it considers that, on top of meeting the proportionality standards when using force, States must also eliminate any form of racist consideration at the time of making and implementing their security policies.³⁰¹

178. The Commission reminds that it is imperative that in their system of domestic laws, the member States regulate, by law, the procedures for the use of lethal force by police. The IACHR observes that member States have a specific obligation to provide permanent training and instruction to the members of their police forces so that when they use lethal force in their operations, they do so in strict accordance with internationally accepted standards. States have an obligation to provide their police with the means, weaponry and equipment that will enable them to use nonlethal force in the procedures they follow to lawfully deter and suppress violence and crime.³⁰²

179. Accordingly, the member States must enact the regulations necessary to dictate the principle of necessity in the use of force, which holds that no matter what the situation, the defensive and offensive security measures used should be those strictly necessary to carry out the lawful orders of a competent authority in the event of acts of violence or crime that imperil the right to life or the right to personal security. By the same token, the domestic laws should provide that the use of force, including lethal force, shall be informed by the principles of reasonableness, moderation and progressiveness, always taking into account: (1) the rights that are to be protected; (2) the legitimate end to be achieved, and (3) the risk that the police must face.³⁰³

180. The Inter-American Commission points out that State agents must receive the training and instruction to enable them to resort, first and foremost, to nonviolent means to deal with situations that jeopardize the observance of the rights directly at stake in citizen security, before resorting to physical force, coercive tactics or

³⁰⁰ See, *inter alia*, Amnesty International, *Picking up the pieces: Women's Experience of Urban Violence in Brazil* (2008), p. 38.

³⁰¹ See, also, United Nations, CERD, General Recommendation XXXIV, CERD/C/GC/34, 3 October 2011, para.39.

³⁰² See, *inter alia*, IACHR, *Report on Citizen Security and Human Rights*, OAS/Ser.L/V/II., Doc. 57, December 31 2009, para. 115.

³⁰³ See, *inter alia*, IACHR, *Report on Citizen Security and Human Rights*, OAS/Ser.L/V/II., Doc. 57, December 31 2009, para. 116.

firearms. The use of force, including lethal force, will only be lawful when nonviolent means are manifestly incapable of protecting the threatened rights. The ongoing training and instruction that new recruits and officers in active service receive are essential to accomplish this objective. Members of the security forces must keep intact, throughout their period of service, the ability to discern the seriousness of the threat in order to weigh the alternative ways of responding to it, including the type or degree of force that can be used. This is a professional right of the members of State security forces; therefore, the member States have an obligation to provide their agents with ongoing training and instruction.³⁰⁴

2. Criminal justice system and racism

181. The CERD has established some indicators to determine the existence of racial discrimination in the administration and functioning of the criminal justice system. In this respect, as factual indicators, the CERD has made reference to: i) the number and percentage of Afro-descendant people who are victims of aggression or other offences, especially when they are committed by police officers or other State officials; ii) the absence or small number of complaints, prosecutions and convictions relating to acts of racial discrimination in the country; iii) insufficient or no information on the behavior of law enforcement personnel vis-à-vis Afro-descendant people; iv) the proportionately higher crime rates attributed to Afro-descendant people; v) the number and percentage of Afro-descendant people who are held in prison or preventive detention; vi) the handing down by the courts of harsher or inappropriate sentences against Afro-descendants; and vii) the insufficient representation of Afro-descendant people among the ranks of the police, in the system of justice, including judges and jurors.³⁰⁵

182. Additionally, the CERD has stated a series of legislative indicators, summed up as follows: a) gaps in domestic legislation on racial discrimination, and b) the potential indirect discriminatory effects of certain domestic legislation, particularly legislation on terrorism, immigration, nationality, banning or deportation of non-citizens from a country, as well as legislation that has the effect of penalizing without legitimate grounds certain groups or members of certain communities.³⁰⁶

183. Moreover, that Committee has maintained that the mere fact of belonging to a racial group is not a sufficient reason, *de jure or de facto*, to place a person in pre-trial detention and that the particularities of the Afro-descendant population must be taken into account upon assessing the guarantees often required of accused persons as a condition of their remaining at liberty pending trial, such as fixed address, declared employment, and stable family ties.³⁰⁷

³⁰⁴ See, *inter alia*, IACHR, *Report on Citizen Security and Human Rights*, OAS/Ser.L/V/II., Doc. 57, December 31 2009, para 117.

³⁰⁵ See, *inter alia*, CERD, General Recommendation No. XXXI, U.N. Doc. CERD/C/GC/31/Rev.4 (2005).

³⁰⁶ See, *inter alia*, CERD, General Recommendation No. XXXI, U.N. Doc. CERD/C/GC/31/Rev.4 (2005).

³⁰⁷ See, *inter alia*, CERD, General Recommendation No. XXXI, U.N. Doc. CERD/C/GC/31/Rev.4 (2005).

184. Thus, it has been established that it is an established fact that offences involving members of stigmatized or marginalized groups are more severely punished and that whatever the legal and procedural system in force in a given country, the structural inequalities, stereotypes and prejudices are mirrored in the criminal justice system.³⁰⁸

185. This situation has often been described as a downward spiral from social discrimination to marginalization, incurring frustrations which may lead to criminal behavior, in its turn a source of collective stigma. In addition, such stigmatization perpetuates structural inequalities and engenders differences in treatment that amount to direct or indirect discrimination. In this sense, the system of minimum penalties and mandatory imprisonment applied to certain offences is a perfect illustration of laws that are apparently neutral but have a discriminatory aspect which emerges in practice.³⁰⁹

186. On the other hand, the Commission declared a petition admissible as regards allegations that the alleged victim was tried, convicted and sentenced to death in circumstances amounting to racial discrimination, that he was deprived of effective legal representation, that there was a lack of impartiality and that he was denied access to effective post-conviction remedies.³¹⁰

187. Notwithstanding the lack of detailed comprehensive reports,³¹¹ it is possible to state that Afro-descendant people are underrepresented in the judicial system and security entities – especially in hierarchically upper positions, and overrepresented among victims³¹² and prison population,³¹³ and that race is used as a tool to justify criminal indictment and the highest penalties, even the death penalty.³¹⁴

³⁰⁸ Human Rights Watch, *Punishment and Prejudice, Racial Disparities in the War on Drugs*, May 2000. See, *inter alia*, United Nations, Economic and Social Council, Human Rights Commission, Subcommission of Human Rights Promotion and Protection, 57th period of sessions. Administration of Justice, Rule of Law and Democracy. Discrimination in the Criminal Justice System. Progress Report by Leila Zerrougui, Special Rapporteur, E/CN.4/Sub.2/2005/7, July 14 2005, paras. 31 and 58.

³⁰⁹ See, *inter alia*, United Nations, Economic and Social Council, Human Rights Commission, Subcommission on the Promotion and Protection of Human Rights, 57th period of sessions. Administration of Justice, Rule of Law and Democracy. Discrimination in the Criminal Justice System. Progress report by Leila Zerrougui, Special Rapporteur, E/CN.4/Sub.2/2005/7, July 14 2005, para. 20. IACHR, Thematic Hearing, 124th Regular Period of Session, *Situation of Persons Affected by Mandatory Minimum Sentences in the United States*, American Civil Liberties Union (ACLU), Justice Roundtable, Open Society Policy Center, National Association for the Advancement of Colored People (NAACP), United States, March 3 2006.

³¹⁰ See, *inter alia*, IACHR, Report No. 77/09 (Admissibility), Petition 1349-07, *Orlando Cordial Hall* (United States), August 5, 2009, para. 3.

³¹¹ See, *inter alia*, Justice Studies Center of the Americas (CEJA), 2004: 49 (“[I]n Colombia there is no statistical data on the number of Afrocolombian people in prisons nor on the crimes for which they are usually sentenced to such penalty. There is no other interesting information [such as] the amount of Afrocolombians working in the system of justice administration”).

³¹² See, *inter alia*, Amnesty International, “*Racism and Administration of Justice*”, (ACT 40/020/2001). Human Rights Watch, “*Effet raciste: justice pénale et administration publique*”, 2001.

³¹³ See, *inter alia*, UNDP, *The Rights of Afro-descendants in Latin America: Challenges Regarding its Implementation*, p. 145 (“[A]ccording to Statistics Bulletin 2004-2005 of the National Directorate for Social Rehabilitation of Ecuador (DNRS), over 11.63% of the population in prisons are Afro-descendant. This figure exceeds the estimation of total Afroecuadorian population, which accounts for 5% of the country according to the
Continues...

188. Replies to the Commission's questionnaire show that judicial systems have no disaggregated information that takes into account the "Afro-descendance" variable or allows to notice if the legislation is being applied in an egalitarian and impartial manner.³¹⁵

189. The IACHR worriedly observes the impact of racism in the criminal justice systems in the region and reiterates that the use of race and skin color as grounds to set and adjust a criminal sentence are banned by the inter-American system of human rights protection.

190. Particularly, the Commission observes that there is no information about Afro-descendant women in prison, and considers that it is essential to have complete and disaggregated information about Afro-descendants in the criminal and prison systems, as that would be the first step towards determining racial bias, and when and how it is applied.

IV. MEASURES ADOPTED BY STATES TO COMBAT RACIAL DISCRIMINATION

191. Article 2 of the American Convention states as follows

Where the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms.

192. The OAS General Assembly, through AG RES. 1930 (XXXIII-O/ 03) – "Prevention of Racism and All Forms of Discrimination and Intolerance and Consideration of the Preparation of a Draft Inter-American Convention," instructed the Inter-American Commission of Human Rights to conduct a "a study of the laws of member states of the

...continuation

ethnic self-identification of 2001 census. (...) While the Afro-descendant people amounts to 3.1% of those in Quito, in the city prisons they amount to 18%). UNDP, *The Rights of Afro-descendants in Latin America: Challenges Regarding its Implementation*, p. 146 ("This disproportion reinforces the prejudice that associates Afro-descendants with delinquency and racial dangerousness"). United Nations, CERD, Concluding observations, United States, *cit.*, para. 20. CERD, Report submitted by the United States, *cit.*, paras. 10, 163 (Under census 2000, the Afro-descendant population in the US accounted for about 12% of total national population. However, according to statistics furnished by the same State, in 2005, the Afro-descendants in prison amounted to 38.9% of total). National Movement Cimarrón's reply. Canada's reply (the Prison Service gathers information about the ethnicity of people in prison sentenced to two years or not, including men and women, detained in federal or provincial institutions, and also about those on parole. Statistics have shown that although the Afro-descendant population in the country accounted for 2.5% of the total, according to census 2006, the imprisoned Afro-descendants amounted to 7.9% of total population in prisons). United Nations, CERD, General Recommendation XXXIV, CERD/C/GC/34, 3 October 2011, para. 6.

³¹⁴ See, *inter alia*. IACHR, Report No. 57/96 (Merits). Case 11.139. *William Andrews*, (United States), December 6, 1996, para. 148. United Nations, CERD, Concluding observations, United States, *cit.*, para. 23.

