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Racism, racial discrimination, xenophobia and related forms of intolerance: follow-up to and implementation of the Durban Declaration and Programme of Action

Report of the Ad Hoc Committee on the Elaboration of Complementary Standards on its twelfth session*, **

Chair-Rapporteur: Kadra Ahmed Hassan (Djibouti)

Summary

The present report is submitted pursuant to Human Rights Council decision 3/103 and Council resolutions 6/21 and 10/30. The report is a summary of the proceedings of the twelfth session of the Ad Hoc Committee on the Elaboration of Complementary Standards and the substantive discussions that took place during the session.

* The annexes to the present report are circulated as received, in the language of submission only.

** The present report was submitted after the deadline so as to include the most recent information.



I. Introduction

1. The Ad Hoc Committee on the Elaboration of Complementary Standards submits the present report pursuant to Human Rights Council decision 3/103 and resolutions 6/21 and 10/30.

II. Organization of the session

2. The Ad Hoc Committee held 18 meetings during its twelfth session, which took place at the Palais des Nations in Geneva from 19 to 29 July 2022 in a hybrid format.

A. Attendance

3. The session was attended by representatives of Member States, non-Member States represented by observers, intergovernmental organizations and non-governmental organizations (NGOs) in consultative status with the Economic and Social Council (see annex III).

B. Opening of the session

4. The twelfth session of the Ad Hoc Committee on the Elaboration of Complementary Standards was opened by the Chief of the Rule of Law, Equality and Non-discrimination Branch, Office of the United Nations High Commissioner for Human Rights (OHCHR).

C. Election of the Chair-Rapporteur

5. At its 1st meeting, the Ad Hoc Committee elected Kadra Ahmed Hassan, Permanent Representative of Djibouti to the United Nations Office and other international organizations in Geneva, as its Chair-Rapporteur, by acclamation.

6. The Chair-Rapporteur thanked the Committee for her re-election. She hoped for cooperation and constructive engagement so that all views were reflected from delegations, regional groupings and civil society as the Committee worked towards fulfilling its mandate.

7. She recalled that, pursuant to Human Rights Council decision 3/103 and resolutions 6/21 and 10/30, the Committee was mandated to elaborate, as a matter of priority and necessity, complementary standards in the form of either a convention or additional protocol(s) to the International Convention on the Elimination of All Forms of Racial Discrimination. Since 2017, the Committee had been working under an updated mandate, first articulated in General Assembly resolution 71/181 and Human Rights Council resolution 34/36, respectively, in which the Assembly and the Council had requested the Chair-Rapporteur to ensure the commencement of the negotiations on the draft additional protocol to the Convention criminalizing acts of a racist and xenophobic nature.

8. The Chair-Rapporteur noted that, while that work had been delayed somewhat as a result of the exigencies of the coronavirus disease (COVID-19) pandemic and the exceptional adjournment of the eleventh session in December 2021 owing to an urgent personal matter, it was high time to work steadily and surely to elaborate the additional protocol. She recalled that the scourge of racism was all too present, mutating, proliferating and affecting the human rights of millions of people. As a multilateral mechanism, the Ad Hoc Committee must remain relevant and address those challenges, in accordance with its mandate.

9. The Chair-Rapporteur recalled that at its eleventh session, the Committee had interacted with experts and discussed the issues under the four modules considered during the intersessional legal expert consultation: (a) dissemination of hate speech; (b) racial cybercrime (social media networks and companies); (c) all contemporary forms of

discrimination based on religion or belief; and (d) preventive measures to combat racist and xenophobic discrimination.

10. She explained that, based on the report of the intersessional legal expert consultation¹ and the discussions held during the eleventh session, she had prepared an annotated text to aid the Committee's thinking and discussions and move the work of the Committee forward in order to adopt some concrete proposals.

11. The Chair-Rapporteur noted that, while the meetings of the twelfth session would take place in hybrid format, delegations were encouraged to be present in the room, contribute substantively and avoid making general statements of positions of which the Committee participants were cognizant. While recognizing that there were differing views on some issues, she expressed the hope that all delegations and participants would have open discussions and exchanges as the Committee worked toward finding consensus.

12. In conclusion, the Chair-Rapporteur expressed her desire to hear substantively from participants in order to move forward together. She encouraged the Committee's continued engagement in the important process to address contemporary racism, racial discrimination, xenophobia and related intolerance.

D. Adoption of the agenda

13. At the 1st meeting, the Ad Hoc Committee adopted the following agenda for its twelfth session:

1. Opening of the session.
2. Election of the Chair-Rapporteur.
3. Adoption of the agenda and programme of work.
4. Presentations on and discussion of the historical impact of colonialism on the law.
5. Presentations on and discussion of all contemporary forms of discrimination based on religion or belief.
6. Presentations on and discussion of principles and elements of criminalization.
7. Introduction of the Chair-Rapporteur's annotation of the document entitled "Summary of issues and possible elements discussed pertaining to the implementation of General Assembly resolution 73/262 and Human Rights Council resolution 34/36 on the commencement of the negotiations on a draft additional protocol to the Convention criminalizing acts of a racist and xenophobic nature".
8. Conclusions and recommendations of the session.
9. Adoption of the conclusions and recommendations of the session.

E. Organization of work

14. Also at the 1st meeting, the Chair-Rapporteur introduced the draft programme of work for the session, which was adopted. The programme of work, as subsequently revised, is contained in annex II to the present report. The Chair-Rapporteur invited participants to make general statements. Delegations congratulated the Chair-Rapporteur on her re-election and made opening statements.

15. The representative of Pakistan, speaking on behalf of the Organization of Islamic Cooperation (OIC), assured the Chair-Rapporteur of the support of OIC in fulfilling the mandate of the Ad Hoc Committee. The OIC member States accorded high importance to the Committee's mandate and reiterated their support to further strengthen the human rights architecture against racism, xenophobia and related intolerance. Contemporary global

¹ <https://www.ohchr.org/sites/default/files/2021-12/ReportIntersessionalLegalExpertConsultation.pdf>.

challenges were growing, resulting the loss of lives, injuries and deprivation of human rights, as well as physical and emotional abuse. Those alarming trends demanded immediate remedial measures. The need for an effective solution also resonated with the mandate of the Committee to bridge the existing legal and regulatory gaps in the International Convention on the Elimination of All Forms of Racial Discrimination through an additional protocol to criminalize all acts of a racist and xenophobic nature. Given that progress towards achieving the Committee's mandate remained elusive, OIC believed that the status quo was no longer an option; the Committee's actions must be commensurate with the gravity of contemporary challenges. OIC was deeply concerned at the steady rise in incidents of discrimination, hatred, hostility and violence based on religion, especially against Muslim individuals and communities. Anti-Islam or Islamophobic acts often tolerated or authorized by some States remained pervasive, often under the guise of freedom of expression, counter-terrorism or national security measures. The rise of populist politics and right-wing extremist ideologies across the globe was fuelling religious hatred and violence against Muslim populations. OIC strongly condemned Islamophobic acts in all their forms and manifestations and reiterated its call for the reversal and repeal of such discriminatory laws, and for the perpetrators to be held accountable and remedies to be provided to victims. He noted that the Committee had a clear mandate from the General Assembly and the Human Rights Council, and that OIC could not support any discussion aimed at diverting attention away from the core of the Committee's mandate. OIC suggested that the Chair-Rapporteur utilize the expertise of the legal experts, who represented geographic balance and a diversity of legal systems, in the preparation of an initial draft of the additional protocol. That draft could then be used for further intergovernmental negotiations. He assured the Chair-Rapporteur of the constructive engagement of OIC during the session.

16. The representative of Côte d'Ivoire, speaking on behalf of the African Group, recalled that the Ad Hoc Committee was tasked by the Human Rights Council to draft complementary standards in the form of either a convention or one or more additional protocols to the International Convention on the Elimination of All Forms of Racial Discrimination in order to overcome existing lacune and to develop new norms to combat all forms of contemporary racism, including incitement to racial hatred. Unfortunately, over several years, the Committee had been unable to make much progress to accomplish that mandate, mainly owing to the differing views of Member States as to the need to develop complementary standards. The African Group was firmly convinced that complementary standards were necessary to combat contemporary forms of racism, racial discrimination, xenophobia and related intolerance. The Group believed that the purpose of the Committee was to make progress on discussions that had begun at the tenth session on preparing a draft working document on an additional protocol. That process was highly pertinent given the reality people around the world were facing as victims of racism, racial discrimination, xenophobia and related intolerance. He urged the Committee to shoulder its responsibilities to bolster protection for the increasing number of victims of those acts, including persons belonging to different racial, cultural and religious groups and persons belonging to minorities, migrants, refugees and asylum-seekers. The African Group called on all Member States and stakeholders to be united in their efforts during the session.

17. The representative of Cuba reiterated his country's commitment to the mandate of the Ad Hoc Committee and the desire of Cuba to continue working together constructively to move ahead in agreement. The global challenges that persisted concerning the implementation of the Durban Declaration and Programme of Action more than 20 years after its adoption were worsening in terms of persistent structural racism and an increase in hate speech and violent hate-driven acts against migrants and refugees, minorities and, in some cases, entire nations. The multidimensional global crisis, aggravated by the COVID-19 crisis, had exacerbated that situation. The Constitution of Cuba protected the right to equality and the prohibition of discrimination, and Cuba upheld its commitment to combat racial prejudices and stereotypes in society. He reiterated the call for States to demonstrate their political determination to combat racial discrimination and all forms of intolerance in all regions and countries through constructive dialogue and cooperation within the framework of the United Nations and the human rights mechanisms.

18. The representative of the Bolivarian Republic of Venezuela stated that the Ad Hoc Committee was an important mechanism with a clear mandate to elaborate complementary

standards to the International Convention on the Elimination of All Forms of Racial Discrimination. Halfway through the International Decade for People of African Descent, that group continued to face numerous challenges. The Bolivarian Republic of Venezuela was concerned about the proliferation of lies and hate speech, xenophobic rhetoric and incitement to hatred, as well as the rise in extremist movements, which endangered the achievements made in the protection of the human rights of vulnerable groups. The Government had taken measures to combat poverty and inequality with a multidimensional focus by empowering the most vulnerable social groups. The Bolivarian Republic of Venezuela valued the work of the Committee to draft complementary standards to the Convention, which would help to fill existing gaps and develop new standards to strengthen the fight against all forms of modern-day racism, including incitement to racial hatred.

19. The representative of Iraq confirmed that xenophobia, discrimination and many forms of reprehensible behaviour were a real threat to the work of the United Nations and to human rights in general, and ran counter to international human rights and standards. Despite all the efforts that had been deployed to date to ensure that individuals enjoyed their full rights, many people continued to be victims of racial discrimination. Iraq supported and was willing to assist in developing a legal framework to bring an end to all forms of racial discrimination. The additional protocol to the International Convention on the Elimination of All Forms of Racial Discrimination should contain the following elements: (a) the criminalization of hatred and Islamophobia, as that constituted discrimination on religious grounds; (b) no discrimination against societies in which there were different values; (c) the importance of addressing the contemporary challenges being faced, by criminalizing all racist behaviours, hate speech and incitement to hatred and any form of supremacy, which was also an act of violence which should be punished; and (d) support for cultural diversity.

20. The representative of the Islamic Republic of Iran said that her country associated itself with the statement delivered by Pakistan on behalf of OIC. She regretted that, despite the many documents issued and numerous measures taken to combat racism, racial discrimination, xenophobia and related intolerance, the world was suffering from revived forms and manifestations of racial discrimination, including the racism and Islamophobia witnessed during the COVID-19 pandemic. While there was an urgent need to update the International Convention on the Elimination of All Forms of Racial Discrimination, the Ad Hoc Committee had yet to achieve meaningful progress in the 15 years since its establishment. The Islamic Republic of Iran fully supported the work of the Committee and joined the call to commence drafting the additional protocol to the Convention. The additional protocol would be an important tool to combat all forms of contemporary racism and discrimination by providing proper means towards the criminalization of acts of a racist and xenophobic nature. The Committee should take into account the key role of the Durban Declaration and Programme of Action and its implementation in drafting elements of complementary standards in order to achieve a legally binding instrument in that regard. She cautioned against the conceptual expansion of the Convention and noted that attempts to expand the scope of the Convention should be examined in order to ascertain whether they would have added value or lead to a change in the goals of the Convention, thus diluting the focus on the monitoring body.

