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Working Group to Prepare
a Draft Inter-American Convention against
Racism and All Forms of Discrimination and Intolerance

DRAFT OF A LEGALLY BINDING “INSTRUMENT” AGAINST ALL FORMS OF
DISCRIMINATION AND INTOLERANCE

(Presented by the Chair and considered at the meetings held on December 13, 2011,
February 1 and 9, March 8 and 19 and April 10 and 27, 2012)

EXPLANATORY NOTE

Resolution AG/RES. 2677 (XLI-O/11), “Draft Inter-American Convention against Racism and All Forms of Discrimination and Intolerance”, instructed the Permanent Council to extend the mandate of the Working Group of the Committee on Juridical and Political Affairs and to entrust it with the preparation of legally binding instruments with due consideration of a convention against racism and racial discrimination, as well as an optional protocol or protocols that would, in addition, address all other forms of discrimination and intolerance, in accordance with the work plan and methodology adopted by the Working Group, taking into account, where possible, the progress set forth in document CAJP/GT/RDI-57/07 rev. 13, “Consolidated Document: Draft Inter-American Convention against Racism and All Forms of Discrimination and Intolerance,” and to continue the negotiations based on said instruments.

This document was prepared in accordance with the aforementioned resolution AG/RES. 2677 (XLI-O/11) “Draft Inter-American Convention against Racism and All Forms of Discrimination and Intolerance”, as well as pursuant to the “Work Plan for the 2011-2012 Term” (CAJP/GT/RDI-177/11 rev. 2), adopted by the Working Group on its session held on October 17, 2011. The Work Plan requested that two draft documents be prepared, one regarding racism and racial discrimination, and the other one addressing all other forms of discrimination and intolerance.

Furthermore, it was agreed, pursuant to the methodology adopted by the Working Group in its Work Plan, that with a view to simplify the negotiation process, once both drafts are ready and negotiations begin, all alternative proposals and/or comments by delegations to any of the instruments under negotiation thereafter be included in two separate documents with proposals and comments corresponding to each of the instruments under negotiation. Text will only be included in the draft under negotiation if a consensus is reached on a specific language. In accordance with this proposal, the Working Group agreed that the elaboration of the drafts be based on the document “Informational Document for Discussion and Negotiation Draft Inter-American Convention Against Racism and all Forms of Discrimination And Intolerance” (CAJP/GT/RDI-148/10), presented last year to the Working Group by the Chair, which both reflects the main contents of the consolidated document (CAJP/GT/RDI-57/07 rev. 13), but at the same time simplifies it by not including alternative proposals and/or comments made previously under the different articles.

The guidelines for preparing the documents were to delete, in the preparation of the first document dealing with racism and racial discrimination, all references to all other forms of discrimination from the sources that go beyond racism and racial discrimination. Regarding the second document which deals with discrimination and intolerance, the agreed course of action was to delete all references to racism and racial discrimination from the sources.

Member states also suggested, in the preparation of these drafts, that they reflect the advances reached in the past in the negotiation process. Hence, these advances reflected in the “Consolidated Document” (CAJP/GT/RDI-57/07 rev. 13), are included in this document in the following manner:

As stated in the explanatory note of the “Consolidated Document”, words or phrases that the Working Group has not yet approved by consensus, but has examined, are shown as follows: **in bold**. Phrases or paragraphs on which no consensus has been reached, whether because new proposals have

been presented, including proposals to delete them, or because different wording has been requested, are shown as follows: [in square brackets]. Finally, the explanatory note included in the “Consolidated Document” also contained a reference to new proposals, which were to appear in parenthesis. Nevertheless, it should be noted that according to the agreed methodology, from now on new proposals will not be included in this document unless a consensus is previously reached.