³¹⁵ Racial Discrimination Observatory's reply.

Organization of American States dealing with the adoption of policies to promote equality or affirmative action.”³¹⁶

193. The main objectives of the regional system of human rights and the efficacy principle call for their guarantees to become a reality and to be implemented. Consequently, whenever the exercise of any of these rights is still not guaranteed de jure and de facto under their jurisdiction, the State Parties, in accordance with Article 2 of the American Convention, undertake to adopt such legislative or other measures as may be necessary to give effect to those rights.

194. The Commission and the Inter-American Court have repeatedly established that the right to equal protection under the law and non-discrimination implies that States are obligated: (i) to abstain from introducing into their legal frameworks regulations that are discriminatory or have discriminatory effects on certain groups of the population; (ii) to eliminate discriminatory regulations; (iii) to combat discriminatory practices; and (iv) establish norms and adopt the necessary measures to acknowledge and guarantee an effective equality of all people under the law.³¹⁷

A. Legislative framework and racial discrimination

195. A variety of different situations are found in the region, including: (i) absolute denial of the presence and participation of the Afro-descendant population in the social mindset;³¹⁸ ii) absence of laws which directly refer to discrimination;³¹⁹

³¹⁶ See also, OAS, Resolution AG/RES. 2038 (XXXIV-O/04); Resolution AG/RES. 2126 (XXXV-O/05); Resolution AG/RES. 2168 (XXXVI-O/06); Resolution AG/RES. 2276 (XXXVII-O/07); Resolution AG/RES. 2367 (XXXVIII-O/08); Resolution AG/RES. 2501 (XXXIX-O/09); and Resolution AG/RES. 2606 (XL-O/10) –“Draft Inter-American Convention against Racism and all Forms of Discrimination and Intolerance.”

³¹⁷ See, *inter alia*, IACHR, Report No. 67/06, Case 12.476, *Oscar Elias Biscet et al.* (Cuba), October 21, 2006, paras. 228-231, IACHR, Report No. 40/04, Case 12.053, *Maya Indigenous Community* (Belize), October 12, 2004, paras. 162, 166; I/A Court H. R., *Yean and Bosico Girls v. Dominican Republic Case*. Judgment of September 8, 2005. Series C No. 130, para. 141; I/A Court H. R., *Juridical Condition and Rights of the Undocumented Migrants*. Advisory Opinion OC-18 of September 17, 2003. Series A No. 18, para. 88, cited at I/A Court H. R., *López Álvarez v. Honduras Case*. Judgment of February 1, 2006. Series C No. 141, para 170; *Juridical Condition and Human Rights of Children*. Advisory Opinion OC-17/02 August 28, 2002. Series A No. 17, para. 44; *Proposal for the modification of the Political Constitution of Costa Rica Related to Naturalization*. Advisory Opinion OC-4/84 of January 19 1984. Series A No. 4, para. 54, I/A Court H. R., *Yatama v. Nicaragua Case*. Judgment of June 23, 2005. Series C No. 127, para. 185. See, also, United Nations, CERD, General Recommendation XXXIV, CERD/C/GC/34, 3 October 2011, para. 10.

³¹⁸ See, *inter alia*, United Nations, CERD, Ninth Report of the Dominican Republic, *cit.*, para. 7 (“Historically, the existence of the population of African origin was denied in the Dominican Republic; as a result, there are no statistics reflecting its presence. The category of “Black, of African origin” is not considered to be part of the country’s ethnic and racial diversity...”). CERD, Report submitted by Argentina, *cit.*, para. 106. ([The belief commonly held in Argentina is that there has been no population of African descent in the country since colonial times. According to the Gaviria Foundation and the University of Oxford, however, some 6 per cent of the Argentine population is of African descent (about 2 million people), and this is confirmed by a pilot test carried out under the auspices of the World Bank, which arrives at a similar figure.”).

³¹⁹ Chile’s reply.

ii) declarations of multiculturalism³²⁰ and multiethnicity;³²¹ and iii) explicit State recognition of the rights of Afro-descendant peoples.³²²

196. From the legal viewpoint, all the countries of the region set forth the principle of equality before the law in their constitutional³²³ and legal provisions.³²⁴ In addition, some constitutions expressly enshrine the principle of

³²⁰ See, *inter alia*, Multiculturalism Act of July 1988, Canada. Agreement No. 0719-ep-94 of August 3, 1994, Honduras.

³²¹ Article 1 of the Bolivian Constitution states: "Bolivia becomes a Social Unitary State of Plurinational Communitarian Law, free, independent, sovereign, democratic, intercultural, decentralized and with some autonomous groups. Bolivia is based on the political pluralism, economic, legal, linguistic and cultural plurality, in an integration process within the country." Article 1, paragraph one of the Ecuadorian Constitution provides: "Ecuador is a constitutional State of rights and justice, a social, democratic, sovereign, independent, unitary, intercultural, multinational and secular State. It is organized as a republic and is governed using a decentralized approach." The preamble of the Venezuelan Constitution points out: "The people of Venezuela, exercising their powers of creation and invoking the protection of God, the historic example of our Liberator Simon Bolivar and the heroism and sacrifice of our aboriginal ancestors and the forerunners and founders of a free and sovereign nation; to the supreme end of reshaping the Republic to establish a democratic, participatory and self-reliant, multiethnic and multicultural society in a just, federal and decentralized State that embodies the values of freedom, independence, peace, solidarity, the common good, the nation's territorial integrity, comity and the rule of law for this and future generations;..." Article 8 of the Nicaraguan Constitution establishes: "The people of Nicaragua are by nature multiethnic and are an integral part of the Central American nation."

³²² See, *inter alia*, UNDP, *The Rights of Afro-descendants in Latin America: Challenges Regarding its Implementation*, p. 151 ("...Ecuador is the only country that recognizes the legal status of people and collective rights for both indigenous peoples and afro-descendants").

³²³ Constitution of Antigua y Barbuda, Art. 2; Constitution of Argentina, Art. 16; Constitution of Bahamas, Art. 15; Constitution of Barbados, Art. 23.1; Constitution of Belize, Art. 3; Constitution of Bolivia, Arts. 8, II, 14, I; Constitution of Brazil, Art. 5; Constitution of Canada, Art. 15; Constitution of Chile, Arts. 1 and 19.2; Constitution of Colombia, Art. 13; Constitution of Costa Rica, Art. 33; Constitution of Cuba, Art. 42; Constitution of Dominica, preamble; Constitution of El Salvador, Art. 3; Constitution of Ecuador, Art. 23; Constitution of the United States, 14 Amendment; Constitution of Guatemala, Art. 4; Constitution of Granada, Art. 13; Constitution of Haiti, Art. 19; Constitution of Honduras, Art. 60; Constitution of Jamaica, chapter 3, section 13; Constitution of Mexico, Art. 1, para. 3; Constitution of Nicaragua, Art. 27, first part; Constitution of Panama, Art. 19; Constitution of Paraguay, Art. 46; Constitution of Peru, Art. 2, para. 19; Constitution of Guyana, Art. 149; Constitution of Saint Lucia, Art. 13; Constitution of Saint Kitts and Nevis, Art. 3 and 15; Constitution of Saint Vincent and the Grenadines, preamble; Constitution of Suriname, arts. 7 and 8; Constitution of Uruguay, Art. 8; Constitution of Trinidad and Tobago, Art. 4; Constitution of Venezuela, chapter I, Art. 21.

³²⁴ See, *inter alia*, Labor Code of 1992 Dominican Republic, Principle VII; Protection and Fundamental Rights of Children and Adolescent Code Dominican Republic, Principle IV; Rights and Opportunities Equality Law, No. 648, of 2008, Nicaragua; Canadian Human Rights Act of 1977; Civil Rights Law of 1964, titles II, IV, VI y VII, United States; Civil Rights Law of 1968, United States; Equal opportunity credit Law, United States; Violent crime repression and public order Law of 1994, United States, Migration and Naturalization Law, United States; Education equal opportunity Law of 1974, United States, Equal Rights Act No. 19 of 1990, Guyana; Equal Opportunity Act, 2000, Trinidad & Tobago.

equal opportunity,³²⁵ the prohibition on discrimination³²⁶, the contribution of the Afro-descendant population,³²⁷ and the right to cultural self-identification.³²⁸

197. Similarly, laws have been adopted in the region aimed at recognizing the Afro-descendant people³²⁹, prohibiting discrimination³³⁰,

³²⁵ Article 37 of the Constitution of the Republic of Argentina establishes: “This Constitution guarantees full exercise of political rights according to the principle of sovereignty of the people and the laws passed as a consequence. The suffrage is universal, equal, secret and mandatory. Equal opportunity between men and women regarding access to political and political party positions will be guaranteed by positive actions introduced in the law of political parties and the electoral law”. Article 66, paragraph 4 of the Constitution of the Republic of Ecuador establishes: “It is recognized and will be guaranteed to the people (...) The right to equality before the law, equal opportunities and non discrimination.”

³²⁶ Article 14, paragraphs II and III of the Constitution of Bolivia establishes: “The State prohibits and sanctions any form of discrimination founded in sex, colour, age, sexual orientation, gender identity, origin, culture, nationality, citizenship, language, religion, ideology, political or philosophical affiliation, marital status, economic or social condition, occupation, level of education, disability, pregnancy or other conditions that could annul or diminish the recognition, enjoyment or exercise, in equal conditions, of the rights of any person. III. The States guarantees every person and group of people, without any discrimination, the free and effective exercise of the rights established in this Constitution, the laws and International treaties on human rights.”

³²⁷ Article 3 of the Constitution of Bolivia establishes: “...Bolivian nation is formed by Bolivian women and men, native indigenous nations and peoples, and intercultural and afrobolivian communities. They altogether are the Bolivian people”. Article 56 of the Constitution of the Republic of Ecuador establishes: “Communities, peoples and indigenous nationalities, afroecuadorian people, montubio people and the commune form part of the Ecuadorian State, one and indivisible”. Article 215, paragraph 1 of the Constitution of the Federative Republic of Brazil establishes: “The State will protect folk, indigenous, afrobrasilian and other groups culture”. Provisional Article 55 of the Constitution of the Republic of Colombia establishes: “During the two years after the come in force of the present Constitution, the Congress will pass, after the study undertaken by a special commission created, a law that recognizes the right to collective property to the [afro-descendants] communities that have lived in rural vacant lots in the riverside of the Cuenca of the Pacific rivers.”

³²⁸ Article 21, paragraph 1 of the Constitution of Bolivia establishes: “Bolivian women and men have the following Rights: 1. Cultural self-identification.”

³²⁹ See, *inter alia*. Bolivia, Law No. 234 of 2008 Recognition of Afro-descendant People; Colombia, Law No. 70; Guatemala, Decree No. 19 of 2003 Indigenous and Garifuna National Language Law; Nicaragua, Law No. 28 of 1987 Atlantic Coast Regions Autonomy Statute; Nicaragua, Indigenous and Afro-descendants Decent and Equal Treatment Law of 2009.