21. The representative of the Russian Federation reiterated her delegation's full support for the Ad Hoc Committee and noted that the problems of racism and the proliferation of supremacist ideologies persisted. The current efforts of the international community and the existing United Nations instruments in that field were inadequate. States that were trying to curb the work of the Committee had not addressed their issues concerning racism and supremacist ideologies. She highlighted recent discriminatory experiences of people from Africa and Asia who were attempting to flee conflict. Some States that maintained that there was no further capacity for refugees from Africa had accommodated refugees from a current conflict. She drew connections between the idea of racial supremacy and recent violent attacks in certain countries, and some ideologies present among some members of national military forces. Complementary standards were needed and, with regard to intergovernmental instruments to combat racism, the more of them there were, the better.

22. The representative of the Plurinational State of Bolivia expressed full support for the Ad Hoc Committee. He explained that at the end of the 1990s, his country had undergone

severe conflict, requiring an expert investigation into the violations of human rights that had occurred. He noted discrimination against persons practising evangelical Christianity, a rise in hate speech and the repression of indigenous culture. Numerous hate-driven incidents had led to the decision for his country to become a plurinational, inclusive State. The problems his country had faced during the conflict were the same as the current issues before the Committee. He reiterated his country's support for the work of the Committee to strengthen protection for the victims of hate speech and other manifestations of racial discrimination. He confirmed that the Plurinational State of Bolivia supported efforts to combat poverty, racism and all forms of discrimination and patriarchy that oppressed women, and the elimination of discrimination against ethnic minorities. It therefore supported the mandate of the Committee.

23. The representative of Namibia said that her country aligned itself with the statement that had been made on behalf of the African Group. She noted that the history of Namibia was marred with racial discrimination, segregation and apartheid, the legacies of which continued to pose challenges to the Namibian people in their right to development, among other rights. Many people around the world faced the same challenges. Namibia had long recognized the need for complementary standards to the International Convention on the Elimination of All Forms of Racial Discrimination, as the Convention had been drafted at a time when many countries that were suffering the brutality of racial oppression and apartheid were still colonies. The widespread realities of racism had brought States together to adopt a comprehensive, action-oriented document in the form of the Durban Declaration and Programme of Action in order to combat racism, racial discrimination, xenophobia and related intolerances. It was currently clear that, notwithstanding the existence of the Convention and the Durban Declaration and Programme of Action, States needed to redouble their efforts to address the pernicious and widespread realities of racism. Moreover, it must be noted that the Convention had been adopted at a time when the predominant view was that international law, including international human rights law, was mainly to be applied to States as duty bearers, to the exclusion of non-State actors. In modern international law, there was recognition of the fact that non-State actors, including social media companies, had a responsibility to respect human rights. Recognizing that evolution in international law necessitated the elaboration of complementary standards in order to, among other things, oblige States to compel social media companies to remove racist content, as indicated in the elements document that the Ad Hoc Committee had adopted at its tenth session. She emphasized the support of Namibia for the discussions within the Committee, asking that delegations be guided by the realities of the world as they engaged in discussions, where the colour of one's skin was still used to discriminate and disregard one's humanity. Racism, racial discrimination, xenophobia and hate speech impacted the lives of millions of people across the world, manifesting in many different forms. That alone was a clear indication of the legal gaps that still existed. Namibia thus called upon delegations to remain focused on the mandate of the Committee and to engage constructively in discussions.

24. The representative of South Africa said that his country aligned itself with the statement made by the African Group, noting that the International Convention on the Elimination of All Forms of Racial Discrimination had been adopted in 1965 and had never been updated, unlike most other historic conventions. The world had been very different in 1965 and not all States had been able to participate in the elaboration of the Convention as free, non-colonial States. The understanding of racism and its causes and effects had changed significantly since then. At the 2001 Durban Conference, the world had come together again to update views on racism, racial discrimination, xenophobia and related intolerance and almost all the States that had escaped the yoke of colonialism had been present. The Durban Declaration and Programme of Action elaborated on the understanding of what constituted racism, racial discrimination, xenophobia and related intolerance, as well as issues such as systemic racism. More than 20 years after their adoption, the Durban Declaration and Programme of Action had not been fully implemented, as there was a small number of important States that did not wish to engage with that new way of understanding racism and how it affected the majority of people in the world. It was important to acknowledge that the groups that had not been present at the adoption of the Convention in 1965 believed that there were gaps in the Convention, and in the understanding, *inter alia*, of systemic, structural and institutional racism and how they affected the lives of people all over the world. A common

understanding urgently needed to be developed on those important issues. Work on the elaboration of complementary standards to the Convention was required to develop an additional protocol soon so that a common understanding could be ensured with respect to combating racism, racial discrimination, xenophobia and related intolerance. What had been written in 1965 could not be accepted, since colonialism and the accompanying systemic and structural racism had been the order of the day at that time. The Convention was an almost universally ratified document, including by South Africa, and his country placed great value in it, but it was also true that all historical documents were updated through the Human Rights Council and across the United Nations system, and that a number of additional protocols had been added to most conventions since their original conception. There should be no blanket exception to the International Convention on the Elimination of All Forms of Racial Discrimination. He encouraged all States to work with an open mind to try and find common understanding along the way.

25. The representative of Algeria noted that the Human Rights Council had mandated the Committee to develop complementary standards on the elimination of racial discrimination throughout the world. Those complementary standards were extremely important when it came to filling the gaps that undermined the International Convention on the Elimination of All Forms of Racial Discrimination. There was a need to adopt standards to combat new forms of discrimination, particularly discrimination based on religion. As the Ad Hoc Committee had not made a great deal of progress to date, it was increasingly imperative to elaborate complementary standards to truly combat discrimination, racism and intolerance. He suggested that the outcome of the session should genuinely enable the Committee to move forward when it came to combating discrimination. It was incumbent upon the Committee to thoroughly examine the consequences of racism as it affected victims, regardless of their status. It was also important to address the continuation of certain processes of colonization that had been left over in history. The Committee must refer to the Durban Declaration and Programme of Action because different forms of racism and racial discrimination, particularly against Africans and persons of African descent, continued to be witnessed.

26. The representative of the NGO International Human Rights Council noted that the term “racism” was often confused with similar phenomena, such as stereotypes, in some of the Ad Hoc Committee’s discussions. He highlighted the distinctions between racism and other similar phenomena in terms of meaning, significance and manifestations. Each of those phenomena must be understood separately in order to avoid confusion.

27. The representative of the NGO International Human Rights Association of American Minorities stressed the need to fully implement the International Convention on the Elimination of All Forms of Racial Discrimination, including the full scope of article 15 in connection with the recently adopted Human Rights Council resolution 48/7 on the negative impacts of the legacies of colonialism on the enjoyment of human rights.

28. The representative of the European Union stated that the European Union rejected and condemned all forms of racism and related intolerance and remained firmly committed to combating racism, racial discrimination, xenophobia and related intolerance, within the European Union and around the world. Those phenomena ran counter to the principles of respect for human dignity and freedom, democracy, equality, the rule of law and respect for human rights that underpinned the European Union and were common values to all of its member States. The European Union was working to put those principles into practice; it had comprehensive anti-discrimination legislation and solid legal frameworks to address discrimination and racism. The prevention of and the fight against racism, xenophobia and other forms of intolerance were also integrated in European Union policies. In addition, there were internal mechanisms to exchange best practices, and all legislation was under constant review by the Court of Justice of the European Union. Furthermore, there was a multi-year European Union anti-racism action plan that contained specific targets for action. The European Union had held two summits highlighting the fact that combating racism was top of the ministerial-level agenda and the European Commission had appointed several coordinators to deal with specific aspects of the phenomenon, such as an anti-racism coordinator and dedicated coordinators on anti-Muslim hatred and anti-Semitism. There was a separate European Union framework for ensuring equality for and inclusion of Roma people. The European Union internally monitored what was happening in the member States

through its Agency for Fundamental Rights, and collected data and conducted surveys that fed into the policies that it developed internally. In December 2021, the European Commission had launched an initiative to criminalize hate speech and hate crime at the European Union level. If the Council adopted a decision to that effect, the European Commission would be able to propose secondary legislation allowing the European Union to criminalize forms of hate speech and hate crime other than those involving racist and xenophobic motives, which were already covered by a European Union framework decision. The European Commission and the European Union were taking those initiatives under the umbrella of the International Convention on the Elimination of All Forms of Racial Discrimination. The European Union considered the Convention to be a living document and a treaty that was able to address new and emerging challenges; political will determined the achievement of results internally. As well as focusing on universal adherence to the Convention and encouraging its full and effective implementation – which were the two key elements – the European Union also believed that the Convention should not be seen in an isolated manner and should be read in conjunction with other existing instruments, including articles 19 and 20 of the International Covenant on Civil and Political Rights. The European Union did not agree that there were gaps in the Convention because in its view, the Convention allowed for an endless list of activities to be undertaken. Lastly, with regard to a previous intervention, she expressed regret that the representative had made such a statement at that forum, which had included misinformation about rhetoric and hate speech during recent events.

29. The Chair-Rapporteur welcomed the collective approach to examining racism, and the examples and best practices from national level policies, measures and action plans that had been mentioned. She stated that she wished to keep a focus during the session on the work and mandate of the Ad Hoc Committee and urged all participants to avoid bilateral discussions and to remain focused on the programme of work. In moving forward on the Committee's mandate, she encouraged a results-oriented spirit during the session.

III. General and contextual discussions

A. Presentations on and discussion of the historical impact of colonialism on the law

30. At its 2nd meeting, held on 19 July, the Ad Hoc Committee considered agenda item 4, the historical impact of colonialism on the law. Antony Anghie, Professor of Law at the National University of Singapore Faculty of Law and the University of Utah College of Law, United States of America, and José Manuel Barreto, Professor at the Catholic University of Colombia Faculty of Law and Fellow at the Universität Bielefeld Department of Law, Germany, gave presentations on the topic. A summary of the presentations and the discussion that followed is provided in annex I to the present report.

B. Presentations on and discussion of all contemporary forms of discrimination based on religion or belief

31. At its 3rd and 4th meetings, held on 20 July, the Ad Hoc Committee considered agenda item 5, all contemporary forms of discrimination based on religion or belief. Erica Howard, Professor of Law at Middlesex University, United Kingdom of Great Britain and Northern Ireland, and Rabiati Akande, Assistant Professor, Osgoode Hall Law School at York University, Canada, gave presentations on the topic. A summary of the presentations and the discussion that followed is provided in annex I to the present report.

C. Presentations on and discussion of principles and elements of criminalization

32. At its 5th and 8th meetings, held on 21 and 22 July, respectively, the Ad Hoc Committee considered agenda item 6, principles and elements of criminalization. Beatrice

Bonafè, Professor of International Law at Sapienza University of Rome, Italy, and Mark Drumbl, Professor of Law and Director of the Transnational Law Institute at the School of Law, Washington and Lee University, United States, gave presentations on the topic. A summary of the presentations and the discussion that followed is provided in annex I to the present report.

D. General discussion and exchange of views on agenda items 4–6

33. At the 6th meeting, the Chair-Rapporteur introduced a draft document summarizing some preliminary general themes and ideas emanating from the expert presentations, in order to facilitate a general discussion and exchange of views on the issues. Copies were distributed in the meeting room and the text was projected on a screen that could also be viewed by those participating online. The Chair-Rapporteur invited the Committee to make initial general comments, stressing that the document was a factual summary of the presentations and opinions of the experts who had been invited to address the Committee during the session. The aim was to accurately highlight the key points of the various presentations and the interactive discussions that had been held to date.

34. Several delegations took the floor to express their views on the draft document. The Chair-Rapporteur expressed appreciation to the Committee members who had taken the floor and invited all participants in the room and online to share written text with the secretariat.

35. The Chair-Rapporteur facilitated general discussion and exchange of views on the draft document, which continued at the 12th, 13th, 14th, 15th and 16th meetings. The meetings were suspended at several points to allow for informal discussions. The general conclusions from the discussion (items 4–6) were adopted by consensus by the Committee at its 16th meeting.

E. Introduction of and discussion on the Chair-Rapporteur’s annotated text

36. At its 7th meeting, the Ad Hoc Committee commenced consideration of item 7, the Chair-Rapporteur’s annotation of the document entitled “Summary of issues and possible elements discussed pertaining to the implementation of General Assembly resolution 73/262 and Human Rights Council resolution 34/36 on the commencement of the negotiations on a draft additional protocol to the Convention criminalizing acts of a racist and xenophobic nature”.