DRAFT OF A LEGALLY BINDING “INSTRUMENT” AGAINST ALL FORMS OF
DISCRIMINATION AND INTOLERANCE

(Presented by the Chair)

THE STATES PARTIES TO THIS “INSTRUMENT”,

CONSIDERING that the inherent dignity and equality of all members of the human family are basic principles of the Universal Declaration of Human Rights, the American Declaration of the Rights and Duties of Man, and the American Convention on Human Rights;

REAFFIRMING the resolute commitment of the member states of the Organization of American States to the complete and unconditional eradication of all forms of discrimination and intolerance and their conviction that such discriminatory attitudes are a negation of universal values and the inalienable and infrangible rights of the human person and the purposes and principles enshrined in the Charter of the Organization of American States, the American Declaration of the Rights and Duties of Man, the American Convention on Human Rights, the Democratic Charter of the Americas, the Universal Declaration of Human Rights, and the Universal Declaration on the Human Genome and Human Rights;

RECOGNIZING the duty of adopting national and regional measures to promote and encourage observance of the human rights and fundamental freedoms of all individuals and groups subject to their jurisdiction, without regard to gender, age, sexual orientation, language, religion, political or other opinion, social origin, economic status, migrant, refugee or displaced status, birth, stigmatized infectious-contagious condition, genetic trait, disability, debilitating psychological distress or other social condition;

CONVINCED that the principles of equality and nondiscrimination among human persons are dynamic democratic concepts that foster the promotion of effective legal equality and presuppose an obligation on the State’s part to adopt special measures to protect the rights of individuals or groups that are victims of discrimination, in any area of human endeavor, whether public or private, with a view to cultivating equitable conditions for equal opportunity and to combating discrimination in all its individual, structural, and institutional manifestations;

TAKING INTO ACCOUNT that the victims of discrimination and intolerance in the Americas are, *inter alia*, migrants, refugees and displaced persons and their families, as well as other sexual, cultural, religious and linguistic groups or minorities that are affected by such manifestations;

CONVINCED that certain persons and groups experience multiple or extreme forms of discrimination and intolerance, driven by a combination of factors such as gender, age, sexual orientation, *language*, religion, political or other opinion, social origin, economic status, migrant, refugee or dislocated status, birth, stigmatized infectious-contagious condition, genetic trait, disability, debilitating psychological distress, or other social condition, as well as others recognized in international instruments;

DISTURBED by the fact that various parts of the world have seen a general increase in cases of intolerance and violence motivated by anti-Semitism, Christianophobia, or Islamophobia, and against members of other religious communities, including those with African roots;

RECOGNIZING that peaceful coexistence among religions in pluralistic societies and democratic States is based on respect for equality and nondiscrimination among religions and on the clear separation between the laws of the State and religious tenets;

TAKING INTO ACCOUNT that a pluralistic and democratic society must respect the cultural, linguistic and religious identity of every person who belongs to a minority, and create the conditions that will enable that person to express, preserve, and develop his or her identity;

CONSIDERING that the individual and collective experience of discrimination must be taken into account to combat the segregation and marginalization of cultural, linguistic and religious minorities and to protect the life plan of individuals in general and of minority communities;

ALARMED by the surge in hate crimes motivated by gender, religion, sexual orientation, disability and other social conditions;

EMPHASIZING the basic role that education plays in promoting respect for human rights, equality, nondiscrimination and tolerance; and

AGREE upon the following:

CHAPTER I

Definitions

Article 1

For purposes of this “instrument”:

1. Discrimination shall mean any distinction, exclusion, restriction, or preference, in any area of public or private life, whose purpose or effect is to nullify or curtail the equal recognition, enjoyment, or exercise of one or more human rights and fundamental freedoms enshrined in the international instruments applicable to the States Parties. **AGREED 12/13/11**

Discrimination may be based on nationality, age, sex, sexual orientation, gender identity and expression, language, religion, [cultural identity,] political opinions or opinions of any kind, social origin, socioeconomic status, educational level, migrant, refugee, repatriate, stateless or internally displaced status, disability, genetic trait, mental or physical health condition including infectious-contagious condition and debilitating psychological condition, or any other condition. **AGREED 03/08/12**

2. Indirect discrimination shall be taken to occur, in any realm of public and private life, when a seemingly neutral provision, criterion, or practice has the capacity to entail a particular disadvantage for persons belonging to a specific group, or puts them at a disadvantage, unless said provision, criterion, or practice has some reasonable and legitimate objective or justification under international human rights law **AGREED 02/01/12**
3. Multiple or aggravated discrimination is any preference, distinction, exclusion, or restriction based simultaneously on two or more of the criteria set forth in subparagraph 1 of this article, or others recognized in international instruments, the objective or result of which is to nullify or curtail, the equal recognition, enjoyment, or exercise of one or more human rights and fundamental freedoms enshrined in the international instruments applicable to the States Parties, in any area of public or private life. **AGREED 02/9/12**
4. Special measures or affirmative action adopted for the purpose of ensuring equal enjoyment or exercise of one or more human rights and fundamental freedoms of groups requiring such protection shall not be deemed discrimination provided that such measures do not lead to the maintenance of separate rights for different groups and are not continued once their objectives have been achieved. **AGREED 2/1/12**
5. Intolerance is 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.