³³⁰ See, *inter alia*. Uruguay, Law No. 17817 of 2004 on the Fight against Racism, Xenophobia and Discrimination; Peru, Law No. 26772 against discriminatory acts in employment offers and access to education means, amended by Law No. 27270 of May 29, 2000, Ordinance 002-2008-A-MPA of February 25, 2008 of the provincial municipality of Abancay, Regional Ordinance No 017-2008-CR-APURÍMAC of August 19, 2008, Regional Ordinance No 010-2008MDSJB/AYAC of May 28, 2008 of the district municipality of San Juan Bautista, Ayacucho, Regional Ordinance No 021-2008-MPH/AYAC of June 5, 2008 of the provincial municipality of Huamanga, Ayacucho, Regional Ordinance No 294-MM of August 25 2008 of the district municipality of Miraflores; Costa Rica, Law on the Elimination of Racial Discrimination in Educational Programs and Collective Mass Media (1977); Guatemala, Decree No. 81 of 2002, Law on Educational Promotion against Discrimination, Law on Discrimination Punishment, Decree No. 57 of 2002; Argentina, Law No. 23592 on discriminatory acts; Bolivia, Law on Racial Discrimination No. 26162 of November 1, 2006. Supreme Decree No. 213 of July 22, 2009, Law against Racism and All Forms of Discrimination No. 045 of 2010, Supreme Decree No. 762 of January 5, 2011; Brazil, Law on Racial Equality, Law No. 12.288 of July 20, 2010, Law No. 2694, Law No. 8107 (2001); Canada, Canadian Charter of Rights and Freedoms, Canadian Human Rights Act; Venezuela, Organic Education Law Official Gazette (E) No. 5929 of August 15, 2009, Law on Social Responsibility on the Radio, Television and Electronic Media, Organic Labor Law; Colombia, Disciplinary Code, Law No. 70 of 1993; Mexico, Federal Law for the Prevention and Elimination of
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and establishing criminal statutes or heavier sanctions to punish discriminatory acts.³³¹

198. The Commission has established that the mere promulgation of laws that have no practical effect does not guarantee the full enjoyment and exercise of rights.³³² For its part, the Court's constant jurisprudence has indicated that the formal existence of remedies is not enough, if they are not effective; i.e. they must provide a solution or an answer to the violation of the rights embodied in the Convention.³³³

199. For its part, the CERD has pointed out on many occasions, its concern about the absence of general anti-discrimination legislation, including a definition of racial discrimination in line with Article 1, paragraph 1, of the International Convention on the Elimination of All Forms of Racial Discrimination.³³⁴

200. The Commission observes that the countries that have adopted laws to prevent and punish racial discrimination are a minority, and that even in these cases, they are laws for some specific aspects instead of general ones which expressly refer to racial discrimination.

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Discrimination, United States; Matthew Shepard and James Byrd Jr. Hate Crimes Protection Act; Guyana, Prevention of Discrimination Act No. 26 of 1997.

³³¹ See, *inter alia*, Uruguay, Law No. 16048 of June 1989, Law No. 17677 of July 2003; Argentina, Law No. 23592; Colombia, Law No. 599 of 2000; Perú, Laws No. 27270 and 28867; Brazil, Law No. 1390 of 1951, Law Caó, No. 7716 of January 5 1989, Law No. 9459 of May 13 1995, Law No. 9099 of September 27 1995; Costa Rica, Law No. 4230, Art. 373 of Criminal Code; Guyana, Prevention of Discrimination Act (1997); Canada, Federal Employment Equity Act; United States, Federally Protected Activities, 18 U.S.C. 245 (b) (2), Fair Housing Act criminal provisions, 42 U.S.C. 3631, Voting Act criminal provisions, 42 U.S.C. 1973; Honduras, Art. 321 of Criminal Code; Colombia, Article 58, subsections 3 and 147 of Criminal Code; Peru, Art. 323 of Criminal Code; Bolivia, Law No. 45 on Combating Racism and all Forms of Discrimination; Guyana, Racial Hostility Act 1973 and amendment by Act No. 9 of 2002.

³³² See, *inter alia*, IACHR, Report No. 26/09 (Admissibility and Merits), Case 12.440, *Wallace de Almeida* (Brazil), March 20 2009, paras. 147 and 148; IACHR, *Report on Citizen Security and Human Rights*, OAS/Ser.L/V/II., Doc. 57, December 31 2009, para. 68.

³³³ See, *inter alia*, I/A Court H.R., *Acevedo-Jaramillo et al. v. Peru Case*. Interpretation of the Judgment of Preliminary Objections, Merits, Reparations and Costs. Judgment of November 24, 2006. Series C No. 157, para. 213; *López Álvarez v. Honduras Case*. Judgment of February 1, 2006. Series C No. 141, para. 170; *Ximenes Lopes v. Brazil Case. Preliminary Objection*. Judgment of November 30, 2005. Series C No. 139, para. 4; *Palamara Iribarne v. Chile Case*. Judgment of November 22, 2005. Series C No. 135, para. 184; *Acosta Calderón v. Ecuador Case*. Judgment of June 24, 2005. Series C No. 129, para. 93; *Bulacio v. Argentina Case*. Judgment of September 18, 2003. Series C No. 100, paras. 117 and 142; *Garrido and Baigorria v. Argentina Case. Reparations* (Art. 63(1) American Convention on Human Rights). Judgment of August 27, 1998. Series C No. 39, para. 69; *Trujillo Oroza v. Bolivia Case. Reparations* (Art. 63(1) American Convention on Human Rights). Judgment of February 27, 2002. Series C No. 92, para. 96; *Gómez Paquiyauri Brothers v. Peru Case*. Judgment of July 8, 2004. Series C No. 110, para. 151; *"Five Pensioners" v. Peru Case*. Judgment of February 28, 2003. Series C No. 98, para. 164; *Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago Case*. Judgment of June 21, 2002. Series C No. 94, para. 112.

³³⁴ See, *inter alia*, United Nations, CERD, Concluding Observations, Dominican Republic, *cit.* para. 9. CERD, Concluding Observations, Colombia, *cit.*, para. 13. CERD, Concluding Observations, Uruguay, *cit.*, para. 9. CERD, Concluding Observations of the Committee on the Elimination of Racial Discrimination. Barbados. CERD/C/BRB/CO/16, August 18, 2005, para. 9.

201. Likewise, although the equality principle is widely established in domestic legal systems of the countries in the region, there are still important contingencies for the Afro-descendant population to enjoy an effective exercise of rights, free from all discrimination.

202. The IACHR stresses that the States are bound to carry out comprehensive reviews of their domestic systems in order to: i) identify and abolish regulations that imply direct or indirect discrimination; and ii) adopt laws that expressly and comprehensively punish racial discrimination. This law reform is not just an obligation but also an important tool to visualize the situation of Afro-descendants and contributes to the raising of awareness and modification of historical patterns of segregation and exclusion.

B. Positive measures adopted to combat racial discrimination

203. The inter-American system has highlighted the obligation of the States to adopt measures to ensure real and legal equality among people and combat historical or *de facto* discrimination against a variety of social groups. The Commission has pointed out that the implementation of special measures of protection and measures to promote equality – including affirmative action – is necessary to ensure the exercise of rights by certain sectors that are victims of structural equality or long-standing exclusion.³³⁵

204. For its part, the Inter-American Court has determined that both international instruments and the pertinent case-law clearly establish that the States have the general obligation to respect and ensure fundamental rights. Therefore, they shall adopt positive measures, avoid initiatives that limit or violate a fundamental right and eliminate measures and practices that restrict or violate a fundamental right.³³⁶ Moreover, the Court has established that the States are obliged to take affirmative action to reverse or change discriminatory situations that exist in their societies to the detriment of a specific group of persons. This implies the special obligation to protect that the State must exercise with regard to acts and practices of third parties who, with its tolerance or acquiescence, create, maintain or promote discriminatory situations.³³⁷

205. In terms of public policies, the focus of the countries of the Hemisphere is not homogeneous.³³⁸ In some cases, there is no federal agency specifically in charge of

³³⁵ See, *inter alia*, IACHR, *Access to Justice for Women Victims of Violence in the Americas*, OAS/Ser.L/V/II. doc.68, January 20 2007, paras. 100 – 101. IACHR, *Considerations Regarding the Compatibility of Affirmative Action Measures Designed to Promote the Political Participation of Women with the Principles of Equality and Non-discrimination*, Annual Report of the Inter-American Commission of Human Rights, 1999, OAS/Ser.L/V/II.106. Doc. 3. April 13, 2000, Chapter VI.

³³⁶ See, *inter alia*, I/A Court H.R., *Judicial Condition and Human Rights of the Child*. Advisory Opinion OC-17/02 of August 28, 2002. Series A No. 17, para. 87.

³³⁷ See, *inter alia*, I/A Court H. R., *Judicial Condition and Rights of the Undocumented Migrants*. Advisory Opinion OC-18 of September 17, 2003. Series A No. 18, para. 104.

³³⁸ See, *inter alia*. CERD, Ninth Report of the Dominican Republic, *cit.* para. 11 (“In the country there are no policies specifically oriented to Afro-descendants”). UNDP, *The Rights of Afro-descendants in Latin America: Challenges Regarding its Implementation*, p. 50 (“...Chile neither has laws or decrees that address the specific situation of Afro-descendants or signed International treaties regarding Afro-descendants rights”). Paraguay Continues...

evaluating and promoting the situation of Afro-descendants³³⁹ nor is there an independent national institution on human rights³⁴⁰ or a Constitutional Court.³⁴¹

206. At the same time, it is possible to identify a number of mechanisms in the region that have been implemented to fight and eradicate racial discrimination. The plurality of offices, councils, areas and other State agencies³⁴² may be under the judicial³⁴³, legislative³⁴⁴ and executive³⁴⁵

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Ombudsperson, 2008 (“Paraguay Ombudsperson does not have a specific entity in charge of defending Afroparaguayan rights”).

³³⁹ See, *inter alia*, United Nations, Report on the Working Group on Experts on People of African Descent. Visit to the United States, *cit.*, para. 16. Chile’s reply.

³⁴⁰ See, *inter alia*. United Nations, CERD, Concluding observations, United States, *cit.*, para. 12. CERD, Concluding Observations, Barbados, *cit.*, para. 10.

³⁴¹ See, *inter alia*. United Nations, United Nations, CERD, Concluding observations of the Committee on the Elimination of Racial Discrimination, Suriname, CERD/C/SUR/CO/12, 13 March 2009, para. 11.