37. The Chair-Rapporteur introduced the working document she had prepared for the twelfth session of the Ad Hoc Committee. She recalled that the document had been provided to all participants in advance of the session. The text was projected on a screen for viewing both in the room and online during subsequent meetings. The annotated text was intended to aid the Committee’s thinking and discussions and move its work forward in adopting concrete proposals. She recalled that it was derived from the tenth session elements document, the report of the intersessional legal expert consultation and the points made and issues raised in the meeting room during the eleventh session. The document provided an outline and annotation of a non-exhaustive list of substantive terminology (see para. 41 below), which the experts at the intersessional legal expert consultation had suggested required much greater definition. The Chair-Rapporteur opened the floor for general statements and comments.

38. The representative of Côte d’Ivoire made a general statement on behalf of the African Group, thanking the Chair-Rapporteur for the text and noting the importance of a definitional framework given that the additional protocol would eventually be an agreement of States. The additional protocol needed to be at the same level as other documents aimed at eliminating racial discrimination and xenophobia. The position of the African Group was that the Durban Declaration and Programme of Action contained definitions, for example of racial profiling, that had been agreed upon by States. He suggested that the definition of racism should be based on article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination, which clarified the meaning of the term and helped to fight racial

superiority. He also suggested adding elements from article 2 of the United Nations Educational, Scientific and Cultural Organization (UNESCO) Declaration on Race and Racial Prejudice of 1978, which addressed structural racism and differentiation between groups. He proposed looking at the term “media” based on national laws. He suggested that States should be able to include non-criminal sanctions to fight racial discrimination and xenophobia. The African Group remained open to hearing the views of other delegations.

39. The representative of Pakistan, speaking on behalf of OIC, expressed appreciation for the Chair-Rapporteur’s annotated text. He noted the upsurge in populist and extremist ideologies that had taken place in several countries. Refugees, migrants and asylum-seekers were subject to structural racism and systemic discrimination. He agreed that the Chair-Rapporteur’s text aptly captured the terms requiring elaboration, and that the document would help increase the Committee’s understanding and assist it in fulfilling its mandate. He reiterated the suggestion of OIC that the Chair-Rapporteur seek assistance from legal experts, including from different regions of the world, to enhance the Committee’s understanding of different terms and contexts, noting that there were clear legal gaps in the International Convention on the Elimination of All Forms of Racial Discrimination, which OIC was committed to filling.

40. The representative of Cuba echoed the comments of the African Group and OIC and said that Cuba believed that the Chair-Rapporteur’s document would be a specific and useful basis for the Committee’s work, moving it a step forward towards fulfilling its mandate. Cuba was willing to participate actively and constructively and hoped that other delegations would do likewise.

41. The Chair-Rapporteur led the Committee in its consideration of the annotated text at the 9th, 10th, 11th and 12th meetings, during which the document was available to all participants and was projected on a screen for viewing both in the room and online. Participants provided comments, direction, views and areas of focus and suggested other relevant documents or instruments in relation to the definitions of the following terms: “racism/racist; racial profiling; xenophobia; racist and xenophobic content/acts of a racist and xenophobic nature; hate speech; hate crimes; intolerance; all contemporary forms of discrimination based on religion or belief; derogatory stereotypes; specific persons and specific groups; and media”.

42. At the end of the 11th meeting, the Ambassador and Permanent Representative of Barbados to the United Nations Office and other international organizations in Geneva was given the floor to make a statement. He stated that all forms of discrimination, racial or otherwise, were not to be condoned or tolerated, not only with regard to international law, but also as they were contrary to humanity. Barbados had once been the global headquarters of the slave trade; his country was acutely aware of the effect that still had on people long after slavery had been abolished. Stereotypes came in different forms: institutional, at the country level and in communities. Notwithstanding the form, stereotyping was still present at the current time, requiring that, where possible, every legal mechanism within the international framework needed to be strengthened and those that did not yet exist needed to be created to ensure that in the future, there were tools at the disposal of the international community. Stereotyping existed not only in institutions, but also subliminally and overtly in the media across the international community and in journalistic biases which were sometimes evident and needed to be eliminated. He reiterated the support of Barbados for the Chair-Rapporteur and the work of the Ad Hoc Committee.

F. General discussion and exchange of views on the conclusions and recommendations of the session

43. At its 16th meeting, held on 28 July, the Ad Hoc Committee held a general discussion and exchange of views with a view to adopting the conclusions and recommendations of the session.

44. The representative of Pakistan, speaking on behalf of OIC, proposed that, in the future, a group of legal experts representing different regions and legal systems be engaged and tasked with providing the Chair-Rapporteur with precise guidance and inputs to allow for the

preparation of a Chair-Rapporteur's document. Furthermore, the United Nations High Commissioner for Human Rights should be requested to engage the legal experts and to facilitate their participation in the thirteenth session of the Ad Hoc Committee.

45. The representative of the European Union stated that further consideration of the matter was required and that a proposal in that regard would not be ready to be taken to the next level. All the experts had stated that important information and practical and technical understanding of the issues were still lacking.

46. The Chair-Rapporteur stated that the ideas and suggestions put forward by the Ad Hoc Committee during the session, particularly in relation to the annotated text, had been noted. It would be very useful to the Committee to have experts supporting its mandate. Prolonging debate on the matter was inefficient and would waste the resources of the Organization. Political will and cooperation were important in order to fulfil the mandate provided by the Human Rights Council and the General Assembly. She expressed her appreciation for all the interventions made by the delegations on agenda item 8 concerning the possible conclusions and recommendations of the session and encouraged them to make written submissions.

47. The representative of the NGO Sikh Human Rights Group noted that there were differing views on nomenclature and questioned what constituted racism and xenophobia, where pride in one's community ended and supremacy began and at what point a commitment to one's nation became xenophobia. Those were difficult questions and would not receive the same answers throughout the world, which might be the issue.

48. The representative of the NGO International Human Rights Association of American Minorities suggested that in the future, indigenous experts also be invited to participate in the Ad Hoc Committee's work on elaborating an additional protocol, given that the development of international law for indigenous peoples was lacking. He also suggested that the Committee consider his organization's proposal calling on the Committee on the Elimination of Racial Discrimination to accept and review petitions in accordance with its procedures pursuant to article 15 of the International Convention on the Elimination of All Forms of Racial Discrimination.

49. At the Ad Hoc Committee's 17th meeting, held on 29 July, the Chair-Rapporteur introduced a draft document containing a compilation of the ideas and suggestions that had been made during the session for the conclusions and recommendations of the twelfth session, which had been distributed the previous day. She invited participants to make general statements on the draft text, which was projected on a screen for viewing both in the room and online.

50. The representative of the European Union noted that participants had been given only a short time to review and receive political validation of the draft conclusions and recommendations contained in the document. There was no agreement on several points included in the draft document. The European Union maintained that there were neither substantive nor procedural gaps in the International Convention on the Elimination of All Forms of Racial Discrimination, as it was a living instrument.

51. The representative of Pakistan, speaking on behalf of OIC, requested additional time to review the draft text. Nevertheless, he noted that it was normal practice in other intergovernmental forums to receive the text of draft outcomes on the penultimate day of the session. There should be no debate about the mandate of the Ad Hoc Committee, as the mandate given to the Committee in Human Rights Council resolution 10/30 was clear. The experts who had participated in the session had clearly stated that there were legal gaps in the International Convention on the Elimination of All Forms of Racial Discrimination. While OIC was prepared to reflect the diversity of views in the session outcomes, it was not prepared to compromise on the mandate of the Committee.

52. The representative of Egypt noted that the fact that racism and racial discrimination were still entrenched in societies highlighted the need for additional standards to the International Convention on the Elimination of All Forms of Racial Discrimination. Egypt was ready to cooperate with all stakeholders to tackle racism at its roots. Egypt had taken note of the draft document containing the outcomes of the session and urged the Committee to proceed to elaborating the draft additional protocol.

53. The representative of Barbados expressed appreciation for the draft document containing conclusions and recommendations of the session, stating that the mandate of the Ad Hoc Committee was established and the views of the different delegations were known. It was time to proceed with implementing the Committee's mandate.

54. The representative of Algeria stated that it was high time for the Ad Hoc Committee to move forward and make progress with its work on an additional protocol to the International Convention on the Elimination of All Forms of Racial Discrimination.

55. The representative of the Islamic Republic of Iran agreed that it was important to respect and implement the clear mandate given to the Ad Hoc Committee.

56. The Chair-Rapporteur thanked all delegations for their interventions; they were all entitled to their opinions. Nevertheless, the role of the Chair-Rapporteur was to ensure that the mandate, the result of inclusive and negotiated text in the Human Rights Council and in the General Assembly, was fulfilled. She noted that there appeared to be an impression that the difference in views on the work of the Ad Hoc Committee implied that its work was not supported. That was not the case, as both the Council and the Assembly had repeatedly renewed the Committee's mandate. She reiterated the original mandate contained in Council decision 3/103, which had subsequently been recalled by the Council in its resolutions 6/21 and 10/30 and in several resolutions of the General Assembly. The Chair-Rapporteur requested that the text of decision 3/103 be projected on the screen for viewing both in the room and online. As the mandate gave members of the Committee flexibility as to the context and form of an additional protocol, the Committee should focus on that, not on questioning the mandate. As with all resolutions, once a majority decided on a legislative mandate, that mandate had to be implemented. She urged the Committee to move forward on its mandate, noting that political will would determine the context and form of the additional protocol. She said that neither the Chair-Rapporteur nor the Committee should question the mandate. She underlined that all delegations in the Committee were on an equal footing, and in many cases, their views and positions had been well-known for more than 15 years. With regard to the content of the draft conclusions and recommendations, she stated that the experts must be tasked with an assignment; it was futile to bring in experts to express the same ideas and advice repeatedly. Initiating the Committee's discussion on the structure and text of the draft document containing conclusions and recommendations, the Chair-Rapporteur noted that it was important that the conclusions and recommendations reflected the need to task experts with undertaking specific studies and providing advice, in line with the mandate of the Ad Hoc Committee.

57. The delegate of South Africa, speaking on behalf of the African Group, noted that: (a) there was general consensus that definitions needed to be developed by experts in order to avoid ambiguity; (b) a definitional framework was necessary and, subsequent to agreement, States would be required to implement the International Convention on the Elimination of All Forms of Racial Discrimination; (c) the suggested definitions should be based on article 4 of the Convention, which included the condemnation of ideas of racial superiority; (d) each State should define the term "media" in the context of its respective national laws, and non-criminal penalties should be included in that context; and (e) in combating hate speech and hate crime, there should also be a focus on prevention. With regard to the conclusions and recommendations, while it was important to give the experts specific tasks, they needed guidance and direction from the Committee.

58. Delegations requested an adjournment of the meeting to undertake informal consultations on the draft document.

IV. Adoption of the conclusions and recommendations of the twelfth session

59. At the beginning of the 18th meeting, Committee members reported back to the Chair-Rapporteur on the progress of their informal consultations and requested additional time to work on the draft conclusions and recommendations of the twelfth session. Following further informal discussions, additional time was requested again to complete negotiations.

60. During the meeting, the representative of the NGO *Ascendances Afro Océan-Indien* stated that the work of the Committee should move forward and that tasking the experts was very important. There was no confusion about the mandate of the Committee to elaborate complementary standards and fill existing gaps, given the daily realities of people facing racial discrimination in the twenty-first century. While some participants had stated that nothing should be changed with regard to the International Convention on the Elimination of All Forms of Racial Discrimination, the reality for many around the world suggested otherwise. Noting that 18 July was Nelson Mandela International Day, he recalled that Nelson Mandela had been imprisoned for 27 years, during which the Convention had not protected him or people like him. NGOs were asking why there were attempts to reject the mandate the Human Rights Council and General Assembly had given the Ad Hoc Committee. The World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, held in Durban in 2001, had laid new foundations for eliminating racial discrimination and affirmed a new approach and political will to fight racism. The Committee should improve on the text of the Convention, as the reality in 2022 was very different from that in 1965. Currently, the problems of racial discrimination were spreading around the world like wildfire, underscoring the great need for the Committee to meet its responsibilities and eliminate racism and hatred.

61. Another suspension of the meeting took place to allow for final informal negotiations on the draft conclusions and recommendations of the session.