CHAPTER II Protected Rights

Article 2

Every human being is equal under the law and has a right to equal protection against any form of discrimination and intolerance in any sphere of life, public or private.

AGREED 03/08/12

Article 3

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

CHAPTER III Acts and Manifestations of Discrimination and Intolerance

Article 4

[For purposes of this “instrument” and based on the definitions in the preceding articles 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 support provided to discriminatory activities or that promote intolerance, including the financing thereof;
- ii. Publication, circulation, or dissemination, by any means of communication, including the Internet, of any [discriminatory] materials, understood as being any image or depiction of ideas or theories that advocate, promote, or incite hatred or violence against individuals or groups by reason of any of the criteria set forth in [Article 1.1];
- iii. Publication, circulation, or dissemination, by any means of communication, including the Internet, of materials that condone or justify acts that constitute, or have constituted, genocide or crimes against humanity, as defined in international law;
- iv. Violence motivated by any of the criteria set forth in Article 1.1;
- v. [Criminal activity instigated by hate, in which the victim or the victim’s property is chosen intentionally on the basis of any of the criteria set forth in [Article 1.1]];

- vi. [Any law enforcement action based on any of the criteria set forth in [Article 1.1] rather than on the person's behavior or on objective information identifying the individual as having engaged in criminal activity;]
- vii. Restricting, in an undue or unreasonable manner, the exercise of the individual rights of ownership, administration, and disposition of property of any kind based on any of the criteria set forth in [Article 1.1];
- viii. [Any distinction, exclusion, restriction, or preference applied to persons, because of their multiple or aggravated victim status, the purpose or result of which is to deny or impair the equal recognition, enjoyment, exercise, or protection of rights and fundamental freedoms.]
- ix. [Any discriminatory restriction on the enjoyment of the human rights enshrined in applicable international and regional instruments and in the jurisprudence of international and regional human rights courts, particularly those applicable to minorities or groups that are in vulnerable situations and subject to discrimination;]
- x. [Any restriction or limitation of the use of the language, traditions, customs, and culture of persons or groups who are members of minorities or vulnerable groups, in public or private activities;]
- xi. [Preparing and introducing teaching materials, methods, or tools that portray stereotypes or preconceptions based on any of the criteria set forth in [Article 1.1] of this "instrument";]
- xii. Denying access to public or private education, to fellowships, or to educational loan programs, based on any of the criteria set forth in [Article 1.1] of this "instrument";
- xiii. Denying access to all social, economic, and cultural rights, including the right to work, to housing, to social security, and to health [Article 1.1] of this "instrument";
- xiv. [Conducting research or applying the findings of research into the human genome, particularly in the fields of biology, genetics and medicine, aimed at human selection, cloning, and any other method disrespectful of human rights, fundamental freedoms, and the dignity of individuals and groups of persons;]
- xv. Any other discriminatory conduct that falls within the definition contained in Article 1 of this "instrument."

CHAPTER IV
Duties of the States

Article 5

The States undertake to prevent, eliminate, and punish, in accordance with their domestic legislation and the provisions of this “instrument”, all acts and manifestations of discrimination and **intolerance**.

- i. All support for activities designed to promote discrimination and intolerance, including the financing thereof;
- ii. Publication, circulation, or dissemination, by any means of communication, including the Internet, of any materials that:
 - (a) Advocate, promote, or incite any form of discrimination and intolerance;
 - (b) Condone, justify, or defend acts that constitute, or have constituted, genocide or crimes against humanity, or promote or incite the commitment of such acts;
- iii. Criminal activity in which the victim or the victim’s property is chosen intentionally based on any of the criteria set forth in Article 1.1.
- iv. Any law enforcement action based on any of the criteria set forth in Article 1.1 is not based on the behavior of an individual or on objective information identifying the individual as having engaged in criminal activity;
- v. Restricting, in an undue or unreasonable manner, the exercise of the individual rights of ownership, administration, and disposition of property of any kind based on any of the criteria set forth in [Article 1.1];
- vi. Any restriction or limitation of the use of the language, traditions, customs, and culture of persons or groups who are members of minorities or vulnerable groups, in public or private activities;
- vii. Preparing and introducing teaching materials, methods, or tools that portray stereotypes or preconceptions based on any of the criteria set forth in [Article 1.1] of this “instrument”;
- viii. Denying access to public or private education, to fellowships, or to educational loan programs, based on any of the criteria set forth in [Article 1.1] of this “instrument”;
- ix. Denying access to all social, economic, and cultural rights, including the right to work, to housing, to social security, and to health;