³⁴² See, *inter alia*. Argentina Ombudsperson, created by Resolution No. 768/2001 of the Honorary Deputy Chamber. Bolivia Ombudsperson, created by Law No. 1818 of December 22 1997; Paraguay Ombudsperson, created by Art. 276 of the Constitution of Paraguay of 1992; Colombia Ombudsperson, created by Art. 281 of the Political Constitution of 1991; Ecuador Ombudsperson– National Directorate for the Defense of Afroecuadorian Peoples.– National Institute for Andean, Amazonian and Afroperuvian Peoples (INDEPA), created by Law No. 28495; St. Kitts & Nevis Ombudsperson, created in October 2008; Guyana Ombudsperson.

³⁴³ Special Prosecutor’s Office for the Protection of Ethnic Groups and Cultural Heritage, Public Ministerial Office, Honduras.

³⁴⁴ See, *inter alia*. Human Rights Commission, Honorary Commission against Racism, Xenophobia and all Forms of Discrimination, Law No. 17817 of 2004, regulated by Decree No 152/006, Uruguay; Afroperuvian Workshop of the Congress of the Republic, ratified by Agreement No. 137-2007-2008/MESA-CR, of June 1 2008, Commission of the Andean, Amazonian and Afroperuvian Peoples, Environment and Ecology, Congress of the Republic, Peru.

³⁴⁵ See, *inter alia*. National Institute against Discrimination, Xenophobia and Racism (INADI), created by Law No. 24515, Argentina; Ministry of Culture, created by Supreme Decree No. 29894 of February 7 2009, Commission against Racism and all Forms of Discrimination, Bolivia; Directorate of Human Rights and Humanitarian Law, Area of Human Rights at the Ministry of Culture and Education, Consultancy on Fundamental Rights at the Labor Ministry. Presidential Consultancy on Issues related to Racial Equity, Area of Promotion and Coordination of Public Policies of Affirmative Actions for Afro-descendants of the Human Rights Directorate, Secretary for Afro-descendant Women of the Ministry of Social Development, Interinstitutional Commission for non-discrimination issues dependent on the Labor and Social Security Ministry, Ethnic Afro Area of the National Program on VIH/SIDA dependent on the Ministry of Dwelling, Territorial Planning and Environment, Municipal Thematic Unit for the Right of Afro-descendants dependent on the Municipality of Montevideo, Anti-Discrimination Office, at the Municipal Town Hall of Rivera, 2009, Uruguay; Directorate for Afrocolombian Raizal and Palenquera Communities Affairs of the Ministry of Interior and Justice, National Administrative Department of Statistics, Intersectorial Commission for the Advancement of the Afrocolombian Palenquera and Raizal Population, created by Decree No. 4181 of October 30, 2007, High-Level Advisory Commission, district, department, regional advisory agencies and communitarian councils for Afrocolombian people, created by Law No. 70 of 1993, National Culture Council. National Afrocolombian Pedagogic Commission, created by Decree No. 2249 of 1995, Lecture on Afrocolombian Studies, Decree No. 2249 of 1995 of the National Pedagogic Commission of Black Communities, Colombia; Afroecuadorian Development Council, created by Executive Decree No. 1747 of August 1998, National Afroecuadorian Development Council, created by Executive Decree No. 279 of April 2007, Metropolitan Social Council for the Elimination of Racial Discrimination, created by Metropolitan Ordinance No. 216 of the Metropolitan Council of Quito of August 2007, Secretary of Peoples, Social Movements and Citizens Participation, Continues...

branches, and in some cases they are autonomous and autarchic.³⁴⁶ In addition, national plans³⁴⁷ and various programs have been implemented.³⁴⁸

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created by Executive Decree No. 133 of February 26, 2007, System of Social Indicators of the Afroecuadorian People of 2004, Work Team against Racial Discrimination created in 2003, Unity for Indigenous and Afroecuadorian Peoples of the Governmental Ministry of 2005, Ecuador; National Institute of Andean, Amazonian and Afroperuvian Peoples Development, created on April 16, 2005 by Law No 28495, Peru; Liaison Office with Afro-descendant Communities of the Popular Power Ministry for Culture, Lecture: Free Africa, created in 2006, Subcommittee of Statistics for the Afro-descendant Population of the National Statistics Institute, Presidential Commission for the Prevention and Elimination of all Forms of Racial Discrimination of the Popular Power Ministry for Education, created by decree No. 3645 of 2005, Venezuela; Special Secretary of Promotion Policies for Racial Equality (SEPPIR), Cultural Foundation Palmares, Intergovernmental Forum of Racial Equality Promotion. National Coordinator of Promotion of Opportunities Equality and the Elimination of Discrimination at Work, Brazil; National Commission against Racial Discrimination, Racism, Xenophobia and Related Forms of Intolerance, created by Executive Decree No. 002-2004, Secretary of Indigenous and Afrohonduran People, Honduras; National Council for the Prevention of Discrimination, created by the Federal Law of 2003, Mexico; National Commission for the Elimination of Racial Discrimination created in 2001, Secretary for Indigenous and Afro-descendant Issues, created by presidential decree of May 29, 2008, Nicaragua; Special Commission to establish a governmental policy for full inclusion of the Panamanian black community, created by Executive Decree No. 124 of 2005, Coordinating Commission of Panamanian Black Community, created by law No. 16 of 2002, Panama; National Commission of Afro-Costa Rican Studies, create on April 27, 2005, National Costa Rican Commission, created by Executive Decree No. 36465-RE of February 24, 2011, Costa Rica; Presidential Commission against Discrimination and Racism against Indigenous Peoples, created by Governmental Agreement No. 390-2002 of October 8, 2002, Guatemala; Ethnic Relations Commission, Guyana; Canadian Human Rights Commission, Canada; Office for Civil Rights and Civil Liberties of the Department of Homeland Security, Deputy Under Secretary for Equal Opportunity of the Department of Defense, President's Board of Advisors on Historically Black Colleges and Universities of February, 12, 2002, United States.

³⁴⁶ Canadian Race Relations Foundation. Canada's reply. National Institute of Human Rights (INDH), Department of Diversity and Non-Discrimination. Chile's reply.

³⁴⁷ See, *inter alia*. "Towards a National Plan against Discrimination. Discrimination in Argentina. Diagnosis and Proposals" (Decree No. 1086/05), INADI, 2005, Argentina; "National Action Plan on Human Rights 'Bolivia to Live Good'" (Decree No. 29851 of December 10 2008), Bolivia; "Long-term National Comprehensive Plan on Afrocolombian palenquera and raizal population 2006-2019", "National Plan on the Population Displaced by Violence" (Decree No. 250 of 2005), "National Development Plan 2010-2014 "Prosperity for Everybody", CONPES, Colombia; "Plurinational Plan on the Elimination of Racial Discrimination and Ethnic and Cultural Exclusion (Decree No. 60 of September 28 2009)", "National Development Plan and the Afroecuadorian Component, 2007-2013", Ecuador; "National Plan on Human Rights for 2006-2010" (Decree No. 017-2005 of December 11, 2005), Peru; "National Health Policy for Afro-descendant Population", "National Program on Falciform Anemia", "National Plan against Racism and Discrimination", Uruguay; Action Plan to Reduce Racial and Ethnic Health Disparities, United States.

³⁴⁸ See, *inter alia*. "Cities without Discrimination Program", INADI-UNESCO, October 2006, Argentina; "Development and Cultural Diversity Program on the Reduction of Poverty and Social Inclusion", "Project for Indigenous and Afroecuadorian Peoples Development", "Operative Plan on Black People's Rights", Ecuador; "Free Didactic National Program", "Program on the Strengthening of Afro-descendants in High School", "University Diversity Program", "Financing Fund for Higher Studies Students", Brazil; "A Canada for All: Canada's Action Plan Against Racism", 2005, "Diversity: An Added Value", 2008, Quebec, "Make a Case against Racism", British Columbia, Multiculturalism Grants and Contribution Program, Community Connections, Nationally Standardized Data Collection on Hate-Motivated Crime Initiative, "The Racism. Stop It! National Video Competition (1996)", "Canadian Black History: An Interactive Experience", "The Mathieu Da Costa Challenge" contest, "Communities at Risk: Security Infrastructure Pilot Program (SIP)", "Community Hate Crimes Response Grants", Canada; "E-Race Initiative (Eradicating Racism and Colorism from Employment)" 2007, "National Partnership for Action to End Health Disparities for Ethnic and Racial Minority Populations", 2007, "No Child Left Behind Act", 2001, "Closing the Health Gap", United States; "National Meeting with Afroperuvian Leaders and Organizations Representatives", 2010, Peru; "Rescuing our Roots" Project, 2009. Family Benefits Program (PRAF) – Indigenous and Afrohonduran Continues...

207. According to the replies to the questionnaire: Canada informed about the following measures: i) “Legislated Employment Equity Program – LEEP” under which federally regulated private sector employers with 100 or more employees, shall report annually on the designated group representation in their workforce and the efforts made in creating inclusive workplaces; ii) “Federal Contractors Program”, which covers over 1000 provincially regulated private sector employers with 100 employees or more who receive contracts from the federal government valued at \$200,000 or more, who must certify in writing their commitment to employment equity and, if successful in their bid, implement employment equity; iii) “Racism-Free Workplace Strategy”, which consists of an educational plan for employers as regards all minorities;³⁴⁹ iv) “Public Service Modernization Act”, “Public Service Employment Act”, “2008-2009 Public Service Renewal Action Plan”; and v) strengthening of legal assistance financing for criminal cases.³⁵⁰ Venezuela pointed out that since 2008, the Presidential Commission has carried out many national teachers’ training courses on interculturality, self-recognition and elements related to the eradication of all forms of discrimination and has given scholarships to children from low-resource Afro-descendant communities.³⁵¹ Colombia informed that it has a liaison officer to tighten the bonds between the community and the troops operating in the region with a majority of Afrocolombian population, and that the Ministry of Social Protection has started some sensitization processes oriented to the entrepreneurial sector to strengthen the social Afrocolombian community inclusion through: i) banning discrimination practices; ii) setting disciplinary measure against discriminatory practices; iii) educational activities related to discrimination; iv) adopting affirmative action measures, v) equity policies of the Afrocolombian population at a managerial level; vi) improving employment offers for qualified Afrocolombian professionals; vii) programs to hire the greatest number of Afrocolombian people; viii) private and State cooperation to made social investment in favor of Afrocolombian people; ix) the inclusion of Afrocolombian people into the country’s work policy. It was also stated that the National General Prosecutor’s Office has offices to receive complaints that “provide the user with legal assistance and receive the complaint [on discrimination], thus avoiding a second victimization and preventing those problems which are not typified from escaping judicial scrutiny.”³⁵²

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Peoples, Honduras; Campaign, “Proud Men and Women, I am Afro-descendant... and you? How do you identify yourself? , Venezuela; Specific Participation of Afrocolombians in the Law on Television No. 182 of 1995, Law No. 115 of 1994 which promotes etno-education. Presidential Program for the Formulation of Strategies and Actions for the Comprehensive Development of Afrocolombian, Black, Palenquera and Raizal Peoples from the Administrative Department of the Presidency, Colombia; Access to Justice Initiative, Department of Justice, United States; “Promoting the Development of Harmonious Relations between Ethnic Groups and Removing Barriers to Participation: Ensuring Equal Opportunities and Access for All”, Guyana; “Project on Diversity and Non-Discrimination Seminars with School Boards”; “2010 Good Practices Contest”, Chile.