62. Delegations reported back to the Ad Hoc Committee on the outcome of the informal negotiations and the most recent draft was distributed to meeting participants online and in the room and projected on the screen. The Committee considered the negotiated text before adopting it by consensus. The Committee also discussed time frames for the work with which the experts would be tasked and the importance of the requests of the experts contained in paragraphs 8 and 9 of the adopted text, mindful of the fact that the programme budget implications of the resources needed to carry out the tasks would need to be justified.

63. The representative of Barbados, responding to the Chair-Rapporteur's invitation to participants to make final general statements, indicated his country's support for the work of the Ad Hoc Committee and recognized the contributions made by all participants and the leadership of the Chair-Rapporteur. He thanked the colleagues who had participated throughout, even in the challenging informal discussions, and expressed the commitment of Barbados to the work and goals of the Committee.

64. The representative of the European Union thanked the Chair-Rapporteur for her leadership and for creating an environment within the Ad Hoc Committee in which participants could engage and work constructively. Although participants had encountered some difficulties, the work accomplished over the previous few days had shown that the Committee was still able to achieve results. She also thanked the colleagues who had made the effort to be present in the room.

65. The representative of Pakistan, speaking on behalf of OIC, thanked the Chair-Rapporteur for her stewardship of the Ad Hoc Committee. He noted the deliberations that had taken place during the twelfth session and the fact that the experts had highlighted the need to increase efforts to strengthen the international human rights framework against racism. In view of the alarming contemporary global trend in racism, racial discrimination, xenophobia and related intolerance, stalemate in the Committee was not an option. OIC condemned and rejected violence and discrimination against individuals based on their race, colour, religion and language. Migrants, refugees and asylum-seekers were often victims of multiple and compounded forms of discrimination. Bridging the legal gaps in the International Convention on the Elimination of All Forms of Racial Discrimination and demonstrating its commitment to combat racism in all its forms and manifestations remained the ultimate objective of OIC. He reiterated the call of OIC for the early commencement of negotiations on the text of the additional protocol to the Convention to criminalize all acts of a racist and xenophobic nature. To achieve the mandate of the Committee, the High Commissioner should engage experts with a view to ensuring geographical balance and representation of a diversity of legal systems to support the work of the Chair-Rapporteur of the Committee in the preparation of the initial draft additional protocol to the Convention,

taking into consideration the views expressed by various stakeholders at previous sessions of the Committee.

66. In her concluding remarks, the Chair-Rapporteur thanked the participants in the Ad Hoc Committee for their cooperation and contributions, and for the constructive approach and willingness to compromise they had demonstrated during the twelfth session. She was especially grateful to those delegates who had held informal discussions to work on textual revisions in order to arrive at a consensus outcome for the session. She noted that, despite some differences within the Committee, there was a common belief in the fight against racism. The Committee was working hard to reach consensus, which would ultimately allow it to deliver on its mandate. In her view, efforts should continue in the same vein to start negotiations on the draft additional protocol to the International Convention on the Elimination of All Forms of Racial Discrimination criminalizing acts of a racist and xenophobic nature. The work ahead was important, notwithstanding the complexity it entailed. She expressed the hope that the Committee would continue to demonstrate the political will to move forward and fulfil the Committee's mandate. The Chair-Rapporteur closed the twelfth session of the Ad Hoc Committee.

V. General conclusions from the contextual discussions (agenda items 4–6)

A. Historical impact of colonialism on the law

67. There is an historical context to colonialism, racism and racial discrimination. The relationship between colonialism, racism and racial discrimination is complex. It is a two-way street; the phenomena are mutually reinforcing. However, racism is not solely a construct of colonialism. It also exists in many countries and regions that do not have a colonial history.

68. The following elements were raised during the discussion:

- (a) The development of principles of international law by colonial powers to justify racial discrimination;
- (b) Forms of neocolonialism, including in the context of trade and investment regimes;
- (c) Racism and racial discrimination directed at refugees, migrants and asylum-seekers;
- (d) The involvement of non-State private actors, such as transnational business and social media enterprises.

69. Speakers suggested that:

- (a) An additional protocol to the International Convention on the Elimination of All Forms of Racial Discrimination is an opportunity to address some of the human rights issues arising from colonialism to ensure racial equality;
- (b) United Nations agencies, including UNESCO, should elaborate education policies for States on the phenomena of racism, racial discrimination and colonialism;
- (c) States should acknowledge the historical roots of racism and racial discrimination, as well as the negative legacies of colonialism and imperialism;
- (d) Former colonial powers should recognize their participation in colonization and condemn it as immoral and unjust, as a way of mastering and confronting the past;
- (e) The global South should reflect internally and also take action against racism and racial discrimination.

B. All contemporary forms of discrimination based on religion or belief

70. Speakers raised the following points during the discussion:

(a) Defining religion or belief is difficult because the definitions could be underinclusive or overinclusive and ascribe inappropriate value judgments. It might be advisable not to define those terms;

(b) Protection against discrimination based on religion or belief is weaker than protection against racial discrimination since the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief is not a convention. The definition of discrimination based on religion or belief is largely symmetrical to the definition of racial discrimination in the International Convention on the Elimination of All Forms of Racial Discrimination. Therefore, discrimination on the grounds of religion or belief could fit into or update the provisions of that Convention;

(c) Racial discrimination is often intersectional. The Durban Declaration and Programme of Action refer to the fact that victims can suffer multiple or aggravated forms of discrimination based on race and on other related grounds such as religion. The International Convention on the Elimination of All Forms of Racial Discrimination could be strengthened by adding language on multiple and intersecting forms of discrimination;

(d) Racial discrimination is often linked to being in a vulnerable situation, as is often the case for refugees, migrants and asylum-seekers, as well as for persons belonging to religious communities, indigenous peoples, people of African descent, people of Asian descent and Roma communities;

(e) Racial discrimination can occur at the same time as discrimination based on religion or belief. However, discrimination based on religion or belief is not always racialized;

(f) People may face discrimination only because they look different. The line may be blurred as to whether discrimination occurs because of race or because of religion or belief. This creates a protection gap in international law in respect of combating discrimination based on religion or belief, as well as a lack of protection for victims and a loophole for perpetrators concealing racial motives and claiming that the discrimination or violence was based on religion or belief, which is not always provided for in the law;

(g) Drawing the line between the right to freedom of expression and opinion and hate speech can be difficult. Nevertheless, there is no right to not be offended. In an open society, there must be room for criticism. Human rights do not protect religions. Human rights protect people;

(h) States should proceed carefully when criminalizing hate speech, since that can have a stifling effect. Criminalization is part of the process, but it is only one of several responses. Other remedies should also be considered, such as fostering dialogue, investing in education, promoting respect and tolerance and tackling problems in law enforcement. Law enforcement authorities have an important role to play in the fight against racism, racial discrimination, xenophobia and related intolerance;

(i) The term “intolerance” can be interpreted to include discrimination based on religion or belief. Intolerance is not defined in any legal instrument and is too vague a concept for criminalization.

C. Principles and elements of criminalization

71. The International Convention on the Elimination of All Forms of Racial Discrimination provides for different regimes:

(a) Article 2 provides for State obligations at the international level and article 5 guarantees fundamental rights. They are the logic of State responsibility under international law;

- (b) Article 4 contains criminalization obligations and creates individual criminal liability under national law. That is the logic of criminal responsibility;
- (c) Article 6 provides for effective remedies, such as victims' access to reparation and satisfaction under national law. That is the logic of civil responsibility;
- (d) Article 7 provides for administrative and implementation measures;
- (e) Each regime concerns different subjects, under different conditions, with different legal consequences. These options should be considered when drafting an additional protocol. The options to be considered in the additional protocol include criminalization, international responsibility and civil remedies under national law. Each option is different and concerns different subjects, under different conditions, with different legal consequence. There are different types of crimes: the elements of the crime should be more closely considered by the Ad Hoc Committee;
- (f) In criminal law, the title of an instrument should be consistent with the content of the instrument. The draft elements document should have a title and subtitles that reflect the content of the document;
- (g) A lack of a precise legal definition of the terms "racism" and "xenophobia" in international law could lead to fragmentation and confusion. Definitions are a prerequisite to formulating an additional protocol concerning criminal law;
- (h) Criminalization requires basic elements, including at least a precise definition of the *actus reus* in line with the core principle of legality; the *mens rea*; the modes of liability; and the defences and possible aggravating and mitigating circumstances;
- (i) It is imperative to clarify thresholds or what types of acts are to be punished or criminalized. Acts such as using words, elaborating policies and instituting practices that lead to imminent physical violence or death are the most likely possible crimes to include in an additional protocol;
- (j) While definitions in international law are meant to be universal, the acts, effects and manifestations of racism and racial discrimination are local and often grounded in colonialism and local history. The context is crucially important;
- (k) There are limits to criminal law, and criminalization attaches poorly to racism and international law. It is important to elaborate a combination of criminal law and civil law provisions. Punishment should be left at the discretion of national systems;
- (l) Criminal law penalties may well entrench racist attitudes and motivations. In addition to punishment, rehabilitation and reprogramming are critical to rehumanizing racist perpetrators. Remediation, resocialization and return to a healthy social life are very important;
- (m) There is an intersection between youth and racism, resulting in child soldiers, criminal gangs and indoctrinated and militarized youth. It will be important to develop actions to address racist and xenophobic acts so that where a young person is involved in racist acts and there is indoctrination, this should be seen as an aggravating factor. There should be a difference in treatment of victims of racist indoctrination, and there should be a strong focus on preventive measures.

VI. Conclusions and recommendations of the twelfth session

72. The Ad Hoc Committee acknowledges that there is an historical context to colonialism, racism and racial discrimination. The relationship between colonialism, racism and racial discrimination is complex. It is a two-way street; the phenomena are mutually reinforcing. However, racism is not solely a construct of colonialism. It also exists in many countries and regions that do not have a colonial history.

73. The Ad Hoc Committee emphasized that Member States should take measures, including in the fields of education, culture and the mass media, to combat negative stereotyping, which leads to racial discrimination, and that United Nations agencies,

including UNESCO, should elaborate education policies for States on the phenomena of racism, colonialism and imperialism, as they have done on other phenomena.

74. Some experts and Member States highlighted that protection against discrimination based on religion or belief is weak and underlined that in elaborating an additional protocol, consideration should be given to including combating discrimination based on religion or belief. Other States disagreed with that position and stated that the International Convention on the Elimination of All Forms of Racial Discrimination is not the proper instrument in which to address discrimination based on religion or belief.

75. In the context of criminalizing acts of a racist and xenophobic nature, Member States should consider the ways in which racial discrimination is often intersectional. The line between racial discrimination and discrimination based on other grounds, including religion and belief, can become blurred in a manner that constitutes multiple discrimination.

76. The title of an additional protocol to the International Convention on the Elimination of All Forms of Racial Discrimination should accurately reflect the content of the instrument. Consideration should be given to either altering the content of the draft elements document to reflect the phrase “criminalizing acts of a racist and xenophobic nature” or expanding the title in a manner that would enable inclusion of preventive measures, international responsibility and civil remedies, in addition to criminalization.

77. In the context of criminalizing acts of a racist and xenophobic nature, precise legal definitions of racism and xenophobia, as well as of the types of acts (thresholds) to be punished or criminalized, are a prerequisite to ensure uniform interpretation.

78. The majority of States noted that the importance of a definitional framework stems from the fact that an additional protocol of this nature would qualify as a subsequent agreement of States and that this would thus influence the interpretation and amplify the implementation of the International Convention on the Elimination of All Forms of Racial Discrimination.

79. In the further fulfilment of its mandate, the Ad Hoc Committee recommends that, in accordance with its mandate, a group of legal experts representing different regions and legal systems be engaged and tasked to provide the Chair-Rapporteur with precise guidance and input on the following questions to allow for the preparation of a Chair-Rapporteur’s document:

(a) What are the elements that need to be legally defined in order to criminalize acts of a racist and xenophobic nature, either at the national, regional or international level?

(b) What structure would a legal document aimed at criminalizing acts of a racist and xenophobic nature take?

(c) What should the scope of such a document be?

(d) Which terms should be defined at a minimum?

