

SPEAK NOW, OR FOREVER
(BE FORCED TO) HOLD YOUR PEACE: THE
CONVENTIONS AGAINST ALL FORMS OF
DISCRIMINATION AND INTOLERANCE
AND THEIR CHALLENGE TO FREEDOM
OF EXPRESSION IN THE AMERICAS

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INTRODUCTION

In June 2013, the Organization of American States (the “OAS”) adopted the two sister Inter-American Conventions Against Racism, Racial Discrimination and Related Forms of Intolerance, and Against all Forms of Discrimination and Intolerance (hereinafter, “CAAFDI”).¹ These new instruments greatly broaden the scope of the prohibited grounds of discrimination beyond that of all other treaties on the matter.² Furthermore, these instruments create a wide range of state obligations and duties in promoting equality and eliminating discrimination and intolerance.³ At the time of this writing they have not been ratified by any state in the region.⁴

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¹ Organization of American States (hereinafter “OAS”) available at: www.oas.org, G.A. Res. 2805 (XLIII), *Inter-American Convention Against Racism, Racial Discrimination, and Related Forms of Intolerance* (June 5, 2013), *Inter-American Convention Against All Forms of Discrimination and Intolerance*, June 5, 2013, G.A. Res. 2804 (XLIII).

² *Id.*

³ *Id.*

⁴ Status of Ratifications, OAS.org, http://www.oas.org/dil/treaties_signatories_ratifications_year_text.htm#2013 (last reviewed March 4, 2016). As of this writing, *Inter-American Convention Against Racism, Racial Discrimination, and Related Forms of Intolerance*, had been signed by 11 of the OAS members, and *Inter-American Convention*

Although there are many aspects of these treaties that may be subject to criticism in matters of both law and policy,⁵ this paper deals exclusively with the issue of “intolerance” as a forbidden act or expression, including the duties undertaken by the states with regards to this novel concept.⁶

The central claim of this work is that the definition of intolerance and the state’s duties to combat it – under both Conventions – would fundamentally alter the content and protection of freedom of expression, as we have come to know it and protect it in the Inter-American Regional System.

By reviewing the projected CAAFDI under the standards set out by Inter-American Court and Commission on Human Rights, it becomes clear that this proposal would never pass muster if it were enacted as a matter of municipal legislation, for it would infringe on the core elements of freedom of expression.

Against All Forms of Discrimination and Intolerance had been subscribed to by 9 of the member states, with no ratifications for either one.

⁵ To name a few, the Canadian delegation expressed reservations not only with respect to potential conflicts with freedom of expression, but also with freedom of religion and association. The decision of the negotiators to establish a threshold of only two ratifications for the entry into force of the Conventions under Article 20 is preposterously low, and it would not reflect a broad agreement among the states of the Americas on these issues that would justify enshrining them in international law as a multilateral treaty; and Article’s 4.viii provision on incorporation or integration of international jurisprudence into the Convention standards must receive proper attention by those called upon to vote on whether or not to adopt the conventions, keeping in mind the potential outcomes that this would entail and the substantive differences that exist between different regional regimes.

⁶ While it is true that several instruments have referred to intolerance in the past, it is the case that no resolution, declaration or binding agreement has previously attempted to define what intolerance means as a legal concept. The closest would be the 1995 United Nations Education and Scientific Cultural Organization (hereinafter “UNESCO”) Declaration of Principles on Tolerance, which in any case attempted to define the concept positively. See, UNESCO Res. 5.61, *Declaration of Principles on Tolerance* (Nov. 16, 1995); see also, United Nations General Assembly, G.A. Res. 36/55, *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, ¶ 171 (Nov. 25, 1981), which considered “intolerance and discrimination” as a single action, and adopted language commonly used for the conceptualization of discrimination; World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance, *Programme of Action, Agenda item 9*, adopted on September 8, 2001 in Durban South Africa, U.N. Doc. A/CONF.189/5 (Sept. 8, 2001); Report of the World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance, U.N. Doc. A/CONF.189/12 (Sept. 8, 2001); Report of the World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance, U.N. Doc. A/CONF.189/12 (Sept. 8, 2001); Council of Europe, Comm’n against Racism and Intolerance, *ECRI General Policy Recommendation No. 11, on Combating Racism and Racial Discrimination in Policing*, COE Doc. CRI (2007)39 (June 29, 2007).

This work is divided into three sections. The first part is devoted to a brief overview of the drafting history of the proposed Conventions. The purpose of the overview is to illustrate the concerns of the negotiating states with respect to the impact these instruments will have on freedom of expression and how they went unanswered throughout the process.

Part two looks at the way in which the Conventions are likely to be interpreted and applied in the states that become parties to them, showing that its provisions would directly undermine the core elements of freedom of expression, as clarified and expounded by the Commission and the Court.

The third and final section takes a look at the way in which these new Conventions would interact with the American Convention on Human Rights. This includes the possibility that the new Conventions may fundamentally alter the human right of freedom as it been acknowledged and protected to this day, and what this would mean for the ongoing project of international human rights as a whole.

I. BACKGROUND TO THE CONVENTIONS AND DISAGREEMENT OVER THEIR CREATION

In 2000, the General Assembly of the OAS (hereinafter the “General Assembly”) first adopted a resolution calling on the Permanent Committee on Political and Juridical Matters (hereinafter the “Permanent Committee”) to “consider the necessity” of drafting an instrument to “prevent, punish and eradicate racism and all forms of discrimination and intolerance.”⁷ This first resolution constituted a mandate for the Permanent Committee to test the waters and determine whether there was political will to create such an instrument.

Through Resolution No. 1774,⁸ the General Assembly instructed the Inter-American Juridical Committee (hereinafter the “Juridical Committee”) to draft an analysis of the issue of discrimination in support of the work that had been tasked to the Permanent Committee. This analysis should take into account the responses of states to the

⁷ OAS G.A. Res. 1712 (XXX), *Elaboración de un Proyecto de Convención Interamericana contra el Racismo y Toda Forma de Discriminación e Intolerancia*, (June 5, 2000).

⁸ *Id.*

questionnaire⁹ issued by the Permanent Committee, as a way of gathering their views on the matter.

The United States, unsurprisingly in light of its general approach to international law, made a point of noting that it did not consider a new Convention to be necessary and that the OAS should concentrate on enforcement of the existing instruments on the matter.¹⁰ This position was mirrored by Antigua and Barbuda.¹¹ It is noteworthy that only 13 states from the entire region actually answered the inquiry from the Juridical Committee, and only 11 of those answered that they considered the idea of creating the new Conventions as worthy of their efforts.¹²

The conclusions of the Juridical Committee in its response to the Permanent Committee reads in part that “it is not advisable to undergo the venture of negotiating and concluding a general Convention to prevent, punish and eradicate racism and all forms of discrimination and intolerance, insofar that this may be redundant and would produce an overlap with the consequence of generating serious and inevitable problems of interpretation, and would generate doubts and confusion over the determination of which rights and duties of the states would be part of former agreements and the new one.”¹³

With regard to the definition of intolerance, the draft proposals for the Convention went through three distinct phases. One issue that proves to be prominent in the drafting history is how little attention was paid to the definition of “intolerance” itself in the course of the eight years of negotiations, especially when we consider that its prohibition and eradication is one of the centerpieces of the proposal and directly linked to the state duties of prohibition and punishment of expressions of intolerance.

⁹ Department of International Law of the Secretariat for Legal Affairs of the Committee of Juridical and Political Affairs, *Preparation of a Draft Inter-American Convention Against Racism and All Forms of Discrimination and Intolerance (Background and Questionnaire)*, OEA/Ser.G CP/CAJP-1687/00 rev.2 (January 16, 2001).

¹⁰ Department of International Law of the Secretariat for Legal Affairs of the Committee of Juridical and Political Affairs, *Elaboración de un Proyecto de Convención Interamericana contra el Racismo y Toda Forma de Discriminación e Intolerancia: Estudio del tema en el sistema interamericano y en otros sistemas internacionales*, SG/SLA DDI/doc.6/01, 10 (July 12, 2001).

¹¹ *Id.* at 4.

¹² *Id.*

¹³ Inter-American Juridical Committee, *Report on the Elaboration of a Draft Inter-American Convention Against Racism and All Forms of Discrimination and Intolerance*, OEA/Ser.Q CJI/doc.80/02 rev.3, 12 (March 7, 2002).