³⁴⁹ Canada’s reply.

³⁵⁰ Canada’s reply.

³⁵¹ Venezuela’s reply.

³⁵² Colombia’s reply.

208. In addition, as regards human and financial resources allocated to these institutions, Colombia informed that the Presidential Program for the Comprehensive Development of the Afrocolombian, Black, Palenquera and Raizal Population has been assigned an amount of \$1,500,000,000 for 2011 and has a staff of 1 Program Director, 5 Advisors for strategic issues y 1 Administrative Assistant for the Directorate, and that the Director of Issues for Black, Afrocolombian, Raizal and Palenquera Communities has 16 officials and 53 contractors.³⁵³ Uruguay informed that the Department of Afro-descendant Women has its own budget, a head position and a permanent secretary for the MIDES, an intern administrative assistant, a technical assistant and human resources on field work.³⁵⁴ Mexico stated that the National Council for the Prevention of Discrimination has federal facilities and 20 people to tackle complaints and claims based on all discrimination grounds. According to the 2011 Expenditure Budget of the Federation, the CONAPRED's financial resources amount to \$96,694,698 and those of the National Human Rights Commission to \$1,101,717,930.³⁵⁵ Guyana declared that in 2010, the Ethnic Relations Commission had a budget of G\$73,835,000 and for the 2011 fiscal year they estimated G\$89,099,000.³⁵⁶

209. As regards these efficacy of these institutions, the information received by the Commission indicates that the implementation of these policies and the creation of these entities have not resulted in the expected concrete advances³⁵⁷ and that, in general, it is possible to perceive a lack of gender perspective.³⁵⁸

³⁵³ Colombia's reply.

³⁵⁴ Uruguay's reply. Uruguay considered that the successful indicators were the following: i) publishing the document "The Afro-descendant Population in Uruguay from a Gender Point of View", ii) Seminar on the inclusion of the ethnic-racial dimension, iii) Crossings Plan to get information about the situation of the Afro-descendant people; iv) training courses for 425 people, v) publishing the document "The Inclusion of the Ethnic-racial Dimension in Information Production", vi) state sensitization campaign on the existence of "*Racism and Sexism and What is it that you do not Understand?*", vii) strengthening of the National Afrouroguayan Women NET and training courses for 80 Afro-descendant women.

³⁵⁵ Mexico's reply. Mexico informed as successful indicators that the CONAPRED together with the Ibero-American Network of Organs and Organizations against Discrimination through the following documents: "Attention to the Ibero-American Discrimination. An Initial Figure"; "The Afro-descendants in Mexico. Recognition and Proposals to Avoid Discrimination"; "Construction Process of Identity, Life Quality and Discrimination in Afro-descendant Communities in the States of Coahuila and Tamaulipas". Also, it was said that the assessment and efficiency system is made from annual reports, ratified by the Governmental Board and the Advisory Assembly of the CONAPRED; a quarterly follow-up is also carried out.

³⁵⁶ Guyana's reply. Guyana considered that the successful indicators were the participation and making of movie festivals, Workshops, regional visits, consultation, meetings, research and legal assistance.

³⁵⁷ See, *inter alia*. CERD, Report submitted by Ecuador, *cit.*, para. 25 ("The main purpose of the CODAE is to propose State policies for strengthening the Afroecuadorian people, to spread the Afroecuadorian rights, values, culture and history and to foster ethno-education. However, its operative mechanisms are still being assembled by a series of domestic crisis arising as a consequence of the lack of consensus among the national Afroecuadorian organizations themselves. In 2006, the State allocated the amount of 999,535 dollars as the annual budget for the organ"). Peru Ombudsperson, *cit.*, p. 101 ("... [It] was stated that so far no measures [of the National Plan of Human Rights 2006-2010 of Peru] have been implemented. Peru Ombudsperson, *cit.*, p. 105. (Despite creating the Day of Afropervenian Culture, it "has not been included among educational activities to be appropriately spread"). CERD, Report submitted by Uruguay, *cit.*, para. 38 ("These mechanisms have strengths and weaknesses. One of those weaknesses is that the political, administrative and financial scope of each of them is set by the domestic regulations of the institutions that set them. In general, they have no financial resources from
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210. Firstly, from the available information it appears that the human and financial resources³⁵⁹ allocated to these units are not sufficient nor are they duly trained³⁶⁰ to be able to carry out their mandates and work. Moreover, in some cases the full budget originally allocated has not been made available to these entities³⁶¹ or they have not executed the total budget available to them.³⁶²

211. Secondly, there are instances of lack of coordination that reflect in the overlapping of powers and simultaneous involvement of various entities. Such circumstances obstruct the sharing of good practices and the sum of efforts to obtain better results.³⁶³

212. In this respect, the answers to the Commission's questionnaire showed that many of the reported plans are still at the diagnosis stage, they are not socialized and there is inconsistency in compliance indicators.³⁶⁴

213. Thirdly, it is worth highlighting that the Inter-American Commission has no information about campaigns to promote and divulge these mechanisms, which results in limitations for Afro-descendant people to use them and access them in defense of their human rights.

214. Indeed, the IACHR has received information on the lack of participation of Afro-descendant people in these institutions, by virtue of the representation mechanisms

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the national budget of the Department of Afro-descendant Women of the Inmujeres (its financing comes from international cooperation)".

³⁵⁸ Peru's reply.

³⁵⁹ See, *inter alia*. CERD. Report submitted by Ecuador, *cit.*, para. 92 ("The budget the Ecuadorian State has transferred to the Afroecuadorian Development Corporation during 2002 to ensure its functioning amounts to 0.51%, and 100% of it has been fulfilled; the accrued value accounts for 0.57%. For 2006, the budget of the CODAE is 996,535 dollars"). ONEGUA's reply.

³⁶⁰ Racial Discrimination Observatory's reply.

³⁶¹ See, *inter alia*. UNDP, *The Rights of Afro-descendants in Latin America: Challenges regarding its implementation*, p. 251 ("In 2006, the total budget of Brazilian Quilombola Program amounted to R\$ 24,507,080 (US\$ 30,794,960), but the effective application of resources accounted for R\$ 22,081,619 (US\$ 12,475,490), reaching only 40.5% of total anticipated budget").

³⁶² See, *inter alia*. UNDP, *The Rights of Afro-descendants in Latin America: Challenges Regarding its Implementation*, p. 246 ("The budget of the [Special Secretary of Racial Equality Promotion Policies of Brazil] for 2006 was estimated at R\$ 32,446,828 (US\$ 18,331,541); out of which 41.3% was destined to quilombolas communities. However, during that year, only 58.2% of total budget for that purpose was effectively used").

³⁶³ See, *inter alia*. UNDP, *The Rights of Afro-descendants in Latin America: Challenges Regarding its Implementation*, p. 75 (In Uruguay, "one of the factors that hindered a proper Management of the budgetary issue is related to the inexistence of a specific interinstitutional instance on Afro-descendants in charge of coordinating and centralizing the action of the currently existing organs in a comprehensive way").

³⁶⁴ Racial Discrimination Observatory's reply.

imposed to them which are alien to the conception of representation of Afro-descendant communities³⁶⁵ and due to certain limitations set by those who organize the activities.³⁶⁶

215. Additionally, it has been observed that these instances are not known by common Afro-descendant people and nor are they thought to be efficient or influential,³⁶⁷ that they are unable to implement massive high-impact campaigns to increase the self-esteem of Afro-descendant people and that, many times, the situation of Afro-descendant people is dealt together with other groups at stake, thus generating confusion and hindering the in-depth study into the problems of the Afro-descendant population.³⁶⁸

216. During the technical meeting, the experts pointed out that although they have adopted some measures to combat poverty and social inclusion, there is no experience specifically aimed at the Afro-descendant population and they stressed the importance that racial discrimination issues be tackled through specific mechanisms and not in the context of general human rights plans.

217. The experts also considered it vital that school curricula³⁶⁹ and syllabuses include studies about slavery, colonialism and independence processes from basic education, according to an integrating and inclusive perspective,³⁷⁰ so as to raise awareness as regards the still existing historical debt with the Afro-descendant people, but without incurring in re-victimizing mechanisms, and to show the historical construction of contemporary categories and inequalities.

218. On this issue, it has been said that the lack of information about the contribution of the Afro-descendant population to the societies of the Americas³⁷¹ has substantially contributed to maintaining its invisibility and it has been stressed that it is important to modify the contents of textbooks and education syllabuses so that they include relevant information about the contribution of the Afro-descendant population. That is so because learning about these historical events will make it easier to adopt and incorporate standards of supportive and inclusive coexistence.

219. Moreover, the experts mentioned how useful it is to implement campaigns to highlight that discriminatory and racist attitudes are not only promoted by structural conditions but are also rooted in daily nature; and acknowledging it is the first step towards the elimination of racial discrimination.

³⁶⁵ Racial Discrimination Observatory's reply.

³⁶⁶ Afro-cultural Movement's reply.

³⁶⁷ National Movement Cimarrón's reply.

³⁶⁸ Ruda y Chocolate's reply.

³⁶⁹ Afro-cultural Movement's reply.

³⁷⁰ See, *inter alia*, DPAD, paras. 34, 95, 97. See, also, United Nations, CERD, General Recommendation XXXIV, CERD/C/GC/34, 3 October 2011, para. 61.

³⁷¹ See, *inter alia*, CERD, Ninth Report of the Dominican Republic, *cit.*, para. 82 ("Innovations in the new school curriculum do not establish contents that revolutionize the role of black people in everyday life").

220. As regards good practices, the available information discloses that some countries of the region have made progress in implementing curricular diversification measures, thus promoting a more inclusive education,³⁷² and activities to protect and promote the Afro-American culture in its different manifestations.³⁷³

221. The Commission appreciates the information furnished through the answers to the questionnaire and takes note of the different measures implemented to combat racial discrimination and to contribute to improving the situation of the Afro-descendant population in the region.

222. However, the difficulties mentioned show that these measures are only the first step towards the elimination of the structural discrimination that affects Afro-descendant people. Therefore, the IACHR hopes the information systematized in this report will contribute for the States to adopt innovative and better measures that will effectively accord proper treatment to the situation of Afro-descendants.

223. In particular, the Commission understands that these instances shall be given trained staff to understand and promote the human rights of the Afro-descendant population, as well as the appropriate mechanisms of coordination and participation from civil society. The IACHR understands that this relationship and exchange will not only help to consider the expectations and needs of the Afro-descendant population but will also favor the dissemination of and the access to these instances.

³⁷² See, *inter alia*, PNUD, UNDP, *The Rights of Afro-descendants in Latin America: Challenges Regarding its Implementation*, p. 247 (The Brazilian Law No. 10639 of 2003 states that teaching African and Afro-descendant history and culture is compulsory in all stages of primary and high school"). Peru's reply (Ministerial Resolution No. 440-2008-ED, of December 16 2008 that endorses the "National Curriculum Design for the Regular Primary School"). Venezuela's reply.

³⁷³ See, *inter alia*, African House, Dominican Republic; Declaration of December 3 as National Day of Candombe, Afrouruguayan Culture and Racial Equity, law 18059 of 2006, Uruguay; Colombian Law No. 725 of 2001 that fixes May 21 as the National Day of Afrocolombian Studies; the Legislative Decree of October 2 1997 declares the national day of Afroecuadorian People and acknowledges Alonso de Illescas as the national Afroecuadorian hero; the Congress decreed the National Day of Afroperuvian Culture through Law No. 28761, enacted on June 19, 2006; a decree that provides for the celebration of the Black People and Afro-Costa Rican Culture Day of 1980; Law on Garifuna's Day, Legislative Decree No. 83 of 1996, Guatemala; Legislative Decree no. 330 of 2002, that declares the Month of African Inheritance in Honduras; Decree No. 70 of 1996 that sets the Day of Honduran Black Ethnic Group; Creation of the National Black Ethnic Group's Day, through Law No. 9 of 2000, Mexico; Resolution No. 09-2007 of the National Assembly that set March 21 as the International Day for the Elimination of Racial Discrimination as a national holiday, Nicaragua; Declaration of the National Garifuna's Day in Nicaragua, Decree No. 37 of 2006; Creation of the National Day of Black Ethnic Group, through Law No. 9 of 2000, Panama; National Museum of African American History and Culture, 2003, United States; Creation of June 4 as the Day of Afroperuvian Culture each year, through Law 28761 of June 20 2006; Supreme Resolution No. 010-2009-MIMDES, called "Historical Pardon to the Afroperuvian People", published on November 28 2009; National Afroperuvian Museum; Month of Afroargentine Culture; May 24 was set as the Day against Racial Discrimination in Bolivia; the government of the department of La Paz declared the Afrobolivian community as a live treasure of the Department of La Paz and appreciated the cultural value of Afrobolivian dances as from the Prefectural Resolution No. 1690; Cultural Center Garinagu, Honduras; Black History Month Canada; Day of Afrovenezuelan Culture, Venezuela.

224. Moreover, the Commission considers that training and sensitization campaigns, both general and specific for State officials, are an important tool to eradicate systematic patterns of exclusion and discriminatory practices and contribute to raise awareness about the rights of Afro-descendants and the position of State agencies as regards their needs and difficulties.

225. The Commission deems it essential that the States of the region adopt positive measures to eliminate racial discrimination in the Hemisphere and to ensure the rights of Afro-descendant people. For that purpose, it is vital to have proper and disaggregated information and to assign enough and specific human and financial resources to neutralize racial prejudice and stereotypes and to improve the living conditions of Afro-descendants as regards health, housing, education and employment, especially emphasizing the multiple discrimination that affects Afro-descendant women.

C. Affirmative action measures regarding the Afro-descendant population

226. The validity and legitimacy of adopting legislative affirmative action measures have consistently been recognized in international law, and particularly in international human rights law.

227. Indeed, human rights instruments of the international and inter-American systems have recognized the need for affirmative action measures to remedy or compensate for the effects of past situations of structural discrimination against certain groups, and to avoid the perpetuation of such discrimination. Regardless of the terminology used to describe such measures at the international level (e.g., “positive measures,” “affirmative action,” “positive discrimination,” “reverse discrimination”), international treaty monitoring bodies have recognized the need for these measures as a means of guaranteeing substantive equality and the enjoyment of fundamental rights of people and social groups that been at a disadvantage historically or victims of ongoing prejudices.³⁷⁴

228. The International Convention on the Elimination of All Forms of Racial Discrimination establishes that:

Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or

³⁷⁴ See, *inter alia*, United Nations, Committee on Social, Economic and Cultural Rights. General Comment No. 20, “Non-discrimination in Economic, Social and Cultural Rights (Article 2, para. 2 of the International Covenant on Economic, Social and Cultural Rights), U.N. Doc. E/C.12/GC/20, July 2 2009, para. 8(b). The Committee on Economic, Social and Cultural Rights has pointed out that “to eliminate discrimination in practice, attention should be paid to groups or individuals that suffer historical injustices or are victims of persistent prejudices, instead of only comparing the formal treatment that people receive in similar situations”. IACHR. *Considerations regarding the Compatibility of Affirmative Action Measures Designed to Promote the Political Participation of Women with the Principles of Equality and Non-discrimination*, Inter-American Commission on Human Rights Annual Report, 1999, OAS/Ser.L/V/II.106. Doc. 3. April 13 2000, Chapter VI. IACHR, *The Road to Substantive Democracy: Women’s Political Participation in the Americas*, OAS/Ser.L/V/II., Doc. 79, April 18, 2011, para. 36.

individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.³⁷⁵

229. Article 5.1 of Convention 111 of the International Labor Organization states that, “special measures of protection or assistance provided for in other Conventions or Recommendations adopted by the International Labor Conference shall not be deemed to be discrimination.”

230. In the Declaration on Race and Racial Prejudice, UNESCO indicated that, “special measures must be taken to ensure equality in dignity and rights for individuals and groups wherever necessary, while ensuring that they are not such as to appear racially discriminatory. In this respect, particular attention should be paid to racial or ethnic groups which are socially or economically disadvantaged, so as to afford them, on a completely equal footing and without discrimination or restriction, the protection of the laws and regulations and the advantages of the social measures in force, in particular in regard to housing, employment and health; to respect the authenticity of their culture and values; and to facilitate their social and occupational advancement, especially through education.”³⁷⁶

231. As regards the principle of equal and effective protection before the law, the IACHR stated that under the American Convention and in order to guarantee the right to non-discrimination, the States are required to adopt positive measures by establishing, for such purposes, distinctions based on *de facto* inequities for the protection of those who must be protected. Or else, if they fail to adopt affirmative measures to reverse or change *de iure* or *de facto* discriminatory situations harmful to a specific group, they might be internationally responsible for that.³⁷⁷

232. For its part, the Inter-American Court has concluded that the States must not only abstain from producing discriminatory regulations, but must also combat discriminatory practices “at all levels, particularly in public bodies and, finally, must adopt the affirmative measures needed to ensure the effective right to equal protection for all individuals.”³⁷⁸

³⁷⁵ International Convention on the Elimination of All Forms of Discrimination, Article 1.4.

³⁷⁶ See UNESCO, Declaration on Race and Racial Prejudice, Article 9.2.

³⁷⁷ See, *inter alia*, Report No. 26/09 (Admissibility and Merits), Case 12.440, *Wallace de Almeida* (Brazil), March 20 2009, paras. 145, 147.

³⁷⁸ See, *inter alia*, I/A Court H. R., *Yean and Bosico Girls v. Dominican Republic Case*. Judgment of September 8, 2005. Series C No. 130., para. 141.

233. Similarly, in its General Recommendation No. XXXII, the CERD sustained that:

[T]he concept of special measures is based on the principle that laws, policies and practices adopted and implemented in order to fulfill obligations under the Convention require supplementing, when circumstances warrant, by the adoption of temporary special measures designed to secure to disadvantaged groups the full and equal enjoyment of human rights and fundamental freedoms. Special measures are one component in the ensemble of provisions in the Convention dedicated to the objective of eliminating racial discrimination, the successful achievement of which will require the faithful implementation of all Convention provisions.³⁷⁹

234. Additionally, in its General Observation No. 18, the Committee on Human Rights concluded that:

the principle of equality sometimes requires States parties to take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the Covenant. For example, in a State where the general conditions of a certain part of the population prevent or impair their enjoyment of human rights, the State should take specific action to correct those conditions. Such action may involve granting for a time to the part of the population concerned certain preferential treatment in specific matters as compared with the rest of the population. However, as long as such action is needed to correct discrimination in fact, it is a case of legitimate differentiation under the Covenant.³⁸⁰

235. From the conclusions obtained during the technical meeting, the answers to the Commission's questionnaire and the information obtained from other sources, what emerges is an existing confusion in the States as well as in civil society as regards the notions of positive measures and affirmative action measures. The aim of this section is to specify the definition and the scope of the concept of affirmative action measures,³⁸¹ as well as to gather and systematize the States' practice in the region in order to identify good practices and pending challenges.

³⁷⁹ See, *inter alia*, CERD, General Recommendation N° XXXII, 75° Period of Session, August 2009, para. 11.

³⁸⁰ See, *inter alia*, United Nations, Committee on Human Rights, General Comment No. 18, General Comment adopted by the Committee on Human Rights, Non-discrimination, 37^o Period of Sessions, U.N. Doc. HRI/GEN/1/Rev.7 at 168 (1989), para. 10.

³⁸¹ This type of measures have been called "affirmative action measures", "temporary special measures" or "measures of temporary character", but the term "affirmative action measures" will be used in order to keep homogeneity in the report and to avoid confusions with the obligation to adopt "positive measure."

236. Moreover, in relation to the mandate conferred by the OAS General Assembly, the Commission will analyze the legislation dealing with the adoption of affirmative action measures as regards the Afro-descendant population, using a broad and material definition of "legislation" as opposed to law in the formal sense, according to the Inter-American Court in its Advisory Opinion OC-6/86.³⁸²

237. The concept of affirmative action measures refers to specific or general legislation, plans, programs and any initiative which is designed to ensure the complete and egalitarian enjoyment of human rights and fundamental freedoms by disadvantaged groups.³⁸³ In this way, affirmative action measures represent legitimate instruments to reduce historical inequalities produced by prejudices and patterns of discrimination and exclusion.

238. Affirmative action measures are an exceptional tool within the realm of positive measures, through which a differentiated treatment is granted to a systematically disadvantaged group, in order to correct structural inequalities and contribute to overcoming difficulties that prevent them from enjoying their human rights. Thus, the link between positive actions and affirmative action measures is one of gender-species, i.e. affirmative action measures are positive measures, but not all positive measures have to be implemented by means of affirmative action measures.

239. Affirmative action measures are characterized as "special measures", since they have a specific objective and their temporality is subject to the reaching of those goals and its sustainability over time.³⁸⁴ Moreover, it has been considered that these measures are legitimate to the extent that they represent reasonable, objective and proportional means to redress *de facto* discrimination and are discontinued when substantive equality has been sustainably achieved."³⁸⁵

240. Since affirmative action measures are exceptional measures, they are subject to stricter validity and justification criteria. Therefore, affirmative action measures must: i) be appropriate as regards the situation to be remedied; ii) be legitimate; iii) be necessary in a democratic society; iv) respect the principles of justice and proportionality; v) be temporary; vi) be designed and implemented in case of need; and vii) be based on a realistic assessment of the situation of the affected individuals and community.³⁸⁶

³⁸² See, *inter alia*, I/A Court H.R., *The Word "Laws" in Article 30 of the American Convention on Human Rights*. Advisory Opinion OC-6/86 of May 9, 1986. Series A No. 6.

³⁸³ See, *inter alia*, CERD, General Recommendation. No. XXXII, 75° Period of Sessions, August 2009, para. 11.

³⁸⁴ See, *inter alia*, United Nations, CEDAW, General Recommendation 25, *Measures of a Temporary Character*, UN Doc. CEDAW/C/2004/I/WP.1/Rev.1. 30 (2004), para. 15.

³⁸⁵ See, *inter alia*, United Nations, Committee on Economic, Social and Cultural Rights, General Comment No. 20, "Non-discrimination in Economic, Social and Cultural Rights (Article 2, para. 2 of the International Covenant on Economic, Social and Cultural Rights)", U.N. Doc. E/C.12/GC/20, July 2 2009, para. 9.

³⁸⁶ See, *inter alia*, CERD, General Recommendation No. XXXII, *cit.*, para. 16. IACHR. *Considerations about the Compatibility of Affirmative Action Measures Designed to Promote the Political Participation of Women* Continues...

Additionally, affirmative action measures may be established in both the public and private spheres.

241. The implementation of affirmative action measures can take different forms, according to the characteristic of each situation. Therefore, in the form of preferential treatment, the personal characteristic is used in favor of the person, making a difference with another candidate that does not have the characteristics required for the differentiated treatment. In this regard, there are different positions as to the adequate moment for the distinction to be made, that is, if the personal characteristic should be taken into account at the beginning, during or once the selection has finished.

242. For its part, the system of quotas aims at the establishment of special vacancies, generally in the form of percentages and regarding a general quantity of persons of the social group to benefit from this.³⁸⁷ The possibility of implementing affirmative action measures through a system of goal setting consists of reserving a specific number of vacancies for a minority-group member, or setting specific goals to achieve the participation of minority-group members, particularly by determining percentages for groups that are under-represented in the work force.

243. Accordingly, the possibility of carrying out focused recruitment measures has been considered, through the design of programs aimed at attracting persons from under-represented groups. The strategies can include actions such as focused advertising, creation of incentives for the application to specific jobs, promotion and transfer processes.

244. In the region, although some countries award constitutional³⁸⁸ and legal³⁸⁹ hierarchy to norms that establish affirmative action measures hierarchy, it is also true that this type of measures is not an extended practice.

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with the *Principles of Equality and Non-discrimination*. Annual Report of the Inter-American Commission on Human Rights, 1999, OAS/Ser.L/V/II.106. Doc. 3. April 13, 2000, Chapter VI, Section III.C.

³⁸⁷ See, *inter alia*, IACHR, *Considerations about the Compatibility of Affirmative Action Measures Designed to Promote the Political Participation of Women with the Principles of Equality and Non-discrimination*. Annual Report of the Inter-American Commission on Human Rights, 1999, OAS/Ser.L/V/II.106. Doc. 3. April 13, 2000, Chapter VI.

³⁸⁸ See, *inter alia*, Section 75 subsection 23 of the Argentine Constitution establishes among the powers of the Legislative Power: "To legislate and promote positive measures guaranteeing true equal opportunities and treatment, the full benefit and exercise of the rights recognized by this Constitution and by the international treaties on human rights in force, particularly referring to children, women, the aged, and disabled persons. To issue a special and integral social security system to protect children from abandonment, since pregnancy up to the end of elementary education, and to protect the mother during pregnancy and the period of lactation." Section 11, subsection 2 of the first chapter of the Constitution of the Republic of Ecuador states that: "All persons are equal and shall enjoy the same rights, duties and opportunities. No one shall be discriminated against for reasons of ethnic belonging, place of birth, age, sex, gender identity, cultural identity, civil status, language, religion, ideology, political affiliation, legal record, socio-economic condition, migratory status, sexual orientation, health status, HIV carrier, disability, physical difference or any other distinguishing feature, whether personal or collective, temporary or permanent, which might be aimed at or result in the diminishment or annulment of recognition, enjoyment or exercise of rights. All forms of discrimination are punishable by law. The State shall
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245. Regarding access to public positions, in Ecuador, through Decree No. 60 of September 2009, the Plurinational Plan to Eliminate Racial Discrimination and Ethnic and Cultural Exclusion was adopted, which provides, among other measures, access to public positions in government for, among other groups, Afro-Ecuadorians, in a percentage not below their proportion of the population.³⁹⁰ In Colombia, Law 70 of 1993 and Law 649 of 2001 regulate the election of representatives of the House of Representatives by means of the Special National District for Black Communities.³⁹¹

246. In relation to access to education, in Colombia, Decree No. 1627 of 1996 established the fund of loans subject to forgiveness within the Colombian Institute of Educational Credit and Technical Studies Abroad (*Instituto Colombiano de Crédito Educativo y Estudios Técnicos en el Exterior*) for Afro-Colombian students with limited economic resources and good academic performance. In Uruguay, Law No. 18046 on Accountability and Balance Sheet of Budgetary Execution for the 2005 Fiscal Year created the Carlos Quijano Fellowships to promote graduate studies abroad for the Afro-descendant population.³⁹² In Brazil, in 2003, the Legislative Assembly of the state of Rio de Janeiro enacted Law No. 4.151 which regulates the quota policy in public universities, establishing the need of quotas for Afro-descendant students, from 20% to 40%.³⁹³

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adopt affirmative action measures that promote real equality for the benefit of the rights-bearers who are in a situation of inequality.”

³⁸⁹ See, *inter alia*, Canadian Human Rights Act, section 16. Canada’s reply.

³⁹⁰ Murillo Martínez, Pastor Elías, *Affirmative Action Measures or Special measures: Correct Historical Injustices and Discrimination*, in OAS, *Workshop on Experts on Afro-descendants in the Americas*, Chapter 1, p. 16.

³⁹¹ Murillo Martínez, Pastor Elías, *Affirmative Action Measures or Special measures: Correct Historical Injustices and Discrimination*, in OEA, *Workshop on Experts on Afro-descendants in the Americas*, Chapter 1, p. 16.

³⁹² CERD, Report submitted by Uruguay, *cit.*, para. 117. Uruguay’s reply (“The low number of professionals that have applied for this scholarship makes us think this is due to the different difficulties that the Afro-Uruguayan population face to have access and continue university studies”).

³⁹³ See, *inter alia*, Pablo Gentili, Exclusion and inequalities regarding access to Superior Education in Brasil: affirmative action challenge, Latin American Forum for Educational Policies, Reference No. 20, year 3, November 2006. available at: http://www.foro-latino.org/flape/boletines/boletin_referencias/boletin_20/referencias20_articulos.htm. (In Brazil, many universities have established quotas for Afro-descendants: i) UERJ/UENF: establishes a reserve of 20% of vacancies for Afro-descendants, ii) UNEB: establishes a reserve of 40% vacancies for Afro-descendants who studied in public secondary schools, iii) UnB: establishes a reserve of 20% of vacancies for Afro-descendant students iv) UFAL: establishes a reserve of 20% vacancies for Afro-descendants who studied in public schools. Out of these vacancies, 60% is reserved for women and 40% for men, v) UFPR: establishes a reserve of 20% of the vacancies for Afro-descendant students, vi) UNFESP: adds a 10% vacancies for Afro-descendants who graduated from public schools, vii) UEL: establishes a reserve of 40% of the vacancies for public school graduates, and out of this percentage, 20% must be self-declared Afro-descendant students, viii) UEMS establishes a reserve of 20% vacancies for Afro-descendants, ix) UEMG: establishes a reserve of 20% vacancies for Afro-descendants, x) UFBA: establishes a reserve of 45% of vacancies for public school graduates, and out of this percentage, 85% must be Afro-descendants, xi) UNIMONTES: establishes a reserve of 20% vacancies for Afro-descendants, xii) UEL: adds 10 points for self-declared Afro-descendant students xiii) UNEMAT: establishes a reserve of 25% vacancies for Afro-descendants xiv) UFJF: establishes a reserve of 50% of the vacancies for public school graduates, and out of this percentage, 20% must be self-declared Afro-descendants, xv) UFPA establishes a reserve of 50% of the vacancies for public schools graduates, and out of this percentage, 40% for Afro-descendants).

Additionally, in 2004, Program “University for All” was created “to benefit poor students in the access to private universities (considered in general with less status compared to the public ones), with integral scholarships (i.e completely free for students) for those who live in families whose per capita income is lower than 1.5 minimum wage, and with scholarships that cover between 25 to 50% of the cost of the private university for those who live in families whose income is lower to 3 minimum wages.”³⁹⁴ In Venezuela, Decree No. 3645 on Racial Discrimination establishes scholarship quotas for Afro-descendant youths in training and professionalization institutes. In Bolivia, the Ministry of Education granted 20% of the existing annual quotas in Teacher Training Superior School to indigenous and Afro-Bolivian peoples, who can enter without the entrance examination, the only requirement being an average school mark of 50. Also, agreements were signed to guarantee 250 annual scholarships for indigenous and Afro-Bolivian peoples.³⁹⁵

247. As regards access to employment, in Brazil, in December 2001, the Federal Supreme Court established that all its suppliers of services should respect a quota of 20% of job openings for Afro-descendants. Similarly, 20% of public service positions of the Ministries of Justice, Culture and Agricultural Development must be held by Afro-descendants. Moreover, the Cooperation Protocol of March 21, 2002 of the Ministry of Science and Technology, Ministry of Culture and the Ministry of Foreign Affairs established guidelines for the creation and granting of scholarships called “Vocational Scholarships for Diplomacy” in favor of Afro-descendant students. Additionally, Decree No. 4228/2002 set forth the inclusion – in the contracts with service provider companies, and technicians and consultants for projects developed in cooperation with international bodies – of a provision that determine percentages of participation of Afro-descendants, women and the handicapped. In Canada, the Employment Equity Act establishes that each employer must implement labor equity by: (a) identifying and eliminating labor barriers to persons belonging to certain groups; (b) implementing positive practices and policies and reasonably creating jobs that make it possible to ensure that persons belonging to these groups achieve a degree of representation in each occupational group of the employer.³⁹⁶

248. In terms of economic advancement, in the United States, the Department of Transportation has created the Disadvantaged Business Enterprise program which establishes that no less than 10% of the resources authorized for road construction programs should preferably have small businesses whose owners are persons who belong to historically discriminated groups.³⁹⁷

249. Regarding the Afro-descendant population, in Colombia, the Constitutional Court through judgment T-025 of 2004 recognized them as special subjects of constitutional protection, which justifies the “adoption of positive differentiation measures, which are adapted to their situation of special vulnerability and defenselessness,

³⁹⁴ See, *inter alia*, UNDP, Latin American Forum for Educational Policies, Report Reference No. 20, year 3, *The Rights of Afro-descendants in Latin America: Challenges Regarding Its Implementation*, p. 248.