80. The experts should:

(a) Bear in mind that, at the twelfth session, the discussions within the Ad Hoc Committee on the question of an additional protocol to the International Convention on the Elimination of All Forms of Racial Discrimination remained difficult, with a large number of participants highlighting the need for an additional protocol to address existing legal gaps, while others maintained the position that the Convention has no substantive or procedural gaps;

(b) Ensure that their work is consistent with existing binding international instruments;

(c) Draw inspiration from all relevant sources, as laid out in the Chair-Rapporteur’s annotated text which provides a non-exhaustive list of instruments and

documents, including the International Convention on the Elimination of All Forms of Racial Discrimination and the Durban Declaration and Programme of Action;

(d) Consider the impact of structural and systemic racism, manifestations such as racial profiling and discrimination based on religion or belief, as well as the situation of migrants, refugees and asylum-seekers;

(e) Bear in mind that there are limits to criminal law and that criminalization is only one of several measures that could be included in the additional protocol. In particular, they should take into account the importance of education, training and other preventive measures;

(f) Consider measures under criminal law, civil law and non-law;

(g) Consider whether criminalization should take the form of independent legal provisions or whether it should be considered as an aggravating factor to existing criminal offences;

(h) Be mindful that context is crucially important and central to any determination of the harm that may be caused by a criminal act provided for in the additional protocol;

(i) Focus, *inter alia*, on article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination and articles 19 and 20 of the International Covenant on Civil and Political Rights, which should be read in conjunction with each other;

(j) Explore whether the use of the term “xenophobia” would capture discrimination based on religion or belief;

(k) Explore whether the term “related intolerance” should be further defined;

(l) Advise on how to further define the term “hate crimes”, taking into account relevant references in international human rights instruments, United Nations resolutions, regional instruments and specific national legislation, examining in particular the threshold between hate speech and hate crimes, and context or circumstances to take into account;

(m) Establish a list of the different remedies available to address hate crimes in criminal law, civil law and non-law, and define the circumstances under which each remedy would be advisable;

(n) Look into multiple forms of discrimination based on two or more grounds, which are often inextricably linked;

(o) Apply a gender-sensitive approach and consider intersecting forms of racial discrimination faced by women and girls;

(p) Bear in mind the specific circumstances of children and young people when discussing measures to be included in the additional protocol.

81. The High Commissioner should be requested to engage legal experts and to facilitate their participation in the thirteenth session of the Ad Hoc Committee in order for them to provide advice with a view to contributing to discussions on the elaboration of a draft additional protocol criminalizing acts of a racist and xenophobic nature, in order to implement the Committee’s mandate.

Annex I

Summaries of the context discussions and initial discussions on the agenda topics

Context discussion 1: Historical impact of colonialism on the law

1. At its 2nd meeting on 19 July 2022, the Ad Hoc Committee commenced its first context discussion of the 12th session on the historical impact of colonialism on the law under item. The Committee heard presentations from Mr. Antony Anghie, Professor of Law at the National University of Singapore and the College of Law at the University of Utah, and Mr. José Manuel Barreto, Professor in the Faculty of Law, Catholic University of Colombia and Fellow at the Department of Law at Universität Bielefeld.

2. In his presentation, Professor Anghie informed the Committee that, in order to understand the colonial dimensions of international law, attention should be shifted from solely European perspectives in order to see international law as a framework that justified imperial expansion. Mr. Anghie traced the roots of modern international law back to early 16th century trade and imperialism and the work of Francisco de Vitoria in Spain. Vitoria, Professor Anghie explained, was deeply troubled by Spanish expansion into Latin America, but attempted to find a legal justification for it. To do so, Vitoria stated that “The Spaniards have a right to travel to the lands of the Indians and to sojourn there, so long as they do no harm, and they cannot be prevented by the Indians.” In this statement, Professor Anghie explained certain fundamental ideas appear: the first is that Vitoria considers it completely legal for the Spaniards to enter the lands of the “Indians,” and that the Indigenous peoples on those lands have no legal right to prevent them. From this, Mr. Anghie continued, Vitoria drew the conclusion that “...to keep certain people out of the city or province as being enemies, or to expel them when already there, are acts of war”: in other words, if Indigenous occupants of territories resisted Spanish entry, that denial could amount to an act of war, justifying the Spanish mounting a defense. Here, Professor Anghie said, the early relationship between doctrines of trade and doctrines of war could be noted.

3. Professor Anghie then discussed Hugo Grotius, a lawyer for the Dutch East India Company in the early 17th century who is considered the founder of modern international law. Grotius wrote “On the Law of War and Peace” and “The Free Seas.” In his work for the Dutch East India Company, he was asked to justify the capture of a Portuguese territory off the Coast of Singapore. Professor Anghie explained that Grotius stated that “Access to all nations is open to all, not merely by the permission but by the command of the law of nations,” and that any impediment to Dutch trade in the east is an act of war. Grotius’ work, Anghie said highlighted issues about trade, sovereignty, and property.

4. Moving to the 19th century, Mr. Anghie noted that European thinkers on international law drew clear distinctions between “civilized” nations and “uncivilized” nations. He explained that “civilized” nations were considered sovereign, whereas “uncivilized” nations were not seen as sovereign and lacked legal standing. He noted they were prevented by these principles from acting in the international realm, as they were not considered to possess any rights.

5. Professor Anghie stated that he hoped to suggest and outline why race became so integral to international law. He provided a quote from John Westlake, a 19th century Whewell Professor of International Law at Cambridge University, stating “the inflow of the white race cannot be stopped where there is land to cultivate, ore to be mined, commerce to be developed, sport to enjoy, curiosity to be satisfied. If any fanatical admirer of savage life argued that the whites should be kept out, he would only be driven to the same conclusion by another route, for a government on the spot would be necessary to keep them out.” Professor Anghie explained that, in this statement, Westlake essentially argued that, in the end, it is the “white race” that possesses power, and the “white race” cannot be kept out of other (non-white) territories.

6. Providing another example from Westlake – ” When the people of European race come into contact with American or African tribes, the prime necessity is a government under the protection of which the former may carry on the complex life to which they have become accustomed in their homes, which may prevent that life from being disturbed by contests between different European powers for supremacy on the same soil, and which may protect the natives in the enjoyment of a security and well-being at least not less than they had enjoyed before the arrival of the strangers. Can the natives furnish such a government, or can it be looked for from Europeans alone? In the answer to that question lies, for international law, the difference between civilization and the want of it” – Mr. Anghie noted that the fundamental structure is a distinction between civilized and uncivilized, which could be simplified by the concept of race. He told the Committee that the principle embedded in this is that, when people from Europe would travel to other lands, they required a government that provided a standard of life they were accustomed to for the territory to be considered “civilized”, and therefore sovereign.

7. Professor Anghie noted that the primacy of certain “races” over others continued throughout the development of international law and legal authorities. He explained that, at the League of Nations in the early 20th century, some states argued strongly for a racial equality clause in the Covenant, but that this was not permitted by European and other Western nations. Professor Anghie stated that, throughout the 20th century, race became the major battleground for the whole campaign of equality and recognition. He noted the importance of recognizing that the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) proceeded the ICCPR and ICESCR, and that, in many ways, it created the structure that found its way into the ICCPR. He noted that, even in article 1 of the United Nations Charter, equality is described first of all as without distinction as to race.

8. Professor Anghie stressed that issues regarding racial discrimination and racism were not solely rooted in colonialism. He drew the Committee’s attention to the 1955 Bandung Conference, which was the first major conference of non-European peoples. At this conference, the aim was to conceive of a different vision of international law, but the focus was also on race. Professor Anghie referred to text from the Conference itself stating that “in particular, the Conference condemned racialism as a means of cultural suppression,” “the Asian-African Conference deplored the policies and practices of racial segregation and discrimination which form the basis of government and human relations in large regions of Africa and in other parts of the world. Such conduct is not only a gross violation of human rights, but also a denial of the dignity of man,” and the Conference “reaffirmed the determination of Asian-African peoples to eradicate every trace of racialism that might exist in their own countries; and pledged to use its full moral influence to guard against the danger of falling victims to the same evil in their struggle to eradicate it.”

9. Discussing whether this past matters, Professor Anghie noted that some will argue that decolonization has taken place and colonialism is in the past. But, he argued, generally colonialism has been replaced by neo-colonialism, where international legal regimes still reflect imperialism and continue it in new and complex ways. He stated that the issue of race has not gone away at all, and that some current practices can be traced back to colonial times. He concluded by suggesting that the crucial question is whether human rights have a role to play in addressing this.

10. Responding to Professor Anghie, the representative of South Africa asked whether he believed that the systemic and structural racism witnessed in countries are still leftovers or vestiges of policies put in place by colonial powers.

11. The representative of the non-governmental organization IHRAAM stated that there are attempts by colonial states to claim that colonialism has been eradicated and that, due to the passage of time, they were no longer obligations to address it.

12. The delegate for Pakistan in reference to Professor Anghie’s point about neo-colonialization and trade regimes, asked if Mr. Anghie could indicate some elements that could be reflected in the Committee’s work.

13. The representative of the European Union noted that the EU’s 27 member states did not share the same views among themselves on issues concerning colonialism making it

difficult represent the EU on this issue, but informed that the EU is steadfast in addressing it. She indicated that it was useful to have these elements for the Committee's conversation, but questioned whether the issue would be solved by the drafting of an additional protocol, or if it was more so a question of about political will.

14. Replying to the interventions, Professor Anghie noted they were powerful questions, for which he did not have easy answers. Responding to the representative of South Africa he stated that it is very commendable that many countries like South Africa and Australia have focused on attempts at reconciliation. Regarding structural racism, he said that, even though racism is not often as explicit as in the past, scholars now focus on the idea that race has been so internalized that it becomes the way the world is seen, with people of colour seen as dangerous or backward. He noted that changing the biases in people's thinking required a lot of education.

15. Responding to the representative of Pakistan, Mr. Anghie noted that the UN Secretary-General had noted in a 2020 speech how power continues to be exercised in the institution such as the International Monetary Fund (IMF) and how the states which hold power are Western nations. Professor Anghie stated he was not sure how to bring this element into an additional protocol, but that it is important to note that the people most affected by these policies do not have representation in the institutions that control their lives.

16. To the delegate from the EU, Professor Anghie replied that it is heartening to learn of the initiatives being taken by the EU. He suggested looking also to the different circumstances of racism: in the 1950s and 1960s, he said, the focus was around racism was colonialism, but the question remained: What is racism today? He said that it is a different international community today, and racism is often focused on migrants and refugees. Professor Anghie said that the work of Vitoria stated that anyone has the right to go anywhere, yet asylum seekers are not being given equal opportunities everywhere. Professor Anghie provided the example of refugees from an ongoing conflict, where these refugees are accepted, but people of colour may not be as easily accepted. He raised the question of whether those seeking refuge have rights, and said that in the context of 1965, the issue was the racism of settler colonies against indigenous populations, but that is not necessarily the circumstances today. Professor Anghie also noted that the definition of refugees in 1955 was based on the European experience of refugees after the Second World War, but this may not address the universal experience of all refugees, as it may be claimed.

17. Regarding the need to revise and add to international legal standards to the ICERD, Professor Anghie noted that contexts change, and gave the example of needing to account for cyber attacks in the context of laws relating to the use of force. He noted that these were not envisioned at the time the law was written, so the law had to be revised to account for them. He stated that the options would be a new protocol, or development of jurisprudence, but cautioned that not every State would accept jurisprudence as binding.

18. In conclusion, Professor Anghie reminded the Committee that racism is not only a construct of colonialism, it also went beyond that. He recalled that racism and conflict existed in many non-European countries as well and that this also needed to be taken into account. While acknowledging that colonial legacies is important, he stressed that it would not be a good thing if colonialism alone becomes the only driver, as it must be acknowledged that racism exists in other countries outside of the colonial context.

19. Also at the 2nd meeting, the Ad Hoc Committee also heard the presentation of Professor José Manuel Barreto, Professor in the Faculty of Law, Catholic University of Colombia and Fellow at the Department of Law at Universität Bielefeld.

20. He began his by reminding the Committee that there were two main reasons for the adoption of the ICERD: first, it was a response to the wave of anti-Semitism that swept through Europe in 1959-60, and second as in its preamble, the Convention condemned colonialism and asserted the need to eliminate the accompanying racial discrimination. He said that the topic of colonial racial discrimination was present in the preparatory debates, and it is also likely that this reference to colonialism was also a response to another aspect of the current historic context. He said that between many other events and historic phenomena relating to neo-colonial racial discrimination during the 1960s, the apartheid system held sway in South Africa and Namibia. He noted that it came into being in 1948 and only

disappeared in the 1990s, and it was on 21 March 1960 when the Sharpeville massacre occurred, whereby 69 people were killed, today commemorated on the International Day for the Elimination of Racial Discrimination. Professor Barreto also explained that the 1950s and early 1960s bore witness to the greatest achievements of the civil rights movement in the United States, despite the assassination of prominent civil rights leaders.