Ultimately, concerns over the vagueness and breadth of the definition, and the potential conflicts between punishment of intolerance and the exercise of free speech, were only raised by a handful of states and civil organization. It does not appear to have been taken to heart by the Drafting Working Group (hereinafter the “Working Group”), or the rest of the negotiating states. As shown by the *travaux préparatoires*, during the process several states requested the opinion of the Inter-American Commission on Human Rights (hereinafter the “Commission”) in regard to the potential “free speech and intolerance conflict,” with the purpose to consider it when settling on a definition. However, the final concept was adopted without the record showing that the Working Group ever received or considered the Commission’s thoughts on the matter.

A. First Draft and Canadian Objections

The Working Group adopted the first draft of the definition of intolerance in April 2006 after consulting with states. It read:

“acts or manifestations of intolerance are those that convey disrespect for, denial of, and contempt for human dignity and for the richness and diversity of the world’s cultures and the modes of expressing the qualities of human beings.”¹⁴

The response (or lack thereof) from the negotiating states to this proposal is of little use in explaining what they thought of it. If they had concerns over the matter, the *travaux préparatoires* do not show them. The only recorded concerns were those of Argentina, which stated, “The proposed understanding of ‘intolerance’ in Article 1.5 is so broad that it could extend to criminal acts and to other acts that are discriminatory but not criminal.”¹⁵ However, it is not very useful since it is not clear whether

¹⁴ Translated by the author, as it appears in the first draft of the proposed Convention Against Racism and All Forms of Discrimination and Intolerance, Article 1.5. Committee on Juridical and Political Affairs, *Anteproyecto de Convención InterAmericana contra el Racismo y Toda Forma de Discriminación e Intolerancia*, OEA/Ser.G CP/CAJP-2357/06 (April 18, 2006).

¹⁵ State of Argentina, *Comments by Member states on the Preliminary Draft Inter-American Convention Against Racism and All Forms of Discrimination and Intolerance*, OEA/Ser.G CAJP/GT/RDI-31/06 (November 3, 2006).

the delegation's fears were aimed at the broadness of the definition and the possibility of its overreach, or that it did not reach far enough.

Although the official documents of the record do not show other states voicing hesitations on the matter, subsequent consolidated reports on the drafts prepared by the Working Group make a note of the concerns expressed by "some delegations."¹⁶ The reports suggest that the problem shall undergo consultation with the Office of International Law on the proposed definition and its background. There is however no record of a response from the aforementioned Office.

The Canadian delegation's official comments are particularly illustrative of the concerns with which we deal. Since the beginning, Canada consistently opposed the inclusion of a definition of intolerance to the draft Convention. Its commentaries and proposals show direct concern over the conflict that would arise between the proposal and existing human rights instruments.

In early 2008 the Working Group had prepared a consolidated draft proposal incorporating the comments and recommendations made by the states to the first drafts. By March, Canada had advocated for the elimination of "intolerance" as an operative concept.

In discussing then Article 5 – which would later on become part of current Article 4 of the CAAFDI on the duties of the state – Canada proposed a clause under which the identification of discriminatory acts and the appropriate responsive measures would be done "taking into consideration human rights and fundamental freedoms."¹⁷ The footnotes in the Canadian Comment Report clearly illustrate their apprehensions to a proposed framework that favored prohibition heavily over other possible measures to combat discrimination and intolerance.¹⁸ Canada argued that the rationale for their newly proposed clause was "to ensure that any measures taken are consistent with states' other human rights obligations."¹⁹

¹⁶ Committee on Juridical and Political Affairs, *Preliminary Draft Inter-American Convention Against Racism and All Forms of Discrimination and Intolerance*, OEA/Ser.G CP/CAJP-2357/06 rev. 7, 8 (May 8, 2007). (consolidation of state responses)

¹⁷ On the proposed "Chapter III. Acts and Manifestations of Racism, Discrimination, and Intolerance", Permanent Mission of Canada, *Comments of the Permanent Mission of Canada on the Consolidated Text of the "Draft Inter-American Convention Against Racism and All Forms of Discrimination and Intolerance"*, OEA/Ser.G CAJP/GT/RDI-71/08, 1 (March 18, 2008).

¹⁸ *Id.* at 2, n. ii.

¹⁹ *Id.*

Dealing with the proposed Article 5(i)²⁰ – which would then become current Article 4(i) – Canada commented negatively and suggested rewriting much of it since “The broad limitations called for in this paragraph could lead to clashes with other human rights, including freedom of expression (and in some cases freedom of religion)... What about personal views to that effect?”²¹ Further, Canada commented that, in general, the Convention should not consider the concept of “private activities” in the way in which it was currently being used throughout the proposal since “its scope is overly broad and could be construed as condoning, even calling for government action that would go beyond protecting people from discriminatory acts and their consequences to infringing guarantees of freedom of expression and belief as well as increase the role of the government in people’s private lives to an unacceptable level.”²²

Canada’s concerns were voiced consistently to no avail, as reflected in the final version of the CAAFDI that came out of the negotiations process. The lack of reception of its suggestions and concerns led to Canada’s official withdrawal from the negotiations on the treaty proposal by November of 2010, justifying its decisions by affirming that it “continue[d] to be concerned that many provisions of the current draft may undermine or be incompatible with international protection for human rights such as freedom of thought, belief and expression.”²³

B. Second Version After the 2007-2008 Period

By May 2008 the drafts of the treaty had undergone a series of modifications prompted by the comments of states and civil society organizations alike. However, the original concept of intolerance set out in the preliminary draft was almost unchanged, with the exception of

²⁰ Permanent Mission of Canada, *supra* note 15, quoting from the consolidated text of the draft conventions at page 2, “For the purposes of this Convention, and based on the definitions in the preceding Article and the criteria set forth in Article 1.1, the following are among the measures or practices that must be classified as discriminatory and prohibited by the state: (i) Public or private state financing support provided to racist and of unlawful discriminatory activities; or that promote intolerance, including the financing thereof”.

²¹ *Id.* at 3, n. iii

²² *Id.* at 4, n. marked as (*).

²³ Permanent Mission of Canada, *Note by the Permanent Mission of Canada Withdrawing from the Negotiations on the Draft Inter-American Convention Against Racism and All Forms of Discrimination and Intolerance*, OEA/Ser.G CAJP/GT/RDI/INF.21/10, 1 (November 30, 2010).

minor modifications. Thus, the second iteration of the definition was stated as “the set of acts or manifestations that convey disrespect, rejection, or contempt for human dignity and the richness and diversity of the world’s cultures, religions, ideologies, traditions, and human forms of expression, quality, and ways of being.”²⁴

As stated, by this point in time Canada had already requested the deletion of this concept altogether. Some unidentified delegations had expressed their concern that “the limitation in this Article may be considered a restriction on freedom of expression....”²⁵

On January 22, 2009, the Working Group hosted Ariel Dulitzky – former Assistant Executive Secretary for the Commission – who offered his comments on the working document. In regard to the definitions, he cautioned that if the decision was made to keep the proposed definition of intolerance, “a greater conceptual effort is[would] needed to provide it with specific content and not transform it into an all-encompassing concept entailing the prohibition by this Convention of many legitimate behaviors in democratic societies,”²⁶ in which political dissent will end up constituting a prohibited form of intolerance.

In a similar manner, and in reference to the same working definition of intolerance, the Juridical Committee weighed in on the matter through a written note issued on March 2010 to the Working Group. It echoed Dulitzky’s criticism in that the definition was “too broad and liable to be understood as including dissent, which is rather a characteristic of any democratic system.”²⁷

These observations were the first and most blunt criticisms to the proposal at that time. The concern was clear enough. As outlined, the prohibition of intolerance would no doubt involve a clash with the exercise of freedom of expression and perhaps other human rights. Yet, confronted with such warnings, the Working Group and the negotiating

²⁴ Committee on Juridical and Political Affairs, *Report of the Chair presented to the Committee on Juridical and Political Affairs on the Activities of the Working Group in the 2007-2008 Term*, OEA/Ser.G CAJP/GT/RDI-82/08, 14 (May 2, 2008).

²⁵ *Id.*

²⁶ Committee on Juridical and Political Affairs, *Analysis and Commentary on the Draft Inter-American Convention Against Racism and All Forms of Discrimination and Intolerance*, presentation of Dr. Ariel Dulitzky, OEA/Ser.G CAJP/GT/RDI-108/09, 4 (January 27, 2009).

²⁷ Fabián Novak Talavera, *Comentarios al Proyecto de Convención Interamericana contra el Racismo y Toda Forma de Discriminación e Intolerancia*, OEA/Ser.Q CJI/doc.339/09rev.2 ¶3 (March 19, 2010). (translated by the author).

states not only refused to back off; they doubled down and moved towards a definition that would place even greater and more direct restrictions on freedom of expression.

C. Final Version

Although not related with our discussed topic, it should be pointed out that by 2010 the negotiations had become deadlocked. The most contentious issue in the negotiations had been the scope of Article 1 with regards to the forbidden grounds or suspect categories of discrimination that were to be included in the final instrument. There was no agreement to be had between the states. Because of the impossibility to move forward with the negotiations, Antigua & Barbuda forwarded a proposal under which the existing draft convention would be split into two different instruments: a convention focusing on racism and racial discrimination and an additional protocol focusing on discrimination and all forms of intolerance. Thus, the negotiating parties adopted the decision to split the proposal which led to the approval of the two sister Conventions.²⁸

In April 2012, roughly a year before the final conventions were adopted, the Working Group continued to press on with the preparation of the drafts through “informal meetings” held in Washington, D.C. At the time, the definition of intolerance was unchanged from the previous iteration adopted in 2008.²⁹ The Mexico representatives once more indicated that the delegations were awaiting a statement by the Commission on the scope of freedom of expression.³⁰

²⁸ See, Committee on Juridical and Political Affairs, *Report of the Chair Presented to the Committee on Juridical and Political Affairs at the meeting of May 3, 2011, on the Activities of the Working Group during the period 2010-2011*, CAJP/GT/RDI-175/11 rev. 5 (May 11, 2011).

Although the official documents do not reflect the nature of the disagreement, some commentators have suggested that the impasse was reached on account of the inclusion of sexual orientation and gender identity and expression as forbidden grounds for discrimination. The states comprising the Caribbean Community (CARICOM) would not support the inclusion of said categories because of the lack of consensus on the issue of homosexuality within their countries and persistently objected throughout the negotiations process. See, Awaz Raoof, *The Inter-American Anti-Discrimination Conventions and the Concealed Challenges Ahead*, Oxford Human Rights Hub Blog (July 3, 2013), at: <http://ohrh.law.ox.ac.uk/the-inter-american-anti-discrimination-conventions-and-the-concealed-challenges-ahead>.

²⁹ *Supra*, note 22.

³⁰ It is unclear whether that statement by the Commission was in fact issued, but it is not available with the rest of the existing documentation on the drafting of the sister conventions. See, Committee

In March 2013, merely a month away from the adoption of the final version, the Mexican delegation presented its final definition suggestion, which would ultimately end up enshrined in the CAAFDI. Mexico's proposal would consider as intolerance not only the disrespect, rejection or contempt for the dignity of human beings, but also for their "characteristics, convictions, or opinions."³¹ This proposal would be accepted and agreed upon by the negotiating parties on April 2, 2013.³²

The negotiation process concluded after almost 8 years with the approval of the sister Conventions in June 2013. As we have seen through this brief outline, there were several instances in which the drafters were forewarned, both by the negotiating states and by independent third parties, that there were serious concerns with respect to the imminent conflict between the prohibition of intolerance and the exercise of freedom of expression.

It seems quite remarkable that, as late as a year before the agreement on the definition, and seven years deep into the negotiations process, the Working Group was still holding out for a statement on behalf of the Commission on whether or not the instruments would be compatible with existing human rights obligations. And yet, in spite of this, the Working Group chose to ignore the concerns and to press on and adopt a definition even more controversial than the previously criticized ones.

D. Prohibition of Intolerant Actions and Expressions as Legitimate Restrictions on Freedom of Expression

It is clear that most states either supported the inclusion of "intolerance" as a forbidden action or expression in the Convention³³ or

on Juridical and Political Affairs, *Report on the Informal Meeting of the Working Group to Prepare a Draft Inter-American Convention Against Racism and All Forms of Discrimination and Intolerance*, presented by the Vice Chair of the Working Group, OEA/Ser.G CAJP/RDI/INF.25/12 (April 4, 2012), page 2.

³¹ Committee on Juridical and Political Affairs, "*Cuadro que incorpora propuestas de los Estados miembros al proyecto de Convención Inter Americana contra el racismo, la discriminación racial y formas conexas de intolerancia*", document issued by the Working Group, OEA/Ser.G CAJP/GT/RDI-190/12 rev.13 (March 5, 2013), page 2.

³² Committee on Juridical and Political Affairs, *Draft Inter-American Convention Against All Forms of Discrimination and Intolerance*, presented by the Chair and approved at the meeting held on April 24th, 2013, OEA/Ser.G CAJO/GT/RDI-180/11 rev.17 (April 29, 2013).

³³ For instance, the Mexican Delegation supported the inclusion and considered indispensable to come up with an appropriate definition of the term since there was no precedent in the United

were at least indifferent or oblivious to its possible effects. The *travaux préparatoires* show no state defending the definition in the face of the criticism raised against it throughout the process. To the best of our knowledge, the only organization that went on the record defending the definition of intolerance as a forbidden act or expression under the CAAFDI was the Inter-American Institute for Human Rights (the "IIHR"), an institution based in Costa Rica, which shares direct ties to the Commission and the Court, both of which are members of its general assembly.

The IIHR issued an extensive comment on the working document and on the second definition of intolerance adopted in 2008.³⁴ The comment acknowledged that the concept had a breadth that would make it difficult to implement. It also included that racism and discrimination would express or would be manifestations of intolerance. Lastly, it would be best if, instead of conceptualizing intolerance, the Conventions specified manifestations of it.³⁵

More importantly, the IIHR defended that the prohibition of manifestations of intolerance was not an unlawful restriction to freedom of expression since this restriction would fall under Article 13(5) of the American Convention.³⁶ This states that "the expression 'any other similar (lawless) action' found in the Convention would broaden the scope of this standard and transcend any apology and may be extended to other manifestations."³⁷

Is the IIHR correct in its assessment? Its reasoning in favor of the penalization of 'intolerance' leads toward the question of what are the permissible limits or restrictions on freedom of expression under the

Nations framework, and considered that its incorporation might constitute a "high-level contribution" of the Inter-American system to the universal human rights system. Department of International Law of the Secretariat for Legal Affairs of the CIPA, *Final Report of the Special Meeting of the Working Group to Prepare a Draft Inter-American Convention Against Racism and All Forms of Discrimination and Intolerance*, OEA/Ser.G CAJP/GT/RDI-104/08 (December 17, 2008), page 5.

³⁴ *Supra*, note 22.

³⁵ Inter-American Institute of Human Rights, *Comments, Contributions and Recommendations to the working document, Draft Inter-American Convention against Racism and All Forms of Discrimination and Intolerance*, CAJP/GT/RDI/INF. 8/08, page 17, at <http://scm.oas.org/pdfs/2008/CP20987e.pdf>.

³⁶ OAS, *American Convention on Human Rights*, Article 13(5), "Any propaganda for war and any advocacy of national, racial, or religious hatred that constitute incitements to lawless violence or to any other similar action against any person or group of persons on any grounds including those of race, color, religion, language, or national origin shall be considered as offenses punishable by law."

³⁷ *Supra* note 33, at 18.

American Convention. It also suggests the question of whether the proposed new restrictions of the CAAFDI are in line with those permitted, or if they go beyond them in 'violation'³⁸ of the already recognized right of freedom of expression.

II. FREEDOM OF EXPRESSION AND ITS PERMISSIBLE RESTRICTIONS

The legal structure of the right to freedom of expression in the American Convention is "probably the international framework that provides the greatest scope and the broadest guarantees of protection to the right of freedom of thought and expression"³⁹ in any of the human rights regimes around the world. The Commission has pointed out that the wording of Article 13 "is indicative of the importance that the authors of the Convention attached to the need to express and receive any kind of information, thoughts, opinions and ideas."⁴⁰

The high premium placed on the protection of freedom of expression stems from different grounds. Most importantly, this freedom is linked to the first and foremost of all liberties, "our right to think by ourselves and share our thoughts with others."⁴¹ Also, both the Inter-American Court and the Commission have underlined that the "importance of freedom of expression within our catalogue of human rights stems from its structural relationship to democracy,"⁴² and that the exercise of this right is not only necessary for individual fulfillment of the individuals that express themselves, but also for the consolidation of truly democratic societies in which there can be a "public, plural and

³⁸ Quotations are used in this case because, as discussed below, there is an unresolved issue on whether there can be a violation of the Convention if the new instruments have the same legal hierarchy than the American Convention itself.

³⁹ Special Rapporteur for Freedom of Expression of the Inter American Commission on Human Rights, Inter-Am. Comm'n H.R., Report No. 2/09, OEA/Ser.L/V/II/CIDH/RELE/INF, ¶ 3 (2009) [hereinafter Rapporteur Report].

⁴⁰ Francisco Martorell v. Chile, Case 11.230, Inter-Am. Comm'n H.R., Report No. 11/96, OEA/Ser.L/V/II.95 doc. 7 rev. ¶ 56 (1997).

⁴¹ Rapporteur Report, *supra* note 39, ¶ 7.

⁴² See Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 of the American Convention on Human Rights), Advisory Opinion OC-5/85, Inter-Am. Ct. H.R. (Ser. A) No. 5, ¶ 70 (1985); *Claude-Reyes et al. v. Chile*, Inter-Am Ct. H.R. (ser. C) No. 151, ¶ 85 (Sept. 19, 2006); *Herrera-Ulloa v. Costa Rica*, Inter-Am. Ct. H.R. (ser. C) No. 107, ¶ 112 (July 2, 2004); *Ricardo Canese v. Paraguay*, Inter-Am. Ct. H.R. (ser. C) No. 111, ¶ 82 (Aug. 31, 2004); *Ríos et al. Vs. Venezuela*, Inter-Am. Ct. H.R. (ser. C) No. 194, ¶ 105 (Jan. 28, 2009); *Perozo et al. Vs. Venezuela*, Inter-Am. Ct. H.R. (ser. C) No. 195, ¶ 116 (Jan. 28, 2009).

open deliberation about the matters that concern us all as citizens of a given state.”⁴³

Finally, and very much in line with the objections of the Canadian Delegation, the Inter-American case law explains that freedom of expression is a key instrument for the exercise of all other fundamental rights of association, religious freedom, education and many others.⁴⁴

The Inter-American System bodies have greatly clarified the types of protected speech under the right to freedom of expression. It includes “the right to speak, that is, to express one’s thoughts, ideas, information or opinions orally;”⁴⁵ to write (and in particular, to write opinion pieces);⁴⁶ and to disseminate spoken or written expressions in order to communicate them to the greatest number of people.⁴⁷

As a matter of principle, under the American Convention all forms of speech are protected by the right to freedom of expression, independently of their content and degree of government or social acceptance. This means that the protections afforded are extended to speech that is “offensive, shocking, unsettling, unpleasant or disturbing to the state or to any segment of the population.”⁴⁸

Further, there are certain types of speech that are specially protected under the American Convention, including political speech and speech involving matters of public interest, and speech that is an element of the identity or personal dignity of the person expressing them. All of them come into play with respect to the CAAFDI, in particular as it relates with religious speech. It is often deemed as offensive when touching upon issues of morality. The case law has emphasized that the right of freedom of expression is “the right of the individual and the entire community to engage in active, challenging and robust debate

⁴³ Rapporteur Report, *supra* note 39, para. 8.

⁴⁴ *Id.* at para. 9.

⁴⁵ *Id.* at para. 22.

⁴⁶ *Id.* at para. 24, in reference of *Ricardo Canese v. Paraguay*, Inter-Am. Ct. H.R. (ser. C) No. 111 (Aug. 31, 2004).

⁴⁷ Rapporteur Report, *supra* note 39, para. 25.

⁴⁸ *Id.* at para. 31, in reference to *Herrera-Ulloa v. Costa Rica*, Inter-Am. Ct. H.R. (ser. C) No. 107, ¶ 113 (July 2, 2004); “*The Last Temptation of Christ*” (*Olmedo-Bustos et al.*) *v. Chile*, (ser. C) No. 73 ¶ 69 (Feb. 5, 2001); *Rios et al. v. Venezuela*, Inter-Am. Ct. H.R. (ser. C) No. 194, ¶ 105 (Jan. 28, 2009); *Perozo et al. v. Venezuela*, Inter-Am. Ct. H.R. (ser. C) No. 194, ¶ 116 (Jan. 28, 2009); Inter-Am. Comm’n H.R., OEA/Ser.L/V.88. doc. 9 rev. ¶ 1, Chapter V (1995).

about all issues pertaining to the normal and harmonious functioning of society.”⁴⁹

To be sure, freedom of expression is not unlimited. While broadly and robustly protected under the American Convention, there are some types of expressions that are simply not protected as free speech. And, within the realm of the speech that is protected, states may still enact certain limitations, so long as they are acceptable under the Convention’s framework.

The unprotected speech exceptions seem to be inapposite to this case. This is because Article 13(5) excludes from protection specifically “propaganda for war and any advocacy of national, racial, or religious hatred that constitute incitements to lawless violence or to any similar action.” It is a multipart requirement, insofar that it entails the “advocacy of hatred” be based on one of the explicit grounds (national, racial or religious). Such advocacy` incites violence or similar actions of equally grave and illegal nature. This is a much higher and stricter threshold for the exclusion of protection than the one written into the CAAFDI.

The Commission has said that the imposition of sanctions for the abuse of freedom of expression under the charge of incitement to violence must be backed by “actual, truthful, objective and strong proof that the person was not simply issuing an opinion, but that the person had the clear intention of committing a crime and the actual, real and effective possibility of achieving this objective. Acting otherwise would mean admitting the possibility of punishing opinions, and all the states would be authorized to suppress any kind of thought or expressions.”⁵⁰

As for the limitations admissible under Article 13(2), the Inter-American System bodies have developed a three-part test to control their legitimacy. This test is applicable to all manifestations of state authority that affect the full exercise of freedom of expression, including legal and constitutional provisions.⁵¹

⁴⁹ Inter-Am. Comm’n H.R., OEA/Ser.L/V.88, doc. 9 rev. ¶ 1 (1995); Commission, *Arguments before the Inter-American Court of Human Rights in Ricardo Canese v. Paraguay*, cited in *Ricardo Canese v. Paraguay*, Inter-Am. Ct. H.R. (ser. C) No. 111, ¶ 72.c (Aug. 31, 2004).

⁵⁰ Rapporteur Report, *supra* note 39, para. 68, *citing* Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 of the American Convention on Human Rights), Advisory Opinion OC-5/85, Inter-Am. Ct. H.R. (ser. A) No. 5, ¶ 77 (1985).

⁵¹ “*The Last Temptation of Christ*” (*Olmedo-Bustos et al.*) *v. Chile*, (ser. C) No. 73, ¶ 73 (Feb. 5, 2001).

The first requirement under the three-part test is that the limitations to freedom of expression must establish, restrictively and clearly,⁵² in the most specific terms possible, the conduct that is subject to liability. Indeed, “vague, ambiguous, broad or open-ended laws, by their mere existence, discourage the dissemination of information and opinion out of fear of punishment, and can lead to broad judicial interpretations that unduly restrict freedom of expression.”⁵³ This is squarely applicable to the definition of intolerance in the CAAFDI.

It could be objected that the state has a duty to domesticate or incorporate the Conventions into the domestic legal order through its own legislation. Also, that it is at this point in time that it must clearly define the prohibited acts or expressions of intolerance.⁵⁴ But even then, the state is bound by the definitions set out in Article 1 of the CAAFDI so that it cannot fundamentally alter or restrict the concept of intolerance as adopted in the conventions. There would be no point to there being a definition at all.⁵⁵ Additionally, “laws that limit freedom of expression

⁵² Rapporteur Report, *supra* note 39, para. 69, citing Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 of the American Convention on Human Rights), Advisory Opinion OC-5/85, Inter-Am. Ct. H.R. (ser. A) No. 5, ¶ 39-40 (1985); *Palamara-Iribarne v. Chile*, Inter-Am. Ct. H.R. (ser. C) No. 135, ¶ 46 (Nov. 22, 2005); *Herrera-Ulloa v. Costa Rica*, Inter-Am. Ct. H.R. (ser. C) No. 107, ¶ 120 (July 2, 2004); *Tristán Donoso Vs. Panama*, Inter-Am. Ct. H.R. (ser. C) No. 193, ¶ 117 (Jan. 27, 2009); *Palamara-Iribarne v. Chile*, (ser. C) No. 135 (Nov. 22, 2005); Inter-Am. Comm’n H.R., Annual Report 1994, Chapter V, OEA/Ser.L/V.88. doc. 9 rev. 1. 17 (Feb. 1995); Inter-Am. Comm’n H.R., Arguments before the Inter-American Court of Human Rights in *Ricardo Canese v. Paraguay*, cited in *Ricardo Canese v. Paraguay*, Inter-Am. Ct. H.R. (ser. C) No. 111, ¶ 72.a (Aug. 31, 2004).

⁵³ Rapporteur Report, *supra* note 39, para. 71.

⁵⁴ CAAFDI, *supra* note 1, at Chapter III, Article 7.

⁵⁵ This holds particularly true for states adhering to a regimes with mechanisms of direct incorporation or application of international human rights treaties to their domestic legal system in their constitutions, without need for a subsequent act of incorporation. For example, in the Colombian legal system treaty terms become constitutional rules in themselves by way of incorporation through Article 93 of the Colombian Constitution, so that constitutional rights are interpreted in light of the treaty norms. Under the direct application scheme of the Colombian Constitution, if the state becomes a party to the CAAFDI, its courts, resorting to the definition that has been put in place, could directly enforce the new right to protection from discrimination. On the other hand, when it comes to states under regimes that generally require explicit acts of incorporation, such as the United States or Chile, there are cases in practice where the incorporation statutes or understanding have differed from the terms defined in the treaty norms, but this has been protested by treaty monitoring bodies. One such example would be the United States understanding issued at the time of the Senate’s advice and consent to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment and Punishment, under which mental pain or suffering refers to “prolonged mental harm,” which is not part of the treaty’s definition under Article 1. This has been met with criticism from the Committee Against Torture, that in turn has ‘recommended’ the

must be written with such clarity that any sort of interpretation is unnecessary.”⁵⁶ Even specific judicial interpretations are not sufficient to compensate for overly broad formulations.⁵⁷

Second, in order for restrictions to be legitimate under the American Convention, the imposition of liability must constitute a necessity in order to protect the rights of others. The Commission has made it clear that ‘necessity’ is not synonymous with “useful, reasonable or convenient,”⁵⁸ but rather that there must be a clear and compelling need for its imposition, for the “objective pursued cannot be reasonably accomplished by any other means less restrictive to human rights.”⁵⁹ The Inter-American Court of Human Rights and the Commission have also affirmed that there is a stricter standard when it comes to the test for the necessity of limitations whenever dealing with expressions concerning matters of public interest, private citizens involved voluntarily in public affairs, or political speech and debate.⁶⁰

Third, the Inter-American system bodies have specified that in cases where limitations to freedom of expression are imposed for the protection of the rights of other, it is necessary for those rights to be clearly harmed or threatened. This must be demonstrated by the authority imposing the limitation or by the party requesting it. Of course, “if there is no clear harm to another’s right, the subsequent imposition of liability is unnecessary.”⁶¹

United States that it “ensure[s] that acts of psychological torture, prohibited by the Convention, are not limited to ‘prolonged mental harm’ as set out in the state party’s understandings...” Committee Against Torture, *Conclusions and Recommendations Relating to Report Submitted by the United States*, CAT/C/USA/CO/2 (July 25, 2006).

⁵⁶ Rapporteur Report, *supra* note 39, para. 107.

⁵⁷ Commission, *Arguments before the Inter-American Court of Human Rights in Ricardo Canese v. Paraguay*, cited in *Ricardo Canese v. Paraguay*, Inter-Am. Ct. H.R. (ser. C) No. 111, ¶ 72.s-u (Aug. 31, 2004).

⁵⁸ Rapporteur report, *supra* note 39, para. 85, citing *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism* (Arts. 13 and 29 American Convention on Human Rights), Advisory Opinion OC-5/85, Inter-Am. Ct. H.R. (ser. A) No. 5, ¶ 46 (1985); *Herrera-Ulloa v. Costa Rica*, Inter-Am. Ct. H.R. (ser. C) No. 107, ¶ 122 (July 2, 2004); Inter-Am. Comm’n H.R., Annual Report 1994, Chapter V, OEA/Ser.L/V.88. doc. 9 rev. ¶ 1 (Feb. 17, 1995).

⁵⁹ *Id.* at para. 85.

⁶⁰ See *Ioche-Bronstein v. Peru*, Inter-Am. Ct. H.R. (ser. C) No. 74 (Feb. 6, 2001); See *Herrera-Ulloa v. Costa Rica*, Inter-Am. Ct. H.R. (ser. C) No. 107 (July 2, 2004); *Ricardo Canese v. Paraguay*, Inter-Am. Ct. H.R. (ser. C) No. 111 (Aug. 31, 2004); *Kimel v. Argentina*, Inter-Am. Ct. H.R. (ser. C) No. 177 (May 3, 2008); Inter-Am. Comm’n, H.R. Annual Report 1994, Chapter V, OEA/Ser.L/V.88. doc. 9 rev. 1. ¶ (February 17, 1995).

⁶¹ Rapporteur Report, *supra* note 39, at para. 77.

Finally, when it is concluded that a right to reply or correct is not sufficient to secure the rights of others, and legal liability must be imposed as a necessity, resort to this limitation of freedom of expression must in any case comply with the requirements that: i) there must be existence of genuine malice in which the author acted with the intent of causing actual harm, knowingly disseminating false information;⁶² ii) that the party alleging harm must prove that the statements were false and that they effectively caused said harm⁶³ and; iii) that only facts, and not opinions, are susceptible to judgments of truthfulness or untruthfulness.⁶⁴ “For this reason, nobody may be punished for expressing opinions about other persons when such opinions do not imply false accusations of verifiable facts.”⁶⁵

A. Would the CAAFDI Survive Under the American Convention Standards?

As adopted, intolerance is “an action or set of actions or expressions that denote disrespect, rejection, or contempt for the dignity, characteristics, convictions or opinions of persons for being different or contrary. It may manifest itself as marginalization and exclusion of groups in conditions of vulnerability from participation in any sphere of public or private life or violence against them.” States that ratify it acquire an obligation to prohibit and punish intolerance domestically. How do the CAAFDI and its anti-intolerance framework stack up if reviewed under the standards set by the Inter-American System for the protection of freedom of expression?

Intolerance is referred to as ‘an action or set of actions or expressions’ that ‘denote’ something. Because the conventions make this distinction of actions and expressions, we must conclude that the

⁶² *Id.* at para. 109.

⁶³ Rapporteur Report, *supra* note 39, para. 109, citing *Case of Herrera-Ulloa v. Costa Rica*, Inter-Am. Ct. H.R. (ser. C) No. 107, ¶ 132 (July 2, 2004); Commission, *Arguments before the Inter-American Court of Human Rights in the Case of Herrera Ulloa v. Costa Rica*, cited in *Case of Herrera-Ulloa v. Costa Rica*, Inter-Am. Ct. H.R. (ser. C) No. 107, ¶ 101.2.I) (July 2, 2004); (Commission, *Arguments before the Inter-American Court of Human Rights in Ricardo Canese v. Paraguay*, cited in *Ricardo Canese v. Paraguay*, (ser. C) No. 111 ¶ 72.o)-p) (Aug. 31, 2004).

⁶⁴ *Kimel v. Argentina*, Inter-Am. Ct. H.R. (ser. C) No. 177, ¶ 93 (May 3, 2008); *Tristán Donoso v. Panama*, Inter-Am. Ct. H.R. (ser. C) No. 193, ¶ 124 (Jan. 27, 2009).

⁶⁵ Rapporteur Report, *supra* note 39, paragraph 109.

definition's scope reaches not only non-verbal acts, but also pure speech and opinions.⁶⁶

The definition of intolerance requires no actual damage or harm in order for the unlawful conduct to materialize. Also, it makes expressive actions and expressions in general illegitimate by their mere utterance. This is illustrated by the use of the "*may manifest*" clause with regard to the possible effects, which implies that while these outcomes are possible or even probable, they need not exist for the act of intolerance to be considered as such.

With regards to the 'targets' of intolerant actions or words, the definition bundles together "dignity, characteristics, convictions or opinions." The inclusion of 'dignity' is subject to criticism in terms of its vagueness. While human rights literature acknowledges its character as a basic principle of international human rights law, it is nonetheless true that this concept/idea/principle is one of the most debated and perhaps even controversial concepts in the field. This is primarily because of the "multiplicity of different understandings of dignity that diverge from and sometimes contradict one another."⁶⁷ This controversy and lack of agreement on what dignity entails and the ways in which it may be 'disrespected or rejected' leads to the conclusions that the term is hardly clear and unambiguous enough to pass the clarity test required for restrictions on freedom of expression.

The bundling of these four 'targets' also fails to acknowledge the differences in kind between personal characteristics on the one hand and convictions or opinions on the other. While the former may be considered as immutable⁶⁸ and not subject to willful changes, both opinions and convictions are acts of the human will, and therefore are subject to transformation. Not only is it possible for these to change over time, but there is a recognized and protected human right of persons to be able to

⁶⁶ To conclude otherwise would mean that the drafters incurred in redundancy, since everything besides speech would already have been covered by the reference to "*actions or sets of actions*." It can be reasonably assumed that different words are chosen for a reason and that they must mean different things.

⁶⁷ Paolo Carozza, *Human Dignity*, in THE OXFORD HANDBOOK OF INT'L HUM. RTS. L., 345 (Oxford Univ. Press, 2013).

⁶⁸ A proposition that is of itself open to debate, since 'characteristics' involve distinguishing traits or qualities, of which many are not set and are open to change or variance by human will as is the case with personality, virtues, vices, etc.

alter them freely,⁶⁹ which presupposes to some extent that the rights holders may be exposed to ideas different from their own. Also, they will be opposed, questioned and rejected as a necessary occurrence for change of one's own views to occur. Furthermore, not only is this possible but we have even come to expect it in an open and pluralistic society.

The 'message' conveyed or denoted by expressive actions has to be one of "disrespect, rejection or contempt." There seems to be a substantive difference between the three. Rejection as a term is not a qualifying adjective but a noun, which in turn is derived from the action of rejecting that merely refers to "refuse[ing] to believe, accept or consider" something.⁷⁰ The meaning of the term '*rechazar*' (to reject) which is used in the Spanish version of the CAAFDI – equally authoritative as the English version⁷¹ – means either "to contradict what someone expresses or not to admit what he or she proposes or offers" or "to show opposition or lack of appreciation of a person, group or community."⁷² In either case, the term denotes no animus and simply refers to an action. Further, it is the very essence of what any debate or argument entails.

'Contempt' and 'disrespect' fare no better. Webster's Dictionary defines contempt as "a feeling that someone or something is not worthy of any respect or approval" thereby linking it to disrespect or disapproval for someone or something. Colloquially the word is used to convey a higher level of dislike for that which is being assessed, or even disdain or scorn. In this sense, it appears as a more qualified concept than mere rejection, yet it still remains as an unclear notion for purposes of drawing a line of what sorts of actions or expressions fall in and out of bounds without sweeping too broadly in the restriction effort. Another interesting aspect is that the chosen words in the English and Spanish versions of the

⁶⁹ See American Convention on Human Rights, Article 12.1 on Freedom of Conscience and Religion; the same may be said for freedom of thought and expression, which can only be free if it is open to change in the face of error and in pursuit of truth.

⁷⁰ *Rejecting Definition*, MERRIAM WEBSTER'S ONLINE DICTIONARY, <http://www.merriam-webster.com/dictionary/rejecting> (last visited Nov. 16, 2015).

⁷¹ United Nations, Vienna Convention on the Law of Treaties, Art. 33.1, May 23, 1969, U.N.T.S. 1155, 331.

⁷² "*Contradecir lo que alguien expresa o no admitir lo que propone u ofrece*" or "*Mostrar oposición o desprecio a una persona, grupo, comunidad*" ["To contradict someone's idea or to disagree with their proposition" or "to show opposition or contempt to a person, group or community"], Real Academia Española de la Lengua [Royal Academy of Spanish Language], *Rechazar* [to reject], <http://lema.rae.es/drae/?val=rechazar> (emphasis added). OXFORD SPANISH DICTIONARY (4th ed. 2008).

CAAFDI don't seem to capture the same meaning or gravity. The *Real Academia Española de la Lengua* – the official Spanish dictionary – defines its Spanish counterpart of contempt, '*desprecio*,'⁷³ as simply “lack of appreciation,” which seems of lesser severity than the meaning of ‘contempt’ as unworthy of any respect or approval.

Finally, ‘disrespect’ or '*irrespeto*', in the English and Spanish versions respectively, both refer to lack of respect, which is to have a feeling of admiring someone or something that is good or valuable, or to which some deference is due.⁷⁴ Respect is certainly an attitude (although it is defined as a feeling) that may arguably be owed to all persons *insofar as they are persons*. But to use it in reference to opinions or convictions is an open invitation for abuse since, if applied strictly, would require giving deference, or holding admiration as good or valuable to any idea for the mere fact that it is different from the ones held by the subject (i.e., totalitarian political ideas must be given deference out of the fact that they are different and therefore protected under the terms of the CAAFDI).

Under the duties of the state set out in Chapter III of the CAAFDI, the states “undertake to...prohibit, and punish, in accordance with their constitutional norms and the provisions of this Convention, all acts and manifestations of... intolerance,”⁷⁵ *inter alia*, the private support to activities that “promote” intolerance, including the financing thereof; the publication, circulation and dissemination, including through the

⁷³“*Desestimación, falta de aprecio*” [disregard, lack of appreciation], Real Academia Española de la Lengua, *Desprecio* [disdain], <http://lema.rae.es/drae/?val=desprecio> (emphasis added). OXFORD SPANISH DICTIONARY (4th ed. 2008).

⁷⁴“*Miramiento, consideración, deferencia*” [Respect, consideration, deference], Real Academia Española de la Lengua, *Respeto*, <http://lema.rae.es/drae/?val=respeto> (emphasis added) OXFORD SPANISH DICTIONARY (4th ed. 2008); *Respect definition*, MERRIAM WEBSTER'S ONLINE DICTIONARY, <http://www.merriam-webster.com/dictionary/respect>.

⁷⁵ CAAFDI, *supra* note 1, Article 4. Note that the Convention uses the expression “punish” and makes no reference to what branch of the law should be applied in doing so. Comparatively, the Convention on the Prevention and Punishment of Genocide of 1948 also refers to the state duty to punish Genocide (Article I) and for states to provide “effective penalties” (Article V) being understood that it clearly refers to criminal law. The Convention Against Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984 more explicitly requires states to make acts of torture “offences under criminal law” and that these offences shall be “punishable by appropriate penalties.” This illustrates that, as a comparative matter, the use of the term to “punish” as opposed to merely “prevent, prohibit and eradicate” a given practice (i.e., Convention for the Eradication of Racial Discrimination of 1966) entails criminal prosecution. This is further bolstered by the fact that none of the provisions of CAAFDI aims at restricting the type of liability to be imposed on possible perpetrators.

internet, of any materials that “advocate, promote, or incite” intolerance. It adopts legislation that clearly defines and prohibits intolerance, applicable to the public and private sectors, to all authorities and individual natural and legal persons.⁷⁶

With all of these elements considered, the domestic application and enforcement of the provisions of the CAAFDI have a clear and unambiguous effect. They turn illegitimate any action or expression of opposition or disagreement. This will lead to a lack of appreciation or deference to the convictions or opinions held by others for being different or contrary to those of the person expressing him or herself, with no discernible threshold of gravity or malice to limit its effect. They further outlaw as an intolerant action the dissemination in any way of those expressions or expressive actions that the state deems as intolerant. They also outlaw the support by any means, including financing, of those activities that the state now defines as acts of intolerance.

Was this the objective that the drafter had in mind? Perhaps not. However, whether this framework set out in the CAAFDI is the result of their conscious acts – which is plausible considering that they were forewarned of this issue and still proceeded – or defective legal writing, the language is there. It is open to be employed as is in future enforcement and litigation.

In applying the Convention there could be an effort to harmonize both the American Convention and the CAAFDI so as to punish only those acts of intolerance that reach the “higher” levels of “rejection, contempt or disrespect,” but to do so would give the CAAFDI less than its full force. It would also mean that there would have to be a great deal of interpretation and line drawing on behalf of judges in applying the conventions, which is precisely the kind of danger of abuse that the Inter-American System bodies have sought to avoid.⁷⁷

We must also keep in mind that, as is commonly the case, the push for adopting legislation that would incorporate these standards into domestic law and practice will most likely be made by various activist and interest groups. These groups will advocate the positions most favorable to their causes, worldview and positions, and not necessarily for those positions that would best harmonize conflicting rights.

⁷⁶ CAAFDI, *supra* note 1, Article 7.

⁷⁷ Rapporteur report, *supra*, note 58.

Something similar could be said of populist political regimes that might abuse the CAAFDI for their own political agendas. Thus, it is not fanciful to expect a push in favor of applying the standards in the most stringent way possible which includes punishing even lesser forms of disagreement, leading to prosecutorial abuse in the near future.

B. Unreasonable Outcomes as a Matter of Policy

Another potential issue with the application of the CAAFDI is that, because of its broad-reaching definition of intolerance – which lacks the elements to discern between different expressions that may fall outside of the acceptance/rejection binary – it sets up a ‘vicious circle of intolerance’ that will inevitably exist in all discussions, agreements and debates.

At its most basic level, the CAAFDI proscribes relevant discussions in the public discourse. To give one example, the convention would forbid arguments under which immigrant persons unlawfully residing in a state (or even legal residents that are not citizens, distinguishing them nationals or citizens) should not be able to participate in national political processes or be the recipients of benefits reserved for nationals or citizens.⁷⁸ This same example extends by analogy to any and all individuals insofar as their specific condition or characteristics is taken into consideration and actually expressed in the context of discussions for decision-making.

Taking it one step further, let us say for instance that during afterhours activity for parents at a local private Catholic school (or Jewish, Muslim, Mormon or Evangelical; for this example they are no different), the school Principal gives a lecture, which touches upon the Theology of the Body in the writings of Pope John Paul II. As part of the lecture, at one point the speaker directs the parents to point 2357 of the Catechism of the Catholic Church which refers to homosexual actions as

⁷⁸ Eugene Volokh, *University of California considering recognizing a “right” to be “free from ... expressions of intolerance”* WASH. POST, <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/09/11/university-of-california-considering-recognizing-a-right-to-be-free-from-expressions-of-intolerance/> (last visited Sep 11, 2015).

“intrinsicly disordered”⁷⁹ and reiterates that such actions constitute a “grave depravity.”⁸⁰

In the meantime, the lecture is recorded and later uploaded to the school’s website, from where it gets picked up by local LGBT rights advocacy groups. These advocacy groups become enraged by what they claim to be a contemptuous opinion on their persons, their characteristics and, to many, their own convictions and opinions. They indeed would perceive it as an attack on who they are as persons. Rather, what they choose to do is beautiful and God-given. In his outrage, the spokesperson of one of the advocacy group states:

The Principal’s words and opinions are truly despicable and disgusting. He lacks all moral character and stature to even say things like this, seeing as he belongs to one of the most immoral and corrupt institutions on the face of the Earth, as is the Catholic Church. Hopefully, soon enough there will be no more people like him in our world.

These statements are followed by a barrage of messages posted online to the school’s website containing name-calling in various degrees of offensiveness to the Principal himself and of rejection toward his expressed convictions.

Our hypothetical, which is more real than imaginary in the current state of the public square,⁸¹ would come under the terms of the CAAFDI. The LGBT advocacy groups could ask for the prosecution of the Principal since private (non-governmental) speech is fully covered and the state has a duty to punish it. But since the threshold for intolerance is

⁷⁹ Chastity and Homosexuality, *para.* 2357, CATECHISM OF THE CATHOLIC CHURCH, http://www.vatican.va/archive/ccc_css/archive/catechism/p3s2c2a6.htm#2333 (last visited Oct. 31, 2015).

⁸⁰ *Id.*

⁸¹ See e.g., the writ of protection (“*recurso de protección*”) filed by an LGBT rights advocacy group against Deputies and Senators of the Chilean Congress for their expressions and arguments in opposing the reform of adoption legislation in Chile to allow for joint adoption of homosexual couples. Movilh, the organization involved, characterized their reasoning as a “showing of hate and an extreme disrespect, which constitutes violence especially towards the sons and daughters of same sex couples. The levity and disrespect towards others leads to the extreme of offending boys and girls and is not up to the standards of a civilized country” (author’s translation). CAMBIO 21, *Movilh prepara demanda contra miembros de la UDI acusados de “homofobia”* [Movilh prepares lawsuit against UDI members accused of ‘homophobia’], Feb. 19, 2014, available at <http://www.cambio21.cl/cambio21/site/artic/20140219/pags/20140219121839.html> (last visited, Mar. 4, 2016).

simply to reject the opinion or convictions of another, then all parties to the incident, including the LGBT activists, meet this low bar in equal terms, which means that they are all acting intolerantly with respect to each other.⁸²

It could be argued that in order for the expressions to be intolerant in a way that is forbidden by the CAAFDI, they must not only be directed against “dignity, character, convictions or opinions,” but also be based on the prohibited grounds or suspect categories for discrimination under Article 1.1. Alas, this would still not resolve the issue since these grounds were broadened to the point that they include “political opinions or opinions of any kind” as equally forbidden grounds or suspect categories.

Additionally, the CAAFDI do not clarify at all if the intolerant expressions must be directed towards a specific person. It also does not clarify if it encompasses expressions that are said in a general manner and without reference to anyone in particular, but that could be claimed as intolerance towards anyone who finds themselves within the scope of the expression or as a member of an identifiable class.

Thus, as we have seen, the terms of the CAAFDI fail to stack up to the freedom of expression protection standards of the American Convention, as the Court, the Commission and the American states have understood them to this date. The definition of intolerance is overbroad, reaching to all forms of expressions, including opinions, and lacks clarity and precision in giving proper notice of what kinds of ‘messages’ would be subject to punishment. Further, as a matter of policy, the CAAFDI is likely to produce unreasonable and broad reaching effects with enough

⁸² And the structure of the example obviously extends further than issues involving sexual mores. For all intents and purposes, our hypothetical discussions could have been addressing the alleged incompatibility between Islamic tenets of faith and liberal democracy or an argument against the legitimacy of the continued existence of the State of Israel, both of which would likely be criticized as instances of “Islamophobia” or “anti-Semitism.” Incidentally, the University of California’s proposed policy against intolerance was criticized by Jewish student advocacy groups for not going far enough, and with them explicitly arguing for a position that would consider any criticism of the State of Israel and its existence as forbidden intolerance. Other examples of possibly forbidden speech that were discussed included the wearing of t-shirts with the Confederate Flag or celebrating Black Power. Tyler Kingcade, *The University Of California May Violate The First Amendment To Outlaw Intolerance*, THE HUFFINGTON POST, Sep. 16, 2015, http://www.huffingtonpost.com/entry/university-of-california-intolerance_55f71809e4b063ecbfa529ec (last visited Sep. 23, 2015); Michael McGough, *Opinions can be as hurtful as slurs and insults, but they should be protected*, LOS ANGELES TIMES, September 23, 2015, <http://www.latimes.com/opinion/opinion-la/la-ol-uc-intolerance-antisemitism-20150922-story.html> (last visited Sep. 23, 2015).

power to chill all debate and discussion in the public square because of its understanding of intolerance and the duty to punish it.

III. WILL THE CAAFDI ABROGATE FREE SPEECH? IS THIS EVEN POSSIBLE?

From what we have seen so far, the CAAFDI poses a direct challenge to our understanding and protection of freedom of expression, going well beyond the acknowledged and permissible limits and restrictions that have existed under the American Convention to date. If it enters into force, the duty of states to prohibit and punish actions and expressions of intolerance would at the same time put them in a position in which their full compliance with the CAAFDI would entail a transgression of freedom of expression. Thus, it apparently creates a conflict between the new “right of protection against intolerance,”⁸³ and the right to freedom of expression, both of which must be duly protected by the state. However, this is not truly a conflict of laws.⁸⁴ Because freedom of expression is always subject to being restricted when it is necessary to ensure the respect for the rights or reputation of others,⁸⁵ the conflict may plausibly be avoided by interpreting it away as an admissible restriction under Article 13(2) of the American Convention. Any new rights that may be ‘created’ or ‘recognized’ can plausibly be considered further grounds for restrictions of freedom of expression. The problem with this approach is that, at least as a formal matter, there is nothing to stop states from eviscerating freedom of expression, or conscience (Article 12), assembly (Article 15), association (Article 16), movement and residence (Article 22), all of which have built in “restriction clauses”, by way of crafting more and more new rights that

⁸³ CAAFDI, *supra* note 1, Chapter II, Article 2.

⁸⁴ Conflict of laws may be defined broadly as a relationship between two norms in which “one norm constitutes, has led to, or may lead to, a breach of the other” or restrictively, as in the case in which the state is bound by two contradictory obligations. See, Marko Milanović, *Norm Conflict in International Law: Wither Human Rights?* 20 DUKE J. COMP. & INT’L L. 69, at 72 (2009).

⁸⁵ The IIHR touched upon the issue by suggesting that the proposal would fall under Article 13.5, considering that intolerance would not be protected speech because it would constitute advocacy for hatred and incitement to lawless violence or similar actions. However, as we have seen throughout, the bar set by the definition of intolerance in the CAAFDI is much lower than is the case in the American Convention, and the expressions coming under the scope of its prohibition are far more than just those constituting advocacy for hatred and incitement to lawless violence. It is more adequately characterized as a possible case of restriction needed to protect the rights of others, namely, the new right to be protected from intolerance. See *supra*, note 37.

allow for further and further restrictions under the alleged need to do so for their protection.⁸⁶

In international law, unlike domestic legal systems, all sources of law are generally considered equal in their hierarchy. We say this generally because there are at least two rules of hierarchy or preference that have been expressly built into the system and recognized by the community of states.⁸⁷ The first exception is the United Nations Charter, which, by virtue of its Article 103, possesses a “constitutional character”⁸⁸ as the cornerstone of the international legal system developed after World War II. As such, it prevails over other conflicting obligations whenever these exist.⁸⁹ The others are *jus cogens* norms.⁹⁰ Neither of these exceptions would allow for the American Convention to prevail over the CAAFDI if they came into force. The American Convention lacks the constitutional character of the United Nations Charter (at least in a formally recognized way) and the right to freedom of expression has not been recognized as a norm of *jus cogens*.⁹¹ Further, even if viewed in light of some of the existing theories of hierarchy of rights,⁹² one could not prevail over the other since both treaties address human rights and their protection, and the new right to protection from intolerance is arguably a corollary to the rights to equality and non-discrimination, which are first generation rights as well as freedom of expression.⁹³ So there seems to be no way of arguing for the primacy of the American Convention over the CAAFDI if they were to come into force. Thus, by introducing this ‘new right’ into

⁸⁶ For instance, a right to live in communities free from all forms of intolerance may translate into restrictions to freedom of movement and residence, with the state being granted the power to regulate and restrict whether or not to allow for the settlement of a church or temple under its zoning regulations, by concluding that ensuring a tolerant community requires its exclusion based on its positions and moral judgments on various questions.

⁸⁷ See, *Rep. of the Int’l Law Comm’n, Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law*, 58th Sess., May 1-June 9, July 3-Aug. 9, 2006, UN Doc. A/61/10; GOAR, 61st Sess., Supp. No. 10 (2006).

⁸⁸ Bardo Fassbender, *The United Nations Charter as a Constitution of the International Community*, 36 COLUM. J. TRANSNAT’L L. 529, at 531-32 (1998).

⁸⁹ *Supra* note 83, at 76-77.

⁹⁰ Vienna Convention on the Law of Treaties, art. 53, Jan. 27, 1980, 1155 U.N.T.S. 331. (“ . . . norms that are accepted and the recognized by the international community as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character”).

⁹¹ See, *Rep. of the Int’l Law Comm’n*, *supra* note 87, at 419-420, para. 33.

⁹² See generally, Theodor Meron, *On a Hierarchy of International Human Rights*, 80 AM. J. INT’L L. 1 1986.

⁹³ *Id.* at 2.

the legal system, freedom of expression will subsist in name only restricted under the alleged necessity to do so in order to secure the right of all persons to be protected from intolerance. Yet, even if in the current landscape of international law this conclusion seems to be true as a formal matter, it nevertheless poses a challenge that goes directly to the heart of the international human rights project as a whole.

If the scenario that we have presented – an existing human right being fundamentally altered to the point of being deprived of its core content – occurs, it would pose a difficult and perhaps insurmountable challenge to the continued legitimacy of the human rights experiment. Can the state simply contract away existing human rights? As a formal matter, the answer is yes, but then what is left of the ‘inherent dignity’⁹⁴ and ‘inalienable rights’⁹⁵ of man? Did the American states not acknowledge, “[t]he essential rights of man are not derived from one’s being a national of a certain state (which concedes that the state is not the rights giver nor creator), but are based upon attributes of the human personality”?⁹⁶ And when the Human Rights Committee argued in its general comment N^o 26 that “the rights enshrined...belong to the people living in the territory of the state party...once the people are accorded the protection of the rights under the Covenant, such protection...continues to belong to them, notwithstanding change in government...or any subsequent action of the state party designed to divest them of the rights guaranteed...”⁹⁷ Was this nothing but empty and meaningless rhetoric?

It is likely that this issue has never been truly put to the test since the beginning of the international human rights regime in 1945. The process up to now has been characterized by the recognition of rights that did not formally contradict each other on paper. We may be in line to witness a true first in international human rights, for no state has yet attempted to abrogate or alter the contours of those rights heretofore

⁹⁴ International Covenant on Civil and Political Rights, Dec. 6, 1966, 999 U.N.T.S. 171 and International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3.

⁹⁵ *Recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family. . . .* Universal Declaration of Human Rights, G.A. Res. 217 A (III), U.N. Doc. A/RES/217(III) (Dec. 10, 1948).

⁹⁶ OAS, *American Convention on Human Rights*, "Pact of San Jose, Costa Rica," Nov. 22, 1969 1144 U.N.T.S. 123.

⁹⁷ U.N. Human Rights Committee, *CCPR General Comment No. 26* (On issues relating to the continuity of obligations to the International Covenant on Civil and Political Rights) Dec. 8, 1997 CCPR/C/21/Rev.1/Add.8/Rev.1.

recognized and protected directly by international law itself. And if this were to happen, what faith should the peoples of America place on a legal regime in which their inherent and inalienable rights are really neither inherent nor inalienable?

CONCLUSION

As we have seen, the proposed new human rights standards of the sister Conventions Against Racial and All Forms of Discrimination and Intolerance are fundamentally at odds with the way in which the American Convention has conceived the protection of freedom of expression, its limits and restrictions. Since its coming into force, the American Convention's protection of this fundamental freedom has coexisted side by side with the rights to honor and reputation, as well as non-discrimination and equality. Yet it has never been the case that the respect for these rights of others allowed for the restriction of the very core of freedom of expression: the freedom to express one's opinion freely.

If enforced, the CAAFDI will strike directly to the heart of freedom of expression by imposing the duty on all member states to prohibit and punish heretofore-protected opinions: a fundamental safeguard of free and unabridged debate.

The standards set by the CAAFDI lack the sufficient clarity and precision so as to constitute a fair notice of what can or cannot be expressed, and the framework that they propose to establish will produce patently unreasonable results in which any expression of rejection for the convictions or opinions of others may be subject to abusive prosecution and punishment.

The most troublesome outcome of the adoption of these conventions would be the blow against the legitimacy of the human rights experiment itself for, through the fundamental alteration of the right to freedom of expression as we have known it to date, the enforcement of these new treaties would indicate that human rights are not truly inherent nor inalienable, but an illusion which can be dispelled by the state through the stroke of a pen consistent with their changing policy preferences over time.