- x. Conducting research or applying the findings of research into the human genome, particularly in the fields of biology, genetics and medicine, aimed at human selection or cloning that prevails over respect for human rights, fundamental freedoms, and human dignity, generating any form of discrimination based on genetic characteristics.

Article 6

The States Parties undertake to adopt the special differential or preferential measures and policies needed to ensure the enjoyment or exercise of rights and fundamental freedoms of persons or groups that are subject to discrimination or intolerance for the purpose of promoting equitable conditions for equal opportunity, inclusion, and progress for such persons or groups. Such measures or policies shall not be considered discriminatory or incompatible with the purpose or intent of this “instrument”, shall not lead to maintaining separate rights for different groups, and shall not be continued beyond a reasonable period or after their objective has been achieved.

Article 7

The States Parties undertake to formulate and implement policies the purpose of which is to provide equitable treatment and generate equal opportunity for all persons, including educational and promotional policies and the dissemination of legislation on the subject by all possible means, including the mass media and the Internet.

Article 8

The States Parties undertake to adopt legislation that clearly defines and prohibits discrimination and **intolerance**, applicable to all public authorities as well as to all natural or legal persons, both in the public and in the private sectors, particularly in the areas of employment; participation in professional organizations; education; training; housing; health; social protection; exercise of economic activity; access to public services and other areas; and to repeal or amend any legislation that constitutes or produces discrimination or intolerance.

Article 9

The States Parties undertake to ensure that their political and legal systems appropriately reflect the diversity within their societies in order meet the legitimate special needs of each sector of the population.

Article 10

The States Parties undertake to ensure that the victims of discrimination and intolerance receive equitable treatment, equal access to the justice system, expeditious and effective proceedings, and fair compensation in the civil or criminal sphere, as applicable. In addition, they **shall consider adopting** the legislative measures necessary to ensure that the burden of proof will be reversed and the defendants will have to show that procedures and practices have been adopted that ensure equitable and non-discriminatory treatment.

Article 11

The States Parties undertake to consider as aggravating those acts that lead to compounded discrimination **or acts of intolerance**, i.e., any distinction, exclusion, or restriction based on two or more of the criteria set forth in [Articles 1.1 and 1.3] of this “instrument.”

Article 12

[The States Parties undertake to conduct research on the nature, causes, and manifestations of discrimination or intolerance in their respective countries, at the local, regional, and national levels, and to collect, compile, and disseminate data on the situation of groups or individuals that are victims of discrimination and intolerance.]

Article 13

The States Parties undertake, in accordance with their internal legislation, to establish **or designate** a national institution that shall be responsible for monitoring compliance with this “instrument”, and shall inform the OAS General Secretariat of this institution. The representative of that national institution shall be that State’s representative on the Inter-American Committee for the Prevention, Elimination, and Punishment of All Forms of Discrimination and Intolerance.

Article 14

The States Parties undertake to promote international cooperation to exchange ideas and experiences and to execute programs aimed at achieving the objectives of this “instrument”.

CHAPTER V

Protective Mechanisms and Monitoring of the “Instrument”

Article 15

In order to monitor the implementation of the **commitments** assumed by the States Parties to this “instrument”:

- i. Any person or group of persons, or non-governmental entity legally recognized in one or more Member States of the Organization of American States may submit to the Inter-American Commission on Human Rights petitions containing reports or complaints of violations of this “instrument” by a State Party. In addition, any State Party, when depositing its instrument of ratification of **or accession to** this “instrument” or at any time thereafter, may declare that it recognizes the competence of the Commission to receive and examine communications in which a State Party alleges that another State Party has committed violations of the human rights established in this “instrument”. In such case, all the relevant procedural rules

contained in the American Convention on Human Rights as well as the Statutes and the Rules of Procedure of the Commission shall be applicable.

- ii. The States Parties may consult the Commission on questions related to the effective application of this “instrument.” They may also request the Commission’s advisory assistance and technical cooperation to ensure effective application of any provision of this “instrument”. The Commission will, to the extent that it is able, provide the States Parties with the requested advisory services and assistance.
- iii. Any State Party may, when depositing its instrument of ratification of **or accession to** this “instrument”, or at any time thereafter, declare that it recognizes as binding, as a matter of law and without any special agreement, the jurisdiction of the **Inter-American Court of Human Rights** on all matters relating to the interpretation or application of this “instrument”. In such case, all relevant procedural rules contained in the American Convention on Human Rights as well as the Statutes and Rules of Procedure of the Court shall be applicable.
- iv. An Inter-American Committee for the Prevention, Elimination, and Punishment of All Forms of Discrimination and Intolerance shall be established and shall be comprised of independent experts from each of the States Parties. The first meeting of the Committee shall be convened by the Secretary General of the OAS as soon as the tenth instrument of ratification has been received, and the first meeting shall be held at the headquarters of the Organization three months later for the purpose of declaring its establishment, approving its Rules of Procedure and its Working Method, and electing its officials. That meeting shall be presided over by the representative of the country that deposits the first instrument of ratification of this “instrument”.
- v. The Committee shall be the forum for the exchange of ideas and experience, as well as for examining progress made by the States Parties in implementing this “instrument” and any circumstance or difficulty affecting the extent of compliance therewith. Said Committee may recommend to the States Parties that they adopt the appropriate measures. For this purpose, the States Parties undertake to submit a report to the Committee, within one year of its first meeting, with respect to performance of the obligations contained in this “instrument.” The reports that the States Parties submit to the Committee shall also contain disaggregated data and statistics on vulnerable groups. Thereafter, the States Parties shall submit reports every four years. The General Secretariat of the OAS shall give the Committee any support it requires for the performance of its functions.

CHAPTER VI General Provisions

Article 16. Interpretation

1. No provision of this “instrument” shall be interpreted as restricting or limiting a domestic law of any State Party that affords protections and guarantees equal to or greater than those established in this “instrument.”

2. Nothing in this “instrument” shall be interpreted as restricting or limiting the American Convention on Human Rights or any other international convention on the subject that affords equal or greater protections in this regard.

Article 17. Depository

The original instrument of this “instrument”, whose English, French, Portuguese, and Spanish texts are equally authentic, shall be deposited with the General Secretariat of the Organization of American States.

Article 18. Signature and Ratification

1. This “instrument” is open to signature by all Member States of the Organization of American States.

2. This “instrument” is subject to ratification by the signatory States in accordance with the procedures set forth in their constitutions. The instruments of ratification shall be deposited with the General Secretariat of the Organization of American States.

Article 19. Reservations

The States Parties may enter reservations to this “instrument” when signing or ratifying it, provided that such reservations are not incompatible with the aim and purpose of the “instrument” and relate to one or more specific provisions thereof.

Article 20. Entry into Force

1. This “instrument” shall enter into force on the thirtieth day following the date on which the second instrument of ratification of the “instrument” is deposited with the General Secretariat of the Organization of American States.

2. For each State that ratifies the “instrument” after the second instrument of ratification has been deposited, the “instrument” shall enter into force on the thirtieth day following deposit by that State of the corresponding instrument.

Article 21. Denunciation

This “instrument” shall remain in force indefinitely, but any State Party may denounce it through written notification addressed to the Secretary General of the Organization of American States. The “instrument” shall cease to have force and effect for the denouncing State one year after the date of deposit of the instrument of denunciation, and shall remain in force for the other States Parties. Such denunciation shall not exempt the State Party from the obligations imposed upon it under this “instrument” in respect of any action or omission prior to the date on which the denunciation takes effect.

Article 22. Additional Protocols

Any State Party may submit for the consideration of the States Parties gathered during the General Assembly draft protocols in addition to this “instrument”, with a view to gradually including other rights within its system of protection. Each protocol shall determine the manner of its entry into force and shall be applied only among the States Parties to it.