21. Mr. Barreto stated that the adoption of an additional protocol to the Convention is precisely an opportunity to develop some of the specific normative consequences of the Convention deriving from colonialism. He explained that there is a complex relationship between colonialism and racial discrimination. He said that historically the colonialism developed in Africa and Asia from the beginning of the Portuguese Empire in the 15th century and in America from the beginnings of the Spanish Empire, and it was always accompanied by discrimination and racism. He said that in this scenario the relationship between colonialism and racism was a two-way street, because they gave birth to each other and were mutually strengthening. Professor Barreto explained that, ever since the first contacts, the exercise of violence against the indigenous peoples by the empires and colonial companies, simultaneously entailed the materialization of a series of discriminatory and racist practices. He noted that the treaties discriminated against the indigenous peoples simply because they were members of indigenous communities, and this was very clearly different from the treatment of the Europeans. He told the Committee that prejudices and racist culture helped to legitimize, strengthen and maintain the colonial system for hundreds of years.

22. Professor Barreto said that there could not be any modern colonialism without racism. He stated that the structural interrelationship between the phenomenon of colonialism and racial discrimination enables a discussion about the complex phenomenon of inherently racist colonialism and racial discrimination of colonial origin, or colonial racism. Moreover, he continued, the discriminatory practices and racist culture stemming from colonialism survived this same colonialism, and continues to spread all over the world in current times in the post-colonial era. He explained that it is possible to define modern-day culture and political systems as neo-colonial insofar as they have received the racist heritage of colonialism and, thus, racism and racial discrimination are today one of its main characteristics.

23. Professor Barreto indicated that his main point was that it is precisely against this colonial or neo-colonial racism that the Convention could help us make some progress today and display greater determination with regard to the additional protocol.

24. Professor Barreto suggested that racism and racial discrimination is firstly about a restriction on the exercise of human rights on grounds of race, colour, descent, or ethnic or national origin; second, he noted that racial discrimination and racism also take into consideration any other type of consequences of any type of colonial practices stemming from racism, including ill-treatment, forced labour, slavery, sexual violation, torture, mutilation, and killing which in many cases turned into genocide. He reminded the Committee that it is not only a consideration of racial discrimination, but also the horror of colonial violence and such serious crimes as genocide.

25. Colonial genocide occurred at different points in time throughout the geography of global colonialism and on all continents and its victims were indigenous and tribal communities of the various colonies or colonized peoples. He stated that today racist violence targeting migrants and refugees fleeing violence, poverty, and hunger to the territory of the former empires is witnessed. He stressed that the consequences for human rights are not limited to racial discrimination, because in many cases racism has led to genocide, and this reflects the gravity of racism and racial discrimination. Professor Barreto said that, just as those who drafted the Convention back in the 1960s were alarmed by the expressions of anti-Semitism at the time, today societies are alarmed by other expressions of racial discrimination and neo-colonial racism that have been visible for several decades, such as violence targeting migrants and refugees who arrive in countries of the global north.

26. Moving to the topic of the subjects or actors of racial discrimination and colonial racism, Professor Barreto noted that in the present Westphalian configuration of international human rights law, only States are subjects with obligations and responsibilities; however,

empires and colonial companies were also main agents of modern global colonialism from the 15th and 16th centuries and instruments of the conception and spread of colonial racism.

27. Professor Barreto explained that today there are no empires or colonial companies in international human rights law, however there are States which were empires and benefitted from the trade and political operation of the colonial companies. He suggested that today these same States must recognize their colonial past and recognize themselves as former empires. He said that States that were empires are called upon to make reparations for the racist global culture and racial discrimination that they helped to create, strengthen, and extend over the entire planet over a period of several centuries.

28. Professor Barreto recalled article 7 of the ICERD requiring all States parties to adopt measures in the field of education, culture, and mass media, with a view to combating the prejudices which lead to racial discrimination. He suggested that in this field of cultural models, the additional protocol to the Convention could introduce obligations that would apply to all States, but in particular to those States which were empires. He noted that this would apply when it comes to combating racial discrimination, and more particularly in the construction of national cultures and a global culture that is free of colonial racism. Professor Barreto explained that this emphasis on the responsibilities of some States is not foreign to international law, as it is similar to the system that establishes international treaties such as those relating to climate change, and with such treaties various States take on different agreements in accordance with their historic participation in the production of greenhouse gases. He also suggested that any international standard of a penal nature could also include preventive measures that seek to deactivate the cultural causes that lead to the commission of the crimes.

29. Professor Barreto suggested that, if the additional protocol manages to include such specific obligations related to the elimination of the cultural models linked to colonial racial discrimination, the former colonial empires could learn from the educational cultural process in Germany called 'Mastering the Past' regarding the Holocaust and anti-Semitism. He proposed that States that were empires could initiate a process of narrating their colonial history, and could recognize their participation in racist practices and in the dissemination of ideologies based on racial superiority. He stated that such an educational process should condemn such practices as immoral and unjust. He suggested there also be an emphasis on the validity of the international constitutional and legal principle of equal human dignity and non-discrimination. Additionally, he suggested there could be emotional education enabling us to recognize people of all races as people like us or people as human as us.

30. Professor Barreto proposed that the UN specialized agencies also contribute to this effort with a view to eliminating neo-colonial racist prejudices. He noted that UNESCO has created guidelines so that States can adopt national educational policies on the Holocaust, and could also create guidelines on education on the history of colonial genocide and cultural models associated with them.

31. To conclude, Professor Barreto noted that in December 1965 during the final session of the preparatory work for the ICERD, the representative of one of the former empires lamented the fact that the topic of colonialism had been repeatedly introduced in the discussion, and delegations agreed not to mention in the Convention specific forms of discrimination. They opted to speak of 'racial discrimination' in general as a compromise, with a view to ensuring the greatest possible consensus around the final text. He stated that perhaps the distance from the decolonization process and the passage of over 55 years would enable the former empires today not to object to a reference to colonial racial discrimination, and perhaps such a distance could also enable them to recognize their own contribution to this process, to accept obligations in this respect, and to undertake to reduce or dismantle the global culture of racial discrimination that they themselves helped to create. He hoped that States today would rediscover the urgency with which in 1965 states undertook in the Convention to "rapidly eliminate racial discrimination throughout the world."

32. The representative of Cote d'Ivoire on behalf of the African Group highlighted the importance of a broader recognition of the systemic nature of racism, which has affected Africans and persons of African descent, as well as the need to face the past in order to guarantee a future that would preserve human dignity and human rights. He said that the

DDPA remains a major achievement which allowed the recognition of the abuses of the past related to colonialism and slavery, given that they focus on the structural forms of racism and racial discrimination. He stated that UN Member States need to maintain the momentum that was initiated in Durban. He noted that the official abolition of slavery and colonialism has not ended structural racism, which is still perpetuated in certain practices. He stated that there are a number of contemporary forms of racism which need to be considered as an extension of past racial inequalities for which there has been no specific remedy. The African Group believes, as a result, colonialism, as well as the Trans-Atlantic slave trade are the deep root causes of a number of elements of racial discrimination, even today, which was also clearly highlighted in the DDPA. Given this, the African Group calls for recognition of the colonial pasts of countries which have led to modern forms of racial discrimination, and would call on all States to recognize the need to eliminate persistent structures of racial discrimination, including legal ones, which came about during the past, and which deprive Africans and persons of African descent of their human rights.

33. The representative of the European Union wished to focus on some of the elements that Professor Barreto raised concerning education and training. She stated that criminalizing acts is one approach, but that the EU believes that ultimately the objective is a change in mindset. She insisted that the visible discrimination must be combated but also structural, systemic, and unconscious bias and intersectional discrimination must be fought. She stated that the approach also needs to include education, as mentioned by Professor Barreto as there is a wider holistic approach to consider.

34. Professor Barreto responded noticing a common characteristic in the comments, which is the question of the incapacity to address some of the urgent problems that exist today in the human rights arena on the part of certain powerful States, which he referred to as former (or even current) empires. He stated that some willingness to act in this direction could be found from the time of the Durban world conference, therefore in every single approach to the topic of racial discrimination, which is perhaps decisive is the question of the political will to address it. He suggested that that political will should come mainly from the former empires and from the states that created this widespread global culture of racism, but it should be borne in mind that the Bandung Conference made a point for the countries of the Third World to also address racial discrimination issues inside their own countries. He suggested similar political will as has been present in Germany in relation to the Holocaust and anti-Semitism, was required. He said that the call is for the States to have the political will to address this problem.

Context discussion 2: All contemporary forms of discrimination based on religion or belief

35. At its 3rd meeting on 20 July 2022, the Ad Hoc Committee considered the issue of all contemporary forms of religion or belief and heard a presentation from Ms. Erica Howard, Professor of Law, Middlesex University, United Kingdom.

36. During the first portion of her presentation, Professor Howard stated that the ICERD is a very important Convention and it is ratified widely, but that the Ad Hoc Committee is a timely reminder that things have changed since it was adopted. She believes that discrimination based on religion or belief and hate speech occur with even greater frequency now than it did at the time the ICERD was adopted, and noted that this kind of discrimination is closely linked to discrimination on the basis of race and ethnicity.

37. Professor Howard reminded the Committee that equality and non-discrimination are fundamental human rights, grounded in the Universal Declaration of Human Rights (articles 1, 2, and 7), the International Covenant on Civil and Political Rights (articles 2 and 26), the International Covenant on Economic, Social and Cultural Rights (article 2), and various regional instruments. She noted that equality is the basis for all human rights, and that equality and non-discrimination are fundamental rights of all human beings.

38. Regarding contemporary forms of discrimination based on religion or belief, Ms. Howard suggested the Committee review Human Rights Council resolution 16/18,

particularly paragraphs 3, 5, and 6.² She highlighted the following forms of discrimination: advocacy to religious hatred (through any means); incitement to imminent violence based on religion or belief; discrimination on the basis of religion or belief; use of religious profiling and the invidious use of religion as a criterion in conducting questionings, searches, and other law enforcement investigative procedures; and denigration or derogatory religious stereotyping.

39. Although she noted there is no explicit definition of religion or belief, Professor Howard drew Committee's attention to the Declaration on the Elimination of all Forms of Intolerance and of Discrimination Based on Religion or Belief, particularly article 1, which notes that freedom of thought, conscience and religion also includes the right to manifest religion. She explained that the right to manifest religion can be subject to restrictions if prescribed by law and necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others. Ms. Howard also pointed to Human Rights Committee General Comment 22,³ which states that restrictions must be interpreted strictly, and that article 18 protects theistic, non-theistic and atheistic beliefs, as well as the right not to profess any religion or belief; ...it is not limited to traditional religions and beliefs with institutional characteristics or practices analogous to those of traditional religions.

40. Professor Howard questioned whether it is truly desirable to define religion or belief, as a definition can be difficult to achieve. She noted that definitions could easily be over or under inclusive, or could be an inappropriate societal value judgement. She suggested it may be better not to define religion or belief, but rather follow the guidance of General Comment 22.

41. Easier to define, according to Professor Howard would be discrimination based on religion or belief. He noted that the Religion and Belief Declaration offers a definition of such discrimination in article 1(2), where it states: "For the purposes of the present Declaration, the expression 'intolerance and discrimination based on religion or belief' means any distinction, exclusion, restriction or preference based on religion or belief and having as its purpose or as its effect nullification or impairment of the recognition, enjoyment or exercise of human rights and fundamental freedoms on an equal basis." She noted that this provision bears a striking similarity to article 1 of the ICERD, which declares: "In this Convention, the term 'racial discrimination' shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life." Professor Howard suggested that discrimination based on religion or belief could be fit into the ICERD definition, and noted further that religion is listed in article 5 of the ICERD, and that previous experts have suggested based on this, that the ICERD could be read to include religion. She noted that the aim of both the ICERD and the Declaration on Religion and Belief is to eliminate discrimination, and combat intolerance and prejudice.

42. Professor Howard stated that there is a gap in the protection against discrimination based on religion or belief at an international level because the declaration is not legally binding. She also identified many links and overlap between racial discrimination and discrimination based on religion or belief. She noted that, for both, discrimination is often linked to being a member of a vulnerable group. She also explained that the line between race and religion is often blurred. Ms. Howard highlighted the phrasing in the Durban Declaration and Plan of Action of linking together "racism, racial discrimination, xenophobia and related intolerance", and stated her belief that xenophobia and related intolerance can be inclusive of discrimination based on religion or belief, as the term "related intolerance" indicates that anything connected to race could be included and considered.

43. Professor Howard noted that the word "intolerance" is not defined in any international instrument, and that it should not be criminalized because to do so would be to criminalize a feeling or opinion, which is not possible under criminal law principles. She suggested that if

² [A/HRC/RES/16/18](#).

³ [CCPR/C/21/Rev.1/Add.4](#).

these feelings or opinions led to an act, that act could be criminalized. She also explained that people who discriminate typically do not distinguish between a victim's race, colour, descent, national or ethnic origin, culture or religion; they discriminate because someone is different, and the grounds are often multiple and confused.

44. Professor Howard stated that the term xenophobia could be seen as the fear of anything different or alien, which could lead to discrimination. She believes this is a broad enough term to include religion or belief. She provided an example of how, after 9/11 Sikh men wearing turbans were harassed because they were seen as terrorists, and though they were of a different religion, but they were mistakenly perceived to be of a certain religion.

45. Ms. Howard discussed prejudice and stereotypes, and how they could be conscious or unconscious. Stereotyping, she stated, is the application of a generalized standard to all members of a group, even though this could never be the characteristics of every person in that group. She argued that this stereotyping and prejudice could become a violation of international human rights law when it is used to act violently against a person or people.

46. Professor Howard cautioned the Committee that the lack of protection in international law for victims of discrimination based on religion or belief creates loopholes for perpetrators, as it enables them to claim that they were not discriminating based on race – which is punishable – but rather based on religion, which is not punishable under current international law.

47. Ms. Howard also discussed the difference between religion or belief and race or ethnic origin as grounds of discrimination. She noted that some people believe race is immutable but religion is a choice, but she refuted this belief, stating that many people do not see their religion as a matter of choice and that the discrimination they face is the same in effect because it strikes at the core of their identity, and the victim suffers just the same. Similarly, she pointed to the importance of freedom to change religion or belief. She also noted the necessity in any democratic society to have room to criticize religions and beliefs and religious leaders. She explained that freedom of religion and belief protects human beings, not actual religions and beliefs as such, and there is no right not to be offended in human rights law (nor, in her opinion, should there be).

48. Professor Howard identified some international instruments the Committee could consult as it considers the issue of all contemporary forms of discrimination based on religion or belief. She highlighted ICCPR, articles 20(2) and 27; Convention on the Rights of the Child, article 30; and the United Nations Declaration on the Rights of Persons Belonging to National, Ethnic, Religious and Linguistic Minorities. She stated that these instruments show that race and discrimination based on religion or belief are often linked and overlap.

49. Lastly, Professor Howard discussed the issue of multiple discrimination. She noted that multiple discrimination is widely acknowledged, including in the Durban Declaration and Programme of Action. She described multiple discrimination as discrimination on more than one ground that takes different forms where one ground can aggravate one or more other grounds of discrimination. Professor Howard also described intersectional discrimination, which she said is discrimination because of a combination of two or more grounds that are inextricably linked. She stated that multiple and intersectional discrimination is often linked to belonging to a vulnerable group, and that women and girls are more often subject to multiple discrimination. She urged the Committee to recognize and take account for multiple and intersectional discrimination.

50. The representative of Pakistan on behalf of the OIC thanked Professor Howard for her presentation. He also registered concern about people targeted on the basis of religion or belief. He noted that and shared Professor Howard's view that the international human rights standards can be read to prohibit religious discrimination. Nevertheless, he stated that reinforced standards were necessary to prevent religious discrimination, either through a separate legal instrument or by filling gaps in the ICERD. He asked Professor Howard if she could comment on these options, and also sought her advice on what elements could be added to the currently negotiated elements document, as international efforts to elaborate a separate legal instrument on religion or belief have been stalled for decades.

51. The representative of Cuba expressed Cuba's respect for religious plurality, including the rights of individuals not to practice religion, and stated that internationally, there are countries which proclaim to be guarantors of religious liberty or leverage religious identity for geopolitical ends. The representative of South Africa noted the extensive discussion of religion and belief in the DDPA and that South African law protected freedom of religion and the right not to believe or practice religion, but at the same time no country, person or religion should be above the law, therefore it is necessary to strike a balance taking into account the ICERD and the ICCPR.

52. The delegate for the EU expressed support for Professor Howard's suggestion that it might not be desirable to include a definition of religion. She stated that CERD General Comment 22 does give a good overview of the criteria that could be taken into account when trying to frame the right, and noted that the term xenophobia, as applied in the EU, also applies explicitly to religion. She stated that the difficulty was defining where one right stops and the other begins between protection from discrimination based on religion or belief and freedom of expression and opinion.

53. The Chair-Rapporteur asked Professor Howard if she could suggest actionable provisions or language to the Committee it could use to elaborate on this topic in an additional protocol, and also asked whether she considered the term 'xenophobia' broad enough to capture discrimination based on religion or belief.

54. Responding to Pakistan on behalf of the OIC, Professor Howard agreed that the only feasible way to explicitly address religious discrimination is through an additional protocol to the ICERD. She stated her belief that there is room to do it in the ICERD and room to recognize that racial discrimination is linked to religion and belief.

55. Regarding hate speech, as raised by South Africa and the EU, Ms. Howard agreed that it is difficult to define its boundaries and that it is challenging to criminalize hate speech because it required criminalizing speech predicted to result in a certain action: it requires some prediction of what will happen in the future, which is difficult. She noted that if the speech directly calls for violence, that is clearer, but this is already included in many criminal codes. She stated her belief that criminalization of hate speech poses the risk of stifling freedom of expression.

56. Addressing the Chair-Rapporteur's questions, Professor Howard suggested using the definition that is in the Declaration on Discrimination based on Religion or Belief, as it is already close to the definition of discrimination used in the ICERD. Another suggestion is to use the language in the DDPA, which includes "xenophobia and related intolerance," which, in her opinion, is broad enough to capture religious discrimination.

57. At its 4th meeting on 20 July, the Ad Hoc Committee continued its context discussion on all contemporary forms of discrimination based on religion or belief and heard a presentation from Ms. Rabiya Akande, Assistant Professor at Osgoode Hall Law School, York University, Canada.

58. Professor Akande began her presentation by noting that the ICERD is not only one of the most foundational, but also one of the earliest international human rights instruments predating even the International Covenant on Political and Civil Rights. She stated that the ICERD was birthed by a world awash with racial prejudice and ingrained discrimination that had produced the shocking atrocities of the Holocaust in Europe and that had led to the dehumanization, decimation and dispossession of countless peoples in overseas European colonies.

59. Professor Akande explained that constructions of racial difference were foundational to European colonization of its overseas territories. She told the Committee that the subjugation of foreign peoples was justified on the basis of a civilizational difference – one between a civilized Europe and the other – non-civilized peoples. This rhetoric, she noted, is apparent not only in the addresses by war generals but also in the writings of European legal scholars who have come to be regarded as the earliest thinkers of international law. She referenced the work of Francisco de Vitoria, a prominent sixteenth century Spanish Christian theologian and legal scholar who is widely regarded by modern scholars of international law as an intellectual forefather of discipline. She explained that, justifying the rights of Spaniards

to conquer territories occupied by Indigenous peoples in the western hemisphere, Vitoria described indigenous peoples as “unintelligent,” and “unfit to found or administer a lawful state up to the standard required by human or civil claims.” She noted that, having then proclaimed the indigenous person’s lack of civilization and the subordinate status of their governance institutions, it took little to justify the legitimacy of intervention in and ultimately conquest of indigenous lands. She explained that the idea that non-European peoples were fundamentally different – and therefore inferior – came to infuse international legal scholarship, and was advanced to justify European colonization.

60. Professor Akande recalled that the so-called civilization difference that furthered the ends of empire relied on supposedly innate characteristics of foreign peoples, but underlined that racial difference, however, went beyond phenotypical characteristics to include narratives of other forms of foreignness including religion. She explained that Vitoria also connected the racial superiority of the Spaniards with their religious superiority, and inversely the racial and civilization inferiority of Indigenous peoples with their religious inferiority. Professor Akande explained that the examples she referenced were intended to clarify that racial and religious subordination were intersectional. She told the Committee that it was on that racialized religious hierarchy that modern international law was founded. She cited international legal jurist Lassa Francis Lawrence Oppenheim, who noted that international law “in its origin essentially a product of a Christian civilization.” Professor Akande also asked the Committee to consider also the writings and statements of Frederick Lugard, the first Colonial Governor of Northern Nigeria and a key figure in the British conquest of the territory, who said that “Islam is incapable of the highest development” in comparison to Christianity. She explained that Lugard pointed out that despite Islam’s inferiority, it was ideally suited to Africans because, in his and other colonial officials’ estimations, Africans were, by their innate nature, incapable of being civilized.

61. In providing this historical context, Professor Akande also highlighted that European and American Protestant missionaries, who went to the colonies specifically to convert Africans, appearing to contradict the position that they were incapable of being civilized and proceeded from a notion of racial and religious hierarchy and racial and religious subordination. She noted that the notion of inferiority also undergirded missionary efforts – the call for conversion was predicated on the conviction that Africans required a form of civilization that only the missionary enterprise could provide. In both views, she suggested, race and religion were interdependent albeit in different ways, and racial and religious subordination intersectional.

62. Professor Akande argued that it was the Protestant missionary desire to convert the faithful of non-Christian religions, and the tensions of that view with other understandings of the colonial project, that provided a impetus for the drafting and eventually the adoption of Article 18 of the Universal Declaration of Human Rights – the Universal declaration’s provision on religious liberty. Notably, that provision provided for the right to convert from one religion to another. She explained that protection of religious conversion is neutral on its face; however, its historical context was one in which Protestant missionaries sought to protect their prerogative to proselytize to what missionaries described as the “non-Christian world.” She noted that in the historical records, ecumenical actors were highly influential in the drafting of the provision particularly through the Commission of the Churches on International Affairs, a Protestant ecumenical organization, which was newly established at the time.

63. Ms. Akande stated that other forms of imperial interests ensured the making of an international legal provision that excluded racialized religious communities from meaningful recourse under international law. Specifically, she noted, efforts to ensure that the Universal Declaration embodied rights protections not merely for individuals as individuals, but also that communal protections conferred upon minority groups were frustrated by the resistance of some States.

64. Professor Akande argued that the omission of minority group protection has proven fatal for religious persons who belong to a racialized religious group that is also a religious minority. She told the Committee that members of such minority groups suffer discrimination not merely as individual persons but rather as members of a group subordinated for its real or presumed religious identity, and that the religious identity of such groups typically become

essentialized and tied to racial markers regardless of heterogeneous phenotypical characteristics. She told the Committee that the unique impact of racial constructions on the enjoyment of and deprivation of religious liberty is deserving of a race-based group protection for racialized religious groups, and that to treat all religions under the individual rights framework as the current international legal regime does not capture the fact that not all religions, and not all religious persons are treated equally under current international law.

65. Professor Akande argued that international law's construction of religious liberty as entailing a distinction between the internal forum of belief and conscience and the external forum of manifestation is particularly pertinent to the Committee's work. She noted that, whereas the former is absolutely protected under international law, the latter can be derogated from based on public order, public safety among others. She stated that those restrictions appear neutral; however, the dichotomy between absolute protection for the conscience and regulated manifestation of religion evinces a notion of religion as inherent in the conscience, which favours liberal notions of faith that place emphasis on the conscience. She stated that, on the other hand, religious faiths for whom the distinction between faith and practice is tenuous have been subjected to governmental regulation especially when that religion is disfavoured. She gave the example of covered Muslim women, and the decisions handed down upholding state restrictions and even proscriptions on the hijab – the Muslim headscarf or veil – as being a proportional and reasonable restriction of manifestation of religion.

66. Ms. Akande argued that a survey of current international law and human rights jurisprudence leads to the conclusion that not all religions are treated equally under international law. She noted the scapegoating of certain types of religions, and the ensuing disfavour of those religious minorities, has produced the racialization of those religious groups, and that the historical racialization of certain religious groups, has produced a fertile ground for contemporary socio-political hierarchies that could subordinate those groups, including through the law.

67. Professor Akande explained that the history of colonialism created a fertile ground for this form of racialization as a prelude to colonial expropriation, and that history lives on in the current moment with the example of the racialization of Muslims in the aftermath of 9/11 and the global war on terror that ensued. Under those circumstances, the phenotypical diversity of Muslims has not mattered: Islamophobia conceives of Muslim stereotypes (non-white and threatening) and at the same time a racial and a religious other.

68. She stated that Muslim minorities find their position uniquely precarious today, experiencing the effect of Islamophobia and yet unable to access meaningful legal remedy under the law. Professor Akande noted that here are other religious communities inhabiting the race-religion nexus in a way that heightens their subordination, giving examples of anti-Semitism, and the experience of Sikhs. She added that the continued intertwining of religious and racial discrimination also caused certain Christian communities to be minorities, besieged in ways that simultaneously raise fundamental questions both of racial and religious discrimination. Under these circumstances, Professor Akande argued, religious discrimination becomes not only a question of religious liberty, it also becomes a challenge to be tackled by instituting an effective international legal regime of racial non-subordination.

69. Professor Akande told the Committee that no better opportunity exists to design such a legal regime than in the additional protocol to the ICERD. She noted that there has been some international recognition that the international legal regime on the prohibition ought to include protections for racialized religious minorities, most notably from CERD General Recommendation 32, which stipulates that the protections of the ICERD extend to persons belonging to racialized religious communities such as Muslims subjected to Islamophobia. She noted that the Durban Declaration similarly embodies an intersectional approach to racialized forms of religious discrimination. However, she stated, these pronouncements only constitute soft law and call for, rather than obviate the need for, a binding international legal instrument like an additional protocol.

70. Ms. Akande suggested that the language of the additional protocol be precise and reflect the intersectionality of racial and religious discrimination. She suggested substantial revision to the draft element produced at the Committee's tenth session, which refers to "All contemporary forms of discrimination based on religion or belief," as it appears to construe

all forms of contemporary religious discrimination as racial discrimination – a presumption that did not stand up to scrutiny both in the historical and contemporary experiences of religious discrimination. She stated that the clause does not account for the intersection of race and religion and, as a result, fails to acknowledge the everyday struggle of persons who suffer intersectional discrimination along the axis of race and religion. The result, she cautioned, is that the elements document would not offer the legal remedy needed by those whose experience of religious and racial marginalization is compounded by the intersection of those two forms of discrimination.

71. In conclusion, Professor Akande reminded the Committee that religious discrimination against minorities is often racialized, though it is not always so. She stated that fashioning an appropriate legal response to intersectional discrimination requires grasping the historical processes that consigns certain religious groups to a disfavored status: at the same time a racialized, and a religious minority. She recalled that the story of colonization was of the assertion of power and domination based on a narrative of a civilizational difference that at once evoked the racial and religious subordination of colonized populations, and argued that global context lives on in the marginalization of racialized religious groups. She stressed that this marginalization is not only denied recognition and remedy under international law, but is in many ways even compounded by the current international legal regime. She urged the Committee, as it confronts Islamophobia sometimes manifest as national and international security policy, and the persistent denigration of the religions of indigenous peoples globally, to seize this opportunity to take action by offering robust legal protections for communities at the margins.

72. At the 4th meeting, the Ambassador and Permanent Representative of Pakistan requested the floor to make a statement on behalf of the OIC. He reiterated serious concerns over systematic targeting of individuals and communities on the basis of their religious beliefs. He continued that the OIC unequivocally condemns the practice of insulting Islam, Christianity, Judaism and any other religion. He noted that international human rights law is explicit in its call on States to uphold their human rights obligations without discrimination based on race, colour, sex, language and religion, and that this principle is codified in the Universal Declaration of Human Rights, all core human rights covenants, and the Durban Declaration and Programme of Action.

73. He stated that the existence of gaps in international standards have allowed the emergence of new forms of religious discrimination, violence and incitement, and that these developments remain a major concern for the OIC. Therefore, he underscored the need for a legal instrument to counter these contemporary forms of discrimination, including Islamophobia. He acknowledged the diversity of views on the means to address the issue of religious discrimination either through a separate legal instrument or an additional protocol to the ICERD, and asserted that the OIC believes that addressing the challenge of contemporary forms of discrimination from the perspective of its multiple, compounding and aggravated manifestations remains paramount. He stated that CERD Committee has, and continues to, raise concerns about growing incidents of discrimination based on religion, including Islamophobia, and recalled General Recommendation 32, where CERD recognized the intersectionality of racial and religious discrimination rooted also in individuals' national and ethnic origins.

74. He suggested that to avoid a protection gap, reinforcing ICERD through an additional protocol is therefore timely and vital to combat contemporary forms of discrimination. He affirmed that the OIC is ready to begin negotiations on a new legal instrument while building on this Committee's work to strengthen the ICERD through an additional protocol, and expressed trust in other stakeholders to engage constructively in negotiations.

75. Responding to Professor Akande's presentation, the representative of the European Union noted the importance of both racial and religious discrimination, as both are high on the EU's agenda. She questioned whether it is wise to integrate the two issues into one, and noted that there are UN processes ongoing related to the Rabat Plan of Action and the Istanbul Process where religious discrimination is already being discussed. She stated that there are issues of religious discrimination that do not include an intersectional aspect with racial discrimination, and that those are important too. She felt that the EU did not consider it is

wise to incorporate prohibition of religious discrimination in an additional protocol to the ICERD.

76. The representative of Pakistan on behalf of the OIC agreed about how racial and religious discrimination intersected, and reiterated the position stated in CERD's General Comment 32 about a growing trend of intersectional racial and religious discrimination, particularly concerning Islamophobia. He stated that the Committee must move forward on this issue, because a gap exists. The representative stated that the Human Rights Council and General Assembly resolutions mandating the Committee confirmed States' beliefs that there is a gap, so further debate on this issue is not worthwhile. Addressing the EU's concerns, he stated that addressing intersectional discrimination in the Committee did not preclude pushing forward with separate prohibitions using the Rabat and Istanbul processes. He asked Professor Akande about her views on the possibility of a separate convention at a later stage focused expressly on religious intolerance, as no binding instrument currently exists.

77. Professor Akande responded that the essential question from both representatives is the question of why consider religious discrimination in a convention that is about racial discrimination. She stated that the Committee should take this approach because those two identities were intersectional from the beginning of international law and race today is determined by more than phenotypical characteristics. She emphasized that racialization of persons should be thought of beyond phenotypical definitions, and that interdependence of racial and religious subordination is not new and has been present for a long time. She suggested that the Committee take the question of racialization of religious persons seriously, and think of it as intrinsic to how we think about racialization. She indicated that this does not mean the Committee must think about all forms of religious discrimination that are not also racial. These issues, she suggested, could be dealt with in subsequent processes.

78. Professor Akande also raised some concerns regarding criminalization as it has the tendency to shift from structural and group-based injustices to naming and punishing individual perpetrators. She suggested that criminalization should be an essential and part of this process, but that it would be important not to shift focus away from the structural, group-based injustices, which may be better served through remedies such as reparations and education. She also noted that criminalization relies on law enforcement, and could overlook the historical role that law enforcement had played in upholding the oppression of racialized groups.

79. The representative of the EU commented regarding criminalization, that it is one of the tools in the toolbox, and something the EU itself is exploring. She asked whether the focus should be on implementation of what is already agreed to in the ICERD, or whether it should be on new standards. She added that in the EU's opinion, article 5 of the ICERD is sufficient for recognizing intersectional racial and religious discrimination.

80. The representative of Azerbaijan stressed the necessity of bridging legal gaps related to religious discrimination and asked Professor Akande if she could elaborate on what types of elements or points could be considered as constitutive elements of discrimination based on religion or belief in the additional protocol, given history and contemporary changes. The Chair-Rapporteur also asked Professor Akande whether the term "xenophobia" is broad enough to capture discrimination based on religion or belief, or whether the Committee needed to go further in its definitions.

81. Speaking to constitutive elements on a draft protocol, Professor Akande responded that the provision had to start by acknowledging the intersection of racial discrimination and certain forms of religious discrimination. She suggested that some sort of preambular reference would be useful to give the historical and structural context, and that the draft should include protections not only for individuals, but also for groups. She clarified that criminalization should only be one of many elements in the additional protocol. Regarding the question from the Chair-Rapporteur, she responded that the term xenophobia could be sufficient to capture discrimination based on religion or belief, but that the additional protocol should avoid grouping different forms of racial discrimination together, and that there should be actual naming of human rights and forms of discrimination being addressed. She suggested the terms "racialized religious discrimination" and "racialized religious minorities" could be considered in the additional protocol.

Context discussion 3: Principles and elements of criminalization

82. At its 5th meeting on 21 July, the Committee considered item 6 – context discussion on the principles and elements of criminalization. The Committee heard a presentation from Ms. Beatrice Bonafe, Professor of International Law at Sapienza University, Rome on this topic.

83. Professor Bonafe began by stating that her presentation would focus on principles governing criminalization in the context of racial discrimination, and that she would present the basic principles, but also underline differences between criminalization and other options.

84. She explained that the ICERD provides for different regimes or logics, and that the only one which provides for criminalization is article 4. She explained that article 2 can be seen as the logic of state responsibility (international law), and outlines state obligations at the international level (actions that may have to be taken at both international and national levels), and it guarantees the fundamental rights in article 5. Article 4, she noted, expresses the logic of criminal responsibility, where the Convention outlines criminalization obligations and creates individual criminal liability under national law. Article 6, she stated, reflects the logic of civil responsibility and it addresses effective remedies, and victims' access to reparation or satisfaction under national law. Article 7, she explained lays out administrative or implementation measures.

85. Professor Bonafe suggested that the same logic can apply to the development of an additional protocol. She stated that the protocol could use the logic of state responsibility (international law) for legal relations between states; the logic of criminal responsibility (international law) for legal relations between the international community and individuals; the logic of criminal responsibility (national law) for legal relations between the national community and individuals; and the logic of civil responsibility (national law) for legal relations between the perpetrator and victims.

86. Professor Bonafe explained how the additional protocol might be structured. She suggested the Committee consider a preamble stating the additional protocol's purpose, listing inspiring general principles, and situating its relationship with existing legal documents. The articles of the protocol, she indicated, would be the substantive provisions – including, but not limited to, definitions, obligations, beneficiaries, and implementation – using language such as “States undertake to legislate; not to commit; to prevent...”, and procedural provisions – including, but not limited to, jurisdiction, legal standing, and institutions empowered – using language such as “to that end; States undertake to ensure; to have recourse to...”.

87. Turning to the Summary of issues and potential elements document adopted by the Committee at its 10th session, Professor Bonafe examined paragraph 108, noting that it expresses the logic of criminal responsibility under national law and the legal relation between a national community and individuals. She explained that the first part deals with criminalization, but that it is very general. She suggested that this first part (chapeau) of paragraph 108 be transformed into a number of preambular elements. She noted that subparagraphs (e) and (f) raise special issues about the logic of state responsibility (international law) and State preventive, administrative and implementation measures. These subparagraphs also fall under the logic of criminal responsibility (national law) and the logic of civil responsibility (national law), she said. She noted that paragraph 108 (g) contains State preventive, administrative, and implementation measures.

88. Ms. Bonafe discussed the Committee's options, noting that each has different subjects, conditions, and legal consequences. She said each requires the additional protocol to list the conditions and procedures specific to the chosen option, and that they can be combined in the text of the additional protocol.

89. The first option Professor Bonafe discussed was criminalization. She explained that there are different types of crimes: domestic offences, where there is a duty to prohibit and establish penalties at the national level; transnational crimes, where the definition of the offence has a transnational element, modes of liability, penalties to be applied nationally, and cooperation; and international crimes, which involve prohibition and repression at the

international level. The legal implications, she said, are different subjects, different procedures, and attention must be paid to the definition of jurisdiction. She also noted that the power to prosecute must be accounted for in the document.

90. In discussing the elements of the crime, Professor Bonafe explained to the Committee that it must outline the *actus reus* (the material content) – for example, incitement, denial, or public encouragement), and that this must define in a very specific manner what the prohibited conduct is. She explained that under the legality principle no one can be punished for something that is not specifically defined as a crime under the law, so this definition must be precise. She then drew the Committee’s attention to the *mens rea* requirement – the principle of personal responsibility and discriminatory intent. She noted that criminal sanctions could only be attached to conduct that is intended and that corresponds to the will of the actor. She explained that vicarious liability is excluded.

91. Professor Bonafe also addressed the collective dimension of international crimes, where the conduct has a group as its target. She noted that racism is generally based on some elements that would deal with membership in a group. The Committee must also consider modes of liability, for example direct perpetration, order planning, and aiding and abetting. These are the ways in which prohibited conduct can be carried out. She noted that different contributions can be regarded as criminