# INTER-AMERICAN CONVENTION AGAINST RACISM AND ALL FORMS OF DISCRIMINATION AND INTOLERANCE

## POSITION PAPER No.4

## *COLLECTIVE CLAIMS AND THE DRAFT INTER-AMERICAN CONVENTION AGAINST RACISM AND ALL FORMS OF DISCRIMINATION AND INTOLERANCE*

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May 2009

**Contents**

## Preface

The Organization of American States is discussing the adoption of an "Inter-American Convention against Racism and All Forms of Discrimination and Intolerance" (Draft Convention). The University of Texas School of Law Human Rights Clinic, in partnership with the Observatorio de Discriminación Racial (Racial Discrimination Observatory) of the University of Los Andes, Colombia, has prepared the following series of papers to inform the negotiation process of the Draft Convention. The purpose of the papers is to further and strengthen the negotiation process of the Draft Convention and to facilitate the participation of civil society organizations. The papers analyze particular areas of the Draft Convention identified as problematic.

The first paper, drafted by Kimberly Kamienska-Hodge and John Lajzer, explains the benefits of a narrowly focused convention that only addresses racial discrimination, and the detriments of a broad scoped convention that addresses multiple forms of discrimination. The second paper, drafted by Sara Leuschke, examines the 28 grounds currently included in the Draft Convention in the context of the international community's approach to discrimination. The first and second papers advocate for a Draft Convention focused only on racial discrimination. The third paper, drafted by Juan Zarama and Héctor Herrera, highlights the importance of recognizing collective dimensions of discrimination, particularly with regard to historically marginalized groups, like indigenous peoples and afrodescendants, and exposes the arguments in favor of the inclusion of collective rights in the Draft Convention. The forth paper, drafterd by Annie Depper, surveys the collective claims mechanisms available in international and domestic laws, and advocates the inclusion of a collective claims mechanism in the Draft Convention. The fifth and final paper, drafted by María Laura Rojas and Camila Soto, identifies the need the need of the inversion of the burden of proof in cases of discrimination, and advocates for a broad regulation of the burden of proof in the Draft convention. The first, second and forth papers were written under the supervision of Ariel E. Dulitzky. The third and fifth papers were written under the supervision of César Rodríguez Garavito, Nelson Camilo Sánchez León and Isabel Cavelier Adarve.

## 1. Introduction

In its simplest form, a collective claim is brought to protect the rights of more than one person. In practice, there are multiple forms of collective claims. To date, the most common form of collective claim is one in which multiple individuals are represented, and every individual represented is named in the complaint. This type of collective claim fails to meet the needs of modern human rights issues. It is important that the Inter-American Convention Against All Forms of Discrimination and Intolerance (Inter-American Convention) go beyond this type of collective claim. The Inter-American Convention needs to include a collective claim mechanism by which claims may be brought on behalf of a group or collective without the requirement of naming the individual members.[1] Such a collective claim allows claims to be brought on behalf of communities, the citizenry as a whole, and marginalized groups, to name only a few of the beneficiaries.

Currently, the Draft Inter-American Convention Against All Forms of Discrimination and Intolerance (Draft Convention) provides no mechanism by which a collective claim may be brought. The purpose of this paper is threefold: 1) to provide a brief survey of collective claims available in international documents and the domestic laws of member states of the Organization of American States (OAS); 2) to explain the importance of providing a collective claim in the Inter-American Convention; and 3) to recommend a type of collective claim for inclusion in the Inter-American Convention.

## 2. Collective Claims in International Documents

Collective claims have yet to become a common inclusion in international treaties and conventions. This is most likely due to the fact that for its brief history, the focus in human rights law has been on the individual. The individual was the focus in the Universal Declaration of Human Rights, and continues to be the focus today in almost every international document. However, even in this individual-centered environment, the tide is starting to slowly change. Over the past twenty years, international actors and organizations have begun to examine the rights of indigenous groups, and with this, the rights of the collective. Mechanisms for collective claims are finding a place in international documents.

[1] Under the American Convention on Human Rights claims may be brought by of a "group of persons." American Convention on Human Rights art. 44. While Article 44 allows for claims to be brought on behalf of unnamed individuals, the group must be "specific and defined" and the individuals composing it must be identifiable. *Elías Santana et al v. Venezuela*, Pet. 453/01, Inter-Am. C.H.R., Report No. 92/03 (2003). This paper advocates the inclusion of a collective claim that goes beyond that provided for in the American Convention. Therefore, the term "collective claims" used in this paper refers to claims that may be brought on behalf of groups or collectives of possibly unidentifiable individuals.

## 2.1 Organization Party Representative Claims

The organization party representative claim is one brought by an unaffected organization on behalf of a group or collective of unnamed individuals. A mechanism for an organization party representative claim has been included in documents from the Council of Europe (CoE), the Organization of African Unity (African Union), and the International Labour Organization (ILO). A mechanism for an organization party representative claim was included in the Draft Optional Protocol to the Covenant on Economic, Social, and Cultural Rights, but was eventually dropped during negotiations.

The Additional Protocol to the European Social Charter Providing for a System of Collective Complaints (Additional Protocol) does just what its title suggests.[2] Article 1 provides organizations and entities with the right to bring claims on the behalf of groups of unnamed individuals before the European Committee of Social Rights.[3] Article 2 further provides a process by which a member state may recognize additional non-governmental organizations to bring claims against it.[4]

Since the Additional Protocol's entry into force, 54 collective complaints have been brought before the European Committee of Social Rights. For instance, in 2004 the European Roma Rights Center brought a complaint against Greece in which it alleged discrimination against Roma in Greece.[5] Autism-Europe brought a complaint against France in 2002.[6] The complaint alleged that France discriminated against persons with

[2] The Additional Protocol was opened for signature on November 9, 1995, and entered into force on July 1, 1998. To date, the Additional Protocol has been signed by 18 of the 47 members of the CoE, and ratified by 12 of the 47 members of the CoE.

[3] The Contracting Parties to this Protocol recognise the right of the following organisations to submit complaints alleging unsatisfactory application of the Charter: a) International organisations of employers and trade unions referred to in paragraph 2 of Article 27 of the Charter; b) Other international non-governmental organisations which have consultative status with the Council of Europe and have been put on a list established for this purpose by the Governmental Committee; c) Representative national organisations of employers and trade unions within the jurisdiction of the Contracting Party against which they have lodged a complaint. The Additional Protocol to the European Social Charter Providing for a System of Collective Complaints art. 1.

[4] (1) Any Contracting State may also, when it expresses its consent to be bound by this Protocol, in accordance with the provisions of Article 13, or at any other moment thereafter, declare that it recognises the right of any other representative national non-governmental organisation within its jurisdiction which has particular competence in the matters governed by the Charter, to lodge complaints against it.

(2) Such declarations may be made for a specific period.

(3) The declarations shall be deposited with the Secretary General of the Council of Europe who shall transmit copies thereof to the Contracting Parties and publish them. The Additional Protocol to the European Social Charter Providing for a System of Collective Complaints art. 2.

[5] *European Roma Rights Center v. Greece*, Complaint No. 15/2003 (8 December 2004).

[6] *International Association Autism-Europe v. France*, Complaint No. 13/2002 (No Specific Date Given).

Autism, depriving them of the benefit of the right to education, as contained in the European Social Charter.[7]

In addition to collective claims brought based on specific violations, the case law of the CoE indicates that abstract claims may be brought as well. In 2007 the International Centre for the Legal Protection of Human Rights (INTERIGHTS) brought an abstract claim against Croatia.[8] INTERIGHTS asserted that Croatia's schools failed to "provide comprehensive or adequate sexual and reproductive health education for children or young people."[9]

The African Union also provides for an organization party representative claim. Article 56 of the African Charter on Human and Peoples' Rights (ACHPR) allows for organization party representative claims to be brought before the African Commission on Human and Peoples' Rights (African Commission).[10] The African Commission has addressed multiple claims brought to it by NGOs and other organizational entities that allege injuries to groups of unnamed individuals and collectives. For example, in 1999 the African Commission decided *Amnesty International and Others v. Sudan*.[11] Amnesty International, the *Comité Loosli Bachelard*, the Lawyers Committee for Human Rights, and the Association of Members of the Episcopal Conference of East Africa brought the claim alleging multiple human rights violations following the July 30, 1989 coup in Sudan. Without naming any individual victims, the organizations brought claims of arbitrary arrests and detentions, ill treatment, torture, and extra-judicial executions, to name a few.

In 2000, the *Association pour la Defence des Droits de l'Homme et des Libertés* brought a claim against Djibouti.[12] The organization claimed "a series of human rights abuses against members of the Afar ethnic group committed by government troops in areas of renewed

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[7] *Id.*; Article 15 of the European Social Charter provides for "The right of the physically or mentally disabled persons to vocational training, rehabilitation and social resettlement." Article 17 of the European Social Charter provides for "The right of mothers and children to social and economic protection."

[8] *International Centre for the Legal Protection of Human Rights (INTERIGHTS) v. Croatia*, Complaint No. 45/2007 (No Specific Date Given).

[9] *Id.*

[10] Communications relating to human and peoples' rights referred to in [Article] 55 received by the Commission, shall be considered if they: (1) Indicate their authors even if the latter request anonymity, (2) Are compatible with the Charter of the Organization of African Unity or with the present Charter, (3) Are not written in disparaging or insulting language directed against the State concerned and its institutions or to the Organization of African Unity, (4) Are not based exclusively on news discriminated through the mass media, (5) Are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged, (6) Are submitted within a reasonable period from the time local remedies are exhausted or from the date the Commission is seized of the matter, and (7) Do not deal with cases which have been settled by these States involved in accordance with the principles of the Charter of the United Nations, or the Charter of the Organization of African Unity or the provisions of the present Charter. African Charter on Human and Peoples' Rights art. 56; The ACHPR was adopted in June 1981, and entered into force on October 21, 1986. All members of the African Union have ratified the ACHPR.

[11] *Amnesty International and Others v. Sudan*, African Commission on Human and Peoples' Rights, Comm. No. 48/90, 50/91, 52/91, 89/93 (1999).

[12] *Association pour la Defence des Droits de l'Homme et des Libertés v. Djibouti*, African Commission on Human and Peoples' Rights, Comm. No. 133/94 (2000).

fighting with the FRUD [(*Front pour la Restauration de l'Unité et la Démocratie*)]."[13] No individual claimants were named in the claim as the claim was brought on behalf of a collective.

Abstract claims are also allowed by the African Union. The Civil Liberties Organization brought an abstract claim against Nigeria in 1995.[14] The Civil Liberties Organization alleged that the ACHPR was violated through two decrees enacted by the Nigerian government: the Constitution (Suspension and Modification) Decree No. 107 of 1993 and the Political Parties (Dissolution) Decree No. 114 of 1993.[15] These decrees suspended the Nigerian Constitution, prohibited the examination of any decree promulgated after December 1983 by any Nigerian court, dissolved political parties, stripped the Nigerian courts of jurisdiction, and specifically nullified any domestic effect of the ACHPR.[16]

Organization party representative claims may also be brought before the African Court on Human and Peoples' Rights (African Court). Article 5 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (Protocol on the African Court) provides that:

> 3) The Court may entitle relevant Non Governmental organizations (NGOs) with observer status before the Commission … to institute cases directly before it, in accordance with article 34 (6) of this Protocol.[17]

Although the Protocol on the African Court allows for organization party representative claims to be brought before the African Court, the African Court has yet to receive any cases.[18]

Organization party representative claims are allowed through Article 24 of the Constitution of the International Labour Organization.[19] The language of Article 24 allows for claims to

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[13] *Id.*

[14] *Civil Liberties Organization v. Nigeria*, African Commission on Human and Peoples' Rights, Comm. No. 129/94 (1995).

[15] *Id.*

[16] *Id.*

[17] Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights art. 5; Article 34(6) provides that, "At the time of ratification of this Protocol or any time thereafter, the State shall make a declaration accepting the competence of the Court to receive cases under article 5 (3) of this Protocol. The Court shall not receive any petition under article 5(3) involving the State Party which has not made such a declaration. Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights art. 34(6); The Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights was adopted on June 9, 1998, and entered into force on January 25, 2004. To date, 49 of the 53 member countries of the African Union have signed the Protocol, and 25 of the 53 member countries have ratified the Protocol.

[18] African International Courts and Tribunals, *African Court of Justice*, http://www.aict-ctia.org/courts_conti/acj/acj_home.html (last visited April 9, 2009).

[19] In the event of any representation being made to the International Labour Office by an industrial association of employers or of workers that any of the Members has failed to secure in any respect the effective observance within its jurisdiction of any Convention to which it is a party, the Governing body may communicate this representation to the

be brought to the ILO by labor associations. The identification of individual members of the association bringing the claim is not required. For example, in 1996 the World Federation of Trade Unions brought a complaint against France in which it alleged that France failed to observe the Labour Inspection Convention of 1947 and the Social Policy (Non-Metropolitan Territories) Convention of 1947.[20]

Abstract claims are also allowed before the ILO. The Confederation of Turkish Trade Unions (TURK-IS) brought an abstract claim against Turkey in 1996.[21] TURK-IS alleged that because Turkey's domestic legislation failed to give effect to the Termination of Employment Convention (TEC), Turkey was not in observance of the TEC.[22]

The Draft Optional Protocol to the Covenant on Economic, Social, and Cultural Rights provided a collective claim that allowed organization party representative claims.[23] During negotiations this article was removed.

Although collective claims are currently only allowed by three inter-governmental organizations, this seems to be the path of modern human rights law. The Inter-American Convention provides the OAS with a crucial opportunity to become part of the movement to collective claims.

### 2.2 Individual Party Representative Claims

The individual party representative claim is a collective claim brought by an individual on behalf of a group or collective of unnamed individuals. Individual party representative claims exist to a much greater extent in domestic legal structures than in international legal structures. In fact, some may argue that the individual party representative claim does not exist in international legal structures. However, careful examination of the claims allowed by the African Union supports the proposition that individual party representative claims exist in international jurisprudence.

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government against which it is made, and may invite that government to make such statement on the subject as it may think fit. Constitution of the International Labour Organization art. 24.

[20] International Labour Organization, Report of the Committee Set up to Consider the Representation Made by the World Federation of Trade Unions (WFTU) Under Article 24 of the ILO Constitution Alleging Non-observance by France of the Labour Inspection Convention, 1947 (No. 81) and the Social Policy (Non-Metropolitan Territories) Convention, 1947 (No. 82). ILO Doc. GB 265/12/7 (March 1996).

[21] International Labour Organization, Report of the Committee Set up to Consider the Representation Made by the Confederation of Turkish Trade Unions (TURK-IS) Under Article 24 of the ILO Constitution Alleging Non-observance by Turkey of the Termination of Employment Convention, 1982 (No. 158). ILO Doc. GB.268/14/5 (1997).

[22] *Id.*

[23] 1. The State Parties to the present Protocol recognize the right of international non-governmental organizations with consultative status before the United Nations Economic and Social Council to submit communications alleging unsatisfactory application of any of the rights set forth in the Covenant by a State Party.

2. Any State Party may also, at the time of ratification or accession to the present Protocol, or at any moment thereafter, declare that it recognizes the right of any representative national non-governmental organization within its jurisdiction, which has particular competence in the matters covered by the Covenant, to submit collective communications against it. Draft Optional Protocol to the Covenant on Economic, Social, and Cultural Rights, art. 3.

The language of Article 56 of the ACHPR allows the African Commission to hear a claim from anyone, as a representative of an individual or group claim, as long as the claim meets a set of criteria. (*See* text quoted above in footnote 10). Section 2 of Article 56 only requires that the authors of the claim be indicated. Also, although Article 56 does not specifically state that claims may be made on behalf of a group, it also does not specifically state that claims are to be made on behalf of individuals only. This is important because the majority of international documents that limit claims to those made by or on behalf of named individuals specifically use the word "individual" when describing the claim.[24]

It is also possible that individual party representative claims may be brought before the African Court. Article 5 of the Protocol on the African Court allows for the African Court to hear complaints from individuals.[25] "The [African] Court may entitle … individuals to institute cases directly before it, in accordance with article 34 (6) of this Protocol."[26] Again, like the ACHPR, the Protocol on the African Court fails to indicate whether individuals can bring complaints on behalf of groups or collectives, but that is not outside the scope of possibility.[27]

These different possibilities within the African Union are not surprising as the ACHPR not only protects individual rights but also collective or "Peoples'" rights. Further, like the OAS at its creation, the African Union is addressing and will continue to address serious and widespread human rights violations. To be most effective, the African Union allows a broad range of claims to be brought before it; including claims made by individual party representatives.[28]

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[24] The "Guidelines on the Submission of Communications," published by the Secretariat of the African Commission further supports the argument that individuals may bring claims on behalf of a group or collective of unnamed individuals. "Anybody, either on his or her own behalf or on behalf of someone else, can submit a communication to the [African] Commission denouncing a violation of human rights." The Guidelines provide for what must be included in a communication. The Guidelines do not require that the individual victims of the violation(s) be named. Secretariat of the African Commission on Human and Peoples' Rights, *Guidelines on the Submission of Communications, Information Sheet No. 2*.

[25] The Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights was adopted on June 9, 1998, and entered into force on January 25, 2004. To date, 49 of the 53 member countries of the African Union have signed the Protocol, and 25 of the 53 member countries have ratified the Protocol.

[26] Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights art. 5(3).

[27] The African Court is not yet fully operational. Therefore, the number of documents discussing the court is limited.

[28] It is expected that comparisons will be made between the language contained in the ACHPR, the Protocol on the African Court, and the American Convention on Human Rights (American Convention). Article 44 of the American Convention states that "Any person or group of persons, or any nongovernmental entity legally recognized in one or more member states of the Organization, may lodge petitions with the Commission containing denunciations or complaints of violation of this convention by a state party." The Inter-American Commission has held multiple times that while this language is broad, it does not allow claims to be brought on behalf of unnamed individuals. *See Elías Santana et al v. Venezuela*, Pet. 453/01, Inter-Am. C.H.R., Report No. 92/03 (2003). This interpretation maintains that at the heart of these complaints is the individual. The language used in the ACHPR and the Protocol on the African Court is equally broad. An argument could be made that it should be interpreted as the Inter-American Commission has interpreted Article 44 of the

## 3. Collective Claims in Domestic Laws of American States

Collective claims are found throughout the domestic laws of OAS member states. The familiarity that member states have with collective claims on the domestic level lends itself to an easy application of a collective claim under the Inter-American Convention. The collective claim is taking many forms in the Americas. These forms vary in who may bring the claim, who the claim may be brought against, and what types of issues the claim may address.

The public action and the popular action are the most common collective claims in civil law countries in the Americas. The main difference between the two actions is who may bring them. A popular action is usually brought by an individual on behalf of the citizenry. A public actions is usually brought by a government entity or other organization on behalf of the citizenry. There are multiple variations of both actions, and sometimes they exist under the same collective claim. Brazil, Argentina, Colombia, Panama, Peru, and Uruguay are just a few civil law countries in the Americas that provide a type of popular or public action.[29]

Another type of collective claim is one that is brought on behalf of a group smaller than the citizenry as a whole, but large enough to prevent the naming of individual claimants. These claims are often brought by organizations on behalf of their members, but can also be brought by individuals for groups of unnamed individuals. The form of such a claim is also varied among civil law countries of the Americas. Brazil provides for such a claim through its collective writ of security and authorized collective action.[30] Argentina's Constitution also provides for a collective writ of security (amparo).[31]

Not only are collective claims provided for in the laws of Latin American countries, but when the law fails to provide for such a claim, Latin American courts have found that such a claim exists. Argentina's judiciary has recognized a collective claim that was not contained in Argentina's laws. In *Miguel Ángel Ekmekdjián v. Gerardo Sofovich*, the

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American Convention. However, due to the emphasis the Secretariat of the African Commission has placed on the ability of anyone to bring a complaint on behalf of anyone else, and the nature of the African Union itself, such a comparison should not be made. Further, because the Inter-American Commission and Court have interpreted the broad language of Article 44 of the American Convention to preclude complaints made on behalf of unidentifiable individuals, the OAS should include a collective complaint in the Draft Convention with language specifically allowing complaints made on behalf of a group or collective of unnamed individuals.

[29] Constitution of Brazil (1988), Title II (Fundamental Rights and Guarantees), Chapter I (Individual and Collective Rights and Duties) art. 5 (LXXIII); Constitution of Brazil (1988), Title IV (The Organization of the Branches of Government), Chapter IV (Essential Functions of the Justice System), Section I (The Public Ministry) art. 129 (III).; Constitution of Argentina art. 43; Constitution of Colombia art. 88; Constitution of Panama art. 206(2); Constitution of Peru art. 200(5); Code of Civil Procedure of Peru art. 82; General Procedural Code, Law 15.983 (Uruguay) (1988) art. 42.

[30] Constitution of Brazil (1988), Title II (Fundamental Rights and Guarantees), Chapter I (Individual and Collective Rights and Duties) art. 5 (LXX); Constitution of Brazil (1988), Title II (Fundamental Rights and Guarantees), Chapter I (Individual and Collective Rights and Duties) art. 5 (XXI).

[31] Constitution of Argentina art. 43.

Supreme Court of Argentina recognized a collective right of reply.[32] Similar to Argentina, Venezuela's judiciary has recognized a collective claim regardless of the absence of legislation. "[I]n *Cruz del Valle Bermúdez v. Ministry of Health and Social Welfare* [the Venezuelan Supreme Court] allowed a substantial number of indigent AIDS patients to sue on behalf of all similarly situated individuals to force the government to provide necessary treatment."[33]

The United States has a long history of providing for collective claims. In contrast to Latin American countries, essentially all collective claims in the United States come under the umbrella of one mechanism. The vast majority of collective claims in the United States, termed "class actions," come under one rule: Rule 23 of the United States Code of Civil Procedure. Rule 23 sets out the requirements and criteria of a class action. Rule 23 does not specifically state who may bring a class action, but many courts have gleaned from the language of the rule that the person or group who brings the action must be a member of the class. This means that the person or group bringing the claim "ha[s] the same basic interests and the same alleged injuries as the class members."[34] Class actions can be brought against public or private individuals or organizations.

Perhaps the most important requirements for a class action are listed under 23(a). As a prerequisite to class certification, the class must show numerosity, commonality, typicality, and adequacy of representation. To meet the numerosity requirement, the plaintiff must show that the members of the class are so numerous that joinder of all of the members would be impracticable.[35] Also, the injuries of the class members must be alike. Commonality requires that the case present "questions of law or fact common to the class."[36] Under 23(a)(3), the typicality requirement, "the claims or defenses of the representative parties [must be] typical of the claims or defenses of the class."[37] Rule 23(a)(4) requires that "the representative parties will fairly and adequately protect the interests of the class."

The Canadian Federal Rules provide for collective claims, termed "class proceedings."[38] Canadian class proceedings are very similar to American class actions.

Although the vast majority of collective claims are brought under Rule 23, United States law provides for other types of collective claims. Similar to the "popular action" in Latin

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[32] *Ekmekdjián v. Sofovich*, Supreme Court of Argentina (ASCJ), Judgment 315.1503 (7/7/1992)
[33] Oquendo, Ángel R., *Latin American Law* 712 (Foundation Press) (2006); *Cruz del Valle Bermudez et al. v. Ministry of Health and Social Action*, Supreme Court of Venezuela (Political-Administrative Chamber), Decision No. 916, Court File No. 15.789 (1999).
[34] Klonoff, Robert H., *Class Actions and Other Multiparty Litigation* 31 (Thompson West 1999) (2007).
[35] FED. R. CIV. P. 23(a)(1).
[36] FED. R. CIV. P. 23(a)(2).
[37] FED. R. CIV. P. 23(a)(3).
[38] Canadian Federal Rules, Canadian Regulations 98-106, Part 5.1.

American countries, some United States statutes provide for "citizen suits." Such suits are provided for under the Federal Election Campaign Act, the Clean Air Act, and the Federal Water Pollution Control Act, to name a few.[39] Through citizen suits, individuals can make claims against policies or actions that injure society as a whole.

## 4. Conclusion

The reasons supporting the inclusion of a collective claim in the Inter-American Convention are so numerous that it is surprising that such a mechanism has not already been included. First, and perhaps the most obvious reason, is that the Draft Convention protects collective rights. Article 3 provides that:

Every human being has the right to the equal recognition, enjoyment, exercise, and protection of all human rights and fundamental freedoms enshrined in their domestic law and in the international instruments applicable to the States Parties, at both the individual and collective levels.

Article 4 recognizes the collective rights of indigenous peoples and Afro-Descendants, specifically mentioning the right of collective action. Article 5(x) defines as discriminatory "any restriction or limitation of the use of the language, traditions, customs and culture of persons or groups who are members of minorities or vulnerable groups, in public or private activities." Without a mechanism through which groups can assert these rights, the language quoted above is practically useless. To protect collective rights, the collective must be allowed to bring a cause of action.

A collective rights mechanism also lends itself to judicial efficiency. Under the current Draft Convention, each individual of a group would have to bring his or her own claim before the Inter-American Commission or Court to assert their piece of a collective right. Although these cases could be consolidated, listing each individual claimant, there would still be the possibility that later claims may be brought by individuals suffering the same injuries who were not included in the first action. With the inclusion of a collective claim, all individuals, named and unnamed, suffering from the same injury would be covered by the litigation. The time and money saved by the Inter-American Commission or Court in hearing one consolidated claim could be spent addressing a greater number of claims each year.

The remedies available for the settlement of individual claims and the settlement of collective claims are very different. For the individual, the remedy is usually specific only to the individual who brought the claim. This remedy is often in the form of monetary damages. While the individual bringing the claim benefits from receiving monetary

[39] 2 U.S.C. § 437(g); 42 U.S.C. § 7604; 33 U.S.C. § 1365.

damages, a much broader remedy could be achieved with a collective claim. Collective claims may bring policy change, a remedy that very few individual claims ever produce. With the remedy of policy change, there is a possibility that lives outside of the litigation will be positively impacted. Further, collective claims do not necessarily bar the use of monetary damages as a remedy. A number of collective claims throughout the Americas allow for monetary damage awards.

At the heart of the current claim mechanism under the Draft Convention is the individual. While it is important to recognize the position of the individual, and the right of the individual to bring claims, it must also be understood that many individuals do not bring claims. Thousands of individuals fail to bring claims each year; claims that are likely meritorious. There are multiple reasons for this: fear of repercussions from the a government or a private individual or group; concern for monetary cost; concern for the amount of time necessary to bring the action. A collective claim would allow these people to bring claims as a group. Under collective claims, individuals who do not wish to be named as plaintiff can take comfort in the fact that their name does not have to appear on the claim. Further, the time and money expended by the individual would be at a minimum.

The nature of discrimination lends itself to a collective claim. Discrimination often occurs against a group. While individuals may be injured, the target is the group. This is often the case with structural and institutional discrimination. A collective claim would allow such discrimination to be addressed.

Finally, the world, both in international and domestic law, is moving towards the inclusion of collective claims. Multiple Latin American countries are beginning to include collective claims in their laws. Collective claims have a solid base in the laws of the United States and Canada. These claims have stood the test of time, and continue to play a major role in American and Canadian jurisprudence. Regional and international inter-governmental organizations are taking notice of the rights of the collective, and with this, beginning to include mechanisms in their documents by which the collective can assert its claim. The OAS should not only state that collective rights are protected in the Inter-American Convention, but allow a mechanism for collective claims. With the inclusion of a collective claim in the Inter-American Convention, the OAS will better protect the rights of its member states' citizens, and will be at the forefront of modern human rights law.

This paper will not attempt to outline specific inclusions in a collective claim adopted by the OAS, but some issues need to be kept in mind when creating such a claim: 1) the similarity of injuries between group members; 2) the adequacy of representation; 3) the effects of *res judicata*; 4) the remedies made available; and 5) the ability to bring abstract claims.