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The UN World Conference Against Racism: A Race-Ethnic and Gender Perspective

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*by Celina Romany and Katherine Culliton**

Introduction

Over 10,000 delegates attended the United Nations World Conference Against Racism, Xenophobia, and Related Forms of Intolerance (WCAR) in Durban, South Africa at an historic moment. Only seven years earlier, the mobilization of worldwide protest condemning racism as a crime against humanity through the UN system played a significant role in the dethronement of apartheid in South Africa. South Africans were proud to host the WCAR.

For women, the WCAR was a unique opportunity to expand conceptions of international human rights that would work to eradicate racial discrimination at national levels. The conference presented a forum for further refining the concept of intersectionality, or the multiple discriminations that women suffer as a result of their multiple identities, for example, as Black and indigenous women. The opportunity to develop an international language of protection and redress to better reflect women's en-gendered realities was a central piece of their agendas at the conference. In Durban, a pioneering spirit evolved for developing new frameworks of human rights protections and collaborative networks to map a future advocacy agenda.

Few women represented Latin American government delegations at the WCAR, although large numbers of Latin American women were present as NGO delegates. Latina NGO delegates were successful in convincing their governments to adopt concrete measures to remedy the multiple forms of discrimination that affect Afro-descendent and indigenous women in Latin America. Many Latin American governments have denied the existence of racism and have not adopted legal remedies to address this problem. Accordingly, racism has been practiced with impunity throughout Latin America.

Intersectionality of Race, Ethnicity, and Gender

When racism is compounded with other forms of discrimination, such as gender discrimination, women face an even greater disadvantage in asserting their rights and freedoms. For example, Afro-descendent Brazilian women comprise the lowest socio-economic strata of Brazilian society, and are commonly denied the right to work on the basis of race. It is typical to find job announcements in Brazil searching explicitly for white women or for women of "good appearance," a code phrase for white or light-skinned.

Throughout the Americas, indigenous women are excluded from the political process and are routinely denied the right to education. In Mexico, violence against women and trafficking in women are predominately directed against indigenous women. Similarly, women of color in the United States suffer from a combination of race, ethnicity, and gender discrimination. The law placed people in one category or another so that an African American woman experiencing harassment at work had to choose between making her case based either on race or gender, but not both. Until the WCAR, national, regional, and international legal systems had never recognized these compound forms of discrimination.

Credit: Daniel Nina

The REG Justice Affirmative Action Workshop at the NGO Forum of the WCAR.

The WCAR Processes

In preparation for the WCAR, a series of regional Preparatory Conferences (PrepComs) were held in which UN member nations, lobbied by NGOs, defined the WCAR agenda and made resolutions to end racism and related forms of discrimination. None of the preparatory work was controversial. The atmosphere at the PrepComs was very positive as people and governments took steps to understand and put an end to discrimination. The WCAR processes, however, became mired in controversy.

The tensions surrounding the conference corresponded with the broad scope of the WCAR's agenda. Considering that the WCAR was to address racism, xenophobia, and "related forms of intolerance," the conference agenda included hundreds of issues, such as the caste system in India, the treatment of indigenous people and immigrants in the U.S., the demands for the return of African homelands, and land reform throughout the Global South. The draft documents for the WCAR included a Draft Declaration with 131 provisions and a Draft Programme of Action with 264 provisions. The WCAR agenda was to address: "Sources, causes, forms and contemporary manifestations of racism, racial discrimination, xenophobia and related intolerance; Victims of racism, racial discrimination, xenophobia and related intolerance; Measures of prevention, education and protection aimed at the eradication of racism, racial discrimination, xenophobia and related intolerance at the national, regional and international levels; Provision of effective remedies, recourse, redress, compensatory and other measures at the national, regional and international levels; [and] Strategies to achieve full and effective equality, including international cooperation and enhancement of United Nations and other international mechanisms in combating racism,

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racial discrimination, xenophobia and related intolerance, and follow-up."

While the U.S. initially showed support and fully participated in the December 2000 Santiago WCAR PrepCom, it later threatened to withdraw and announced that it would boycott the WCAR if two items were not removed from the agenda: language denouncing Zionism as a form of racism, and the issue of reparations for slavery. The controversial language about Zionism as a form of racism was introduced only in one of nine PrepComs and was not present in the other regional and international PrepCom documents, all of which contained non-binding, draft language.

Through these processes, UN documents are negotiated among the various drafts and ideas are presented in the PrepComs. The issue of reparations for slavery was presented in all four regional and five international PrepComs, and most governments did not find it controversial. The WCAR meeting in Durban was to negotiate final UN documents addressing racism, xenophobia, and related forms of intolerance. Typically at a final UN Conference, governments agree to the provisions of the documents that they approve, make reservations to any provisions they do not approve, and may even register the reasons for their reservations in the final UN documents.

The WCAR was one of the most controversial and politically difficult UN conferences ever realized. Despite the controversy, Afro-descendent and indigenous women from Latin America persisted and succeeded in creating a strong anti-discrimination framework.

The U.S. went further than simply denouncing what it viewed as inflammatory language. The U.S. government, joined by the governments of some European nations, often threatened to leave the conference. Polarization escalated and delegates became more frustrated as the likelihood of a final consensus document dwindled, and agreements and withdrawals of the "offensive language" were unsuccessful. Finally, the United States decided to boycott the WCAR, and withdrew.

Press coverage of the Conference, particularly in the United States, highlighted the controversial discussions and omitted positive developments, such as the nearly unanimous agreement to adopt the substantive WCAR Programme of Action to take measures to understand, redress, and prevent racism and related forms of discrimination. The press also failed to mention that instead of boycotting the WCAR, the U.S. could have made reservations to unacceptable provisions of the final document. Many delegates felt that the U.S. was following the trend initiated when it abruptly announced its unilateral withdrawal from the 1972 Anti-Ballistic Missile Treaty and the Kyoto environmental agreements. Instead of withdrawing, the United States could have remained and contributed on many other aspects of the document.

The heated debates at the official WCAR did not definitively disrupt the efforts of NGOs to forge coalitions. Realizing that the success of the conference did not depend on the actions or omissions of the U.S. government was a turning point among Latina activists. Instead, Latinas at the WCAR worked hard to save their only chance to begin discussion of the widespread and egregious problem of racism in Latin America.

Accomplishments of Latin American Women at the WCAR

Efforts of Afro-descendent and indigenous women from Latin America to make themselves visible in an international arena such as the WCAR required the contextualization of the WCAR to fit their realities, instead of vague, generalized ideas about racism and discrimination. The WCAR was one of the most controversial and politically difficult UN conferences ever realized. Despite the controversy, Afro-descendent and indigenous women from Latin America persisted and succeeded in creating a strong anti-discrimination framework.

The seeds planted in previous international conferences and in the WCAR preparatory meetings served as a reminder to NGOs that it is critical to remain focused and not become distracted by the most visible political issues. Some NGO delegates were conscious of the unprecedented opportunity for building coalitions, sharing experiences, gaining strength, and strategizing. Delegates from Latin America interacted and strategized about the affirmative actions necessary to end racism and address the intersectionality of race, gender, and ethnic discrimination within a human rights paradigm. The Latin American women then shared their findings with the global Gender Commission, which issued a final statement including the Latin American affirmative actions strategy. African and Asian women found that the developments from Latin America were also applicable to the intersectionality of discrimination they experience.

Latina NGOs also took the opportunity to remind Latin American governments of the need to enforce the end result of the Preparatory Meeting held in Santiago, Chile, which produced one of the most progressive and complete PrepCom documents. At the WCAR, Latin American NGOs united, lobbying the Group of Latin American Countries (GRULAC) on the need to fulfill the commitments made in the Santiago PrepCom.

Summary of the Status of International Anti-Discrimination Law after the WCAR

After several months of hesitation and backpedaling on some of the action-oriented provisions calling for reparations, the UN Secretariat finally issued the WCAR Declaration and Programme of Action on January 3, 2002. Both final documents contain substantive language recognizing the intersectionality of discrimination, and calling for concrete actions to be taken by states and international organizations to correct race, ethnicity, and gender discrimination.

Unfortunately, the WCAR documents denouncing all forms of racism lack the approval of the U.S. government. The significant language contained in the final WCAR document, and the dialogues and debates generated by the WCAR processes, however, can still be useful. Moreover, customary international human rights law already contains the provisions necessary to redress discrimination. In 1948, Eleanor Roosevelt convinced the United Nations that the Universal Declaration of Human Rights (Universal Decla-

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ration) must contain the following language: all human beings are born free and equal in dignity and rights (Article 1); everyone is entitled to all the rights and freedoms set forth in the Universal Declaration without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status (Article 2); all are equal before the law and are entitled without any discrimination to equal protection of the law; and all persons are entitled to equal protection against any discrimination in violation of the Declaration and against any incitement to such discrimination (Article 7).

Further, the American Convention on Human Rights (American Convention) contains the following anti-discrimination provisions: Article 1.1 requires that the free and full exercise of the rights in the American Convention must be ensured "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." This language has been a powerful tool for the women's rights movement, and now must be utilized to account for all forms and intersections of discrimination experienced by Afro-descendent and indigenous women.

Under Articles 1 and 2 of American Convention, states must not only refrain from discriminating against individuals, they must also ensure protection of this right. States must take necessary measures to protect against human rights violations and are obliged to organize the state apparatus to guarantee the effective exercise of human rights. In particular, the judiciary must investigate, prosecute, and punish human rights violators. Article 8 provides due process guarantees for all. An effective remedy for discrimination must address the realities of the multiple and simultaneous forms of discrimination experienced by many women in the Americas.

Based on the American Convention, GRULAC agreed to take affirmative actions to address intersections of race, ethnicity, and gender discrimination. GRULAC representatives agreed to the Statement of the Gender Commission discussing the need to redress all forms and intersections of discrimination, which was presented to them in Spanish by Afro-descendent and indigenous women from the region at the WCAR on September 6, 2001. Each of the members of the GRULAC signed on to the final provisions of the WCAR Declaration and Platformme of Action, promising to take into account and redress the intersectionality of discrimination based on race, gender, and ethnicity.

Anti-Discrimination Precedents and the WCAR Final Documents

International human rights law includes compelling language denouncing and prohibiting race, ethnicity, and gender discrimination as violations of fundamental human rights. Basic human rights documents have been complemented by specific anti-discrimination treaties, such as the 1966 Convention on the Elimination of All Forms of Racial Discrimination (CERD) and the 1979 Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). International human rights law require that governments take affirmative measures to investigate, prosecute, and punish all forms of discrimination. This is clear from the language of the Universal Declaration (Article 8), the International Covenant on Civil and Political Rights (Article 2.3), the CEDAW (Article 1(c)), and the CERD (Article 6), which expressly require states to take concrete affirmative actions to remedy intentional and de facto discrimination, in both the civil-political and socio-economic rights arenas. Since participation in the WCAR, the UN committees charged with reviewing compliance with the CERD and the CEDAW are increasingly aware of, and are officially recognizing, multiple forms of discrimination. Coupled with the energy of the WCAR-NGO forum, this development can aid in the transformation of international and national anti-discrimination laws.

The right to be free from discrimination constitutes a centerpiece of a transformation agenda. The Inter-American system, which can provide significant leadership in this effort, must awaken and acknowledge this reality.

New international legal instruments are not necessary to enforce the right to freedom from discrimination. Yet enforcement of a de jure status awaits its de facto transformation. The right to be free from discrimination awaits real enforcement and the political will to realize the end of discrimination; as such, the status of international anti-discrimination law should be clear and unequivocal. The Latina strategy at the WCAR was to demand that governments provide remedies for discrimination, with or without the support of official WCAR documents.

A Latina Experience of Race Discrimination

Latinas' focus at the conference was on improving the life conditions of some of the most marginalized populations in Latin America. Afro-descendent and indigenous women are among the most marginalized populations precisely because their experiences of discrimination have yet to be addressed appropriately in Latin America. In its transition to democracy, Latin America can no longer afford to postpone the realization of multicultural democracies that acknowledge diversity in their conception of participatory democracy. Even though women and racial and ethnic "minorities" led the fight against political oppression during the era of Latin American dictatorships, the human rights culture that emerged during the period of transition to democracy still clings to a narrow characterization of civil and political rights.

Historically, formal legal structures dealt only with violations of political and civil rights, and did not take into account the right to freedom from discrimination, much less address the socio-economic implications of violations of this fundamental right. Thus, the marginalization of Afro-descendent and indigenous women in Latin America has not been addressed adequately through the traditional human rights model. The right to be free from discrimination constitutes a centerpiece of a transformation agenda. The Inter-American system, which can provide significant leadership in this effort, must awaken and acknowledge this reality.

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In Brazil, where the majority of the population is Afro-descendent, or in Central America, where much of the population is comprised of Indigenous Peoples, discrimination is an everyday reality, manifested in lack of access to civil-political and socio-economic rights. The effects are harsh, and include physical abuse, political exclusion, and socio-economic marginalization. The official denial of the existence of racism in countries like Argentina, Chile, and Uruguay, has enabled governments and private parties to practice discrimination with impunity.

The lack of access to resources provided by the World Bank and the Inter-American Development Bank, and the lack of access to the Inter-American political and legal systems, has produced a set of policies skewed in favor of the elite white male. Recent reports by the Inter-American Human Rights Commission and the Inter-American Development Bank describe a systemic failure to include Afro-descendents, Indigenous Peoples, and women in the regional human rights and development systems, resulting in policies of de facto discrimination. The WCAR was the first time that Afro-descendent and indigenous Latin American women were able to voice their concerns about discrimination at a formal conference. Most of these women had never had the opportunity to speak to their governments about racism, much less influence policy and secure promises to design and enforce concrete measures to counter discrimination.

"Affirmative action," broadly defined, is the guiding paradigm needed to combat the intersectionality of discrimination.

The new culture of human rights in Latin America and the adoption of human rights instruments at the constitutional level provide fertile ground for post-WCAR action. Every member of the GRULAC has already adopted the treaties necessary to redress all forms and intersections of discrimination in the region. The fact that such treaties are at the constitutional level means that, with creativity and political will, a new framework of rights can emerge. The adoption of human rights treaties as part of the constitutions of Latin American countries has enabled the rapid and successful development of women's human rights in the region.

The anti-discrimination treaty provisions from the Universal Declaration, the American Convention, the CEDAW, and the CERD are stronger than U.S. civil rights law, particularly in two respects: (1) effects of discrimination are sufficient proof of a legal violation, thus transcending the barriers that proof of intent usually present; and (2) the remedy must redress discrimination effectively, making available a broad spectrum of affirmative actions. The experience and expertise of the U.S. civil rights movement, however, could help inform the emerging Latin American civil rights movement. In fact, bridging North and South and sharing strengths may be key to the empowerment of both civil rights movements post-Durban.

Latin American Affirmative Actions

In 1988, the Inter-American Court of Human Rights (the Court) issued the *Velásquez Rodríguez* decision, interpreting Article 1.1 of the American Convention. According to the Court, Article 1.1 meant that states must take necessary measures to ensure protection against human rights violations by private actors, including the obligations to organize the state apparatus to guarantee the effective exercise of human rights. The Court also said that the judiciary must investigate, prosecute, and punish human rights violators. When the Inter-American system began working on the issue of violence against women, the *Velásquez Rodríguez* precedent was utilized to support the rule that states must take necessary measures to ensure the right to freedom from discrimination. States not only have obligations to investigate, prosecute, and punish the violators of women's human rights, but also to take all measures necessary, including legislative reforms and other affirmative actions, to remedy all forms of discrimination.

"Affirmative action," broadly defined, is the guiding paradigm needed to combat the intersectionality of discrimination. A more limited concept of affirmative action currently in place in the U.S., which stems from a more restricted constitutional framework than the one in place in many Latin American countries, can provide useful examples, but does not exhaust the possibilities of the broader concept Latin American women have in mind. The Latin American legal context has a more open and fluid relationship with the international and regional human rights framework, allowing for greater reform. It is necessary to take into account civil-political and socio-economic discrimination to redress all forms and intersections of race, ethnicity, and gender discrimination. Human rights law has already been utilized to mandate affirmative actions for women in Latin American legislatures, yet it has fallen short for Afro-descendent and indigenous women.

Quotas may be required to redress such discrimination and ensure the right to political participation for traditionally marginalized populations. In at least half of Latin American nations, quotas requiring the nomination of qualified women by the political parties are part of national legislation. Both unique elements of the new human rights system are present: statistics that represent disparities between genders in political participation or that evidence gender discrimination are sufficient proof of discrimination; and remedies must directly and effectively redress discrimination through affirmative actions.

This analysis, however, does not take into account discrimination based on race and ethnicity. Looking at the racial or ethnic composition of Latin American legislatures, a clear picture of discrimination surfaces. While numerical proof has yet to be generated, anyone who steps foot in a Latin American legislature or high executive office observes the effects of racism. Such disparities should be proof enough of discrimination. The next level of analysis must also take into account the intersections of race, ethnic, and gender-based discrimination that Afro-descendent and indigenous women experience. Remedies should be added to address race and ethnicity, and strengthened with regard to gender discrimination in all contexts.

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Chamber had remitted the case earlier in the year for possible adjustment of sentences. The new Trial Chamber increased Mucić's sentence from seven to nine years' imprisonment, decreased Delić's sentence from 20 years to 18 years, and left unchanged the 15 year sentence imposed on Landûo.

In its Appeals Judgement on the merits of February 2001, the Appeals Chamber had allowed the Prosecution's challenge regarding the seven year sentence imposed on Mucić, had quashed several convictions on appeal in relation to Delić, and had dismissed the cumulative convictions under Article 3 of the ICTY Statute against all three defendants. It had remitted the case to a newly constituted Trial Chamber (to be appointed by the ICTY President) to decide on any adjustments to the original sentences imposed by the Trial Chamber ruling in first instance in 1998. This "adjustment" was not meant as a re-hearing.

With respect to Mucić, the Appeals Chamber had found the prison sentence of seven years inadequate and had indicated that "a heavier sentence of a total of around ten years imprisonment" would be more appropriate, leaving aside the possible impact of the reversal of some convictions. The Trial Chamber took this indication into account and changed Mucić's sentence to nine years' imprisonment. The Trial Chamber adjusted Delić's sentence downward from 20 years to 18 years, based on "the totality of [his] criminality," after the Appeals Chamber had quashed his conviction on two counts.

Following its dismissal of the cumulative convictions, the Appeals Chamber had stated that "the final sentence should reflect the totality of the culpable conduct and overall culpability of the offender." Within this context, the Trial Chamber found that the "totality of . . . criminal conduct" of all three defendants had not been reduced due to the quashing of the cumulative convictions, and it allowed no adjustment on this ground. All three received credit for time already served.

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Despite the controversy surrounding the WCAR, affirmative actions can be taken. Fundamental human rights law, from the 1948 Universal Declaration to the 1966 American Declaration, already contains provisions protecting all of the rights required to redress all forms and intersections of discrimination. Furthermore, last year, the CEDAW and the CERD Committees charged with reviewing compliance with these gender and race discrimination treaties resolved to take into account the intersectionality of discrimination.

Conclusion

The WCAR focused not only on law, but more importantly, on the barriers to attaining justice created by the multiple manifestations of race, ethnicity, and gender discrimination. Latinas discussed the urgent need to advance affirmative action and lobbied their governments to take concrete action based on fundamental human rights obligations. Current proposals and projects, which represent just a sample of the work that lies ahead, include the following: (1) enforcement of anti-discrimination laws in the areas of housing, employment, and education for Afro-descendent and indigenous women who have been relegated to work as domestic or sexual servants and has been denied access to fundamental rights; (2) use of numerical quotas to ensure inclusion of qualified Afro-descendent and indigenous women (and men) in Latin American political systems; (3) analysis and monitoring of all government, World Bank, and Inter-American Development Bank programs to ensure social inclusion and correct discriminatory distribution of resources; (4) human rights education for Afro-descendent and indigenous women advocates and their allies; and (5) education of the international human rights community about discrimination experienced by Afro-descendent and indigenous women.

These projects fit the post-WCAR agenda of building effective anti-discrimination policies based on applicable human rights law. The glaring disparity between access to rights and resources encountered by marginalized populations is adequate proof of discrimination under fundamental human rights law. Basic human rights law requires the effective remedy of such discrimination through concrete, affirmative, and systemic measures. The Inter-American human rights system could provide support for the necessary affirmative actions to remedy long-standing, systemic discrimination in Latin America.

As international anti-discrimination law demonstrates, human rights instruments from the past half-century have recognized the urgent need to redress all forms of discrimination. The international human rights community must be mindful that broad interpretation, effective implementation, and enforcement of anti-discrimination law is crucial in protecting human rights and fundamental freedoms, particularly for marginalized populations.

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