³⁹⁵ Bolivia’s reply.

³⁹⁶ Canada, Employment Equity Act, Article 5

³⁹⁷ Available at <http://www.dotcr.ost.dot.gov/asp/dbe.asp>.

and which, through preferential treatment, are conducive to ensuring the effective exercise of their rights.” Additionally, in January 2009, the Constitutional Court issued order 005-09 for the protection of the fundamental rights of the Afro-descendant population that is victimized by forced displacement, within the framework of the unconstitutional state of affairs declared in judgment T-025 de 2004.³⁹⁸

250. The Commission has recognized that even when equality is ensured as a matter of law, this does not equate to a guarantee of equality of opportunity or treatment. Therefore, special measures are useful tools to remedy the persistent conditions of *de facto* discrimination as long as those conditions persist, and until equality of opportunities is achieved. Given that affirmative action measures aim at resolving the situation of historical discrimination affecting a particularly at risk group, these measures do not constitute discrimination.³⁹⁹

251. In fact, the elimination of formal obstacles and the adoption of affirmative action measures to promote equality for Afro-descendant people are essential prerequisites to ensure true equality for Afro-descendants in the Americas.⁴⁰⁰

252. As previously established, it is essential to ask three questions in order to analyze these issues. First, does the measure bring about a difference in treatment that falls within the sphere of application of the American Convention or Declaration, respectively? Second, assuming that it does, does that difference in treatment pursue a legitimate aim? This analysis takes into account the interests and the objectives sought by the State. Third, are the means employed proportional to the end sought? In other words, is there a reasonable balance of interests between the end sought and any restriction of rights imposed? If there is a restriction involved, is it the least restrictive measure possible to accomplish the objective sought? Is the treatment in question arbitrary or unfair in any case? The evaluation of these questions must take into account that a distinction based on status, such as race, gives rise to heightened scrutiny.⁴⁰¹

253. The Commission observes that, while the Constitutions and the legislation in the region establish equality before the law, the Afro-descendant population

³⁹⁸ See, *inter alia*, IACHR, *Annual Report 2009*, OAS/Ser.L/V/II, Doc. 51 corr. 1, December 30 2009, chapter IV, para. 119.

³⁹⁹ IACHR, *Considerations Regarding the Compatibility of Affirmative Action Measures Designed to Promote the Political Participation of Women with the Principles of Equality and Non-discrimination*, Annual Report of the Inter-American Commission on Human Rights, 1999, OAS/Ser.L/V/II.106. Doc. 3. April 13 2000, Chapter VI.

⁴⁰⁰ IACHR, *Considerations Regarding the Compatibility of Affirmative Action Measures Designed to Promote the Political Participation of Women with the Principles of Equality and Non-discrimination*, Annual Report of the Inter-American Commission on Human Rights, 1999, OAS/Ser.L/V/II.106. Doc. 3. April 13 2000, Chapter VI. See, also, United Nations, CERD, General Recommendation XXXIV, CERD/C/GC/34, 3 October 2011, paras. 7 and 18.

⁴⁰¹ IACHR, *Considerations Regarding the Compatibility of Affirmative Action Measures Designed to Promote the Political Participation of Women with the Principles of Equality and Non-discrimination*, Annual Report of the Inter-American Commission on Human Rights, 1999, OAS/Ser.L/V/II.106. Doc. 3. April 13 2000, Chapter VI.

faces serious difficulties to exercise their human rights, and suffer from a situation of structural discrimination. As a consequence, the correction of this situation requires positive measures, and especially, affirmative action measures to promote effective equality of the Afro-descendant population. The aim of guaranteeing real equality of Afro-descendants is in itself a legitimate and necessary objective.

254. The IACHR reiterates that affirmative action measures fully comply with the principle of non-discrimination and the provisions of international human rights instruments.⁴⁰² The elimination of racial discrimination and the protection of the rights of Afro-descendants must be a priority for the States of the Americas. Consequently, the Commission urges States to adopt measures of affirmative action to ensure real equality for Afro-descendant people.

V. CONCLUSIONS AND RECOMMENDATIONS

255. The Commission has highlighted throughout this report the situation of structural discrimination that affects Afro-descendants in the Americas and, particularly Afro-descendant women, which is reflected in important obstacles for the enjoyment and exercise of their civil and political, economic, social and cultural rights.

256. Moreover, the IACHR has noted the narrow link between racism and discrimination, and how the invisibility of the needs of Afro-descendants, together with ongoing stereotypes and prejudices, contributes to perpetuate historical situations of segregation and exclusion.

257. The Inter-American Commission considers that this regional report is the first step in the efforts of the inter-American system towards giving visibility and empowering the Afro-descendant population in the Hemisphere, and aimed at improving and strengthening the States' legislation, policies and practices in order to deal with racial discrimination, and to ensure the human rights of all Afro-descendants in the Americas.

258. The IACHR reiterates the need for the States to adopt measures promptly and without delay in order to deal with the obstacles and barriers in the exercise, respect and guarantee of the human rights of Afro-descendant people in the Americas.

259. The Commission reiterates its commitment to cooperate with the States in the region to find solutions to the identified issues. Many measures adopted to deal with this situation show the understanding and acknowledgement of the seriousness of the existing problems, and the commitment of the public and private sectors to tackle effectively the difficulties that Afro-descendants face.

⁴⁰² IACHR, *Considerations Regarding the Compatibility of Affirmative Action Measures Designed to Promote the Political Participation of Women with the Principles of Equality and Non-discrimination*, Annual Report of the Inter-American Commission on Human Rights, 1999, OAS/Ser.L/V/II.106. Doc.3. April 13 2000, Chapter VI.

260. These recommendations seek cooperation with the States in the region, in the processes that lead to the adoption of measures and practices that allow effective compliance with their obligation of protection and guarantee the human rights of Afro-descendant people in the Americas.

1. The Commission recommends that the States adopt the necessary mechanisms to promote the self-identification of their Afro-descendant population, especially through the inclusion of the “Afro-descendance” variable in all public registries, and particularly the population census and household surveys.
2. To that end, the States must carry out sensitization campaigns for civil society and training for the interviewers in order to create the necessary conditions to allow Afro-descendants to identify themselves as such.
3. Regarding the censuses, the States must have specialized staff and appropriate financial resources. Additionally, States must guarantee adequate channels for civil society participation so as to adequately design the categories used in the self-identification questions. In particular, the question on self-identification must be included among the first questions in the basic questionnaire.
4. Moreover, the States must adopt programs aimed at gathering disaggregated statistics, distinguishing between men and women, boys and girls, as regards its Afro-descendant population.
5. The Commission recommends that the States adopt urgent measures in order to overcome the situation of structural discrimination that affects the Afro-descendant population.
6. The Commission urges the States to revise their domestic legislation, to repeal provisions that directly or indirectly have a discriminatory impact on the Afro-descendant population, and to adopt legislation that specifically ensures the right to equality for the Afro-descendant population, and sanctions acts of racial discrimination.
7. The Commission recommends that the States adopt positive measures to eliminate racial discrimination and guarantee the access of Afro-descendants to basic services in conditions equal to the rest of the population.
8. Particularly, the States must adopt positive measures aimed at ensuring effective access to healthcare, maternal and reproductive health, housing, education and work.
9. Moreover, the States must adopt positive measures aimed at ensuring the political participation of Afro-descendant people in various public

institutions, since this participation will contribute considerably to the modification of racist patterns, and shed light on their concrete needs.

10. Additionally, the States must urgently adopt positive measures with a gender perspective to deal with the multiple discrimination suffered by Afro-descendant women and their special needs.
11. The Commission recommends that the States implement sensitization campaigns in order to: a) promote Afro-descendants awareness of their own rights; b) promote self-identification of Afro-descendant people; c) reveal the continuity of patterns of racial discrimination, especially regarding Afro-descendant women; d) promote the modification of discriminatory socio-cultural patterns against Afro-descendant people e) sensitize and train State officials, especially State law enforcement agents, judges and justice operators.
12. The Commission recommends that the States carry out the necessary processes to modify school curricula in order to recognize the contribution of the Afro-descendant population in the countries of the region; to promote a more inclusive education and to eradicate racial prejudices. These modifications seek the generation of national cultures that “promote real equality for persons in their every day life”
13. The Commission urges the States to revise their policies and legislation regarding citizen security in order to identify and eradicate the use of racial profiling as a valid mechanism of detention and investigation of persons.
14. In particular, the Commission urges the States to design performance protocols that sanction racial discrimination as an institutionalized performance pattern, and to implement adequate control and monitoring mechanisms regarding the effective implementation of these practices by law enforcement agents.
15. The States must, as a complement to the corresponding institutional modifications, establish and execute adequate sanction mechanisms for law enforcement agents that use racial profiling to perform their duties, and/or use disproportionate force and unjustified lethal force regarding the Afro-descendant population.
16. The Commission recommends that the States urgently adopt the necessary measures to ensure effective access to justice for the Afro-descendant population, as a fundamental mechanism of protection of their human rights.

17. Most importantly, the States must promote juridical and programmatic measures to remove obstacles that the Afro-descendant population faces in order to carry out complaints about social discrimination.
18. The States must establish simple and expedient actions for racial discrimination cases, and carry out promotional campaigns informing the Afro-descendant population of their rights, as well as actions and mechanisms that they can activate if these rights are violated.
19. Moreover, the States must ensure the material conditions for access to justice, regarding access to Courts, provision of free-of-charge legal aid, judicial costs and complexity of the judicial procedures.
20. Additionally, the States must adopt and disseminate suitable mechanisms so that Afro-descendant girls and women can report physical and sexual violence (including sexual harassment and rape).
21. The Commission recommends that the States implement the necessary measures in order to remove or modify those regulations and practices that lead to racial bias in the criminal justice system. In particular, the States must advance efforts to gather information about the judicial activity and about the Afro-descendant people deprived of liberty, in pre-trial detention, convicted or in a psychiatric institution.
22. Moreover, the States must ensure proportionate representation of the Afro-descendant population in the criminal justice system.
23. The Commission urges the States that have not yet adopted affirmative action measures for the Afro-descendant population to implement them in the most effective way, respecting the characteristics and the particularities of this population.
24. Affirmative action measures must prioritize the inclusion of the Afro-descendant population in all levels of the labor market, the educational spheres, and the private and public sectors. Affirmative action measures must also strengthen the inclusion of the Afro-descendant population in public decision-making.
25. To that end, the States must create specialized institutions and provide them with trained human resources, and sufficient financial resources. Additionally, due to the especial requirements of legitimacy for affirmative action measures, the States must establish suitable indicators on these measures and implement the corresponding supervision and assessment mechanisms.

26. The States must set up incentive programs for the private sector so that Afro-descendant people are hired in proportion to their demographic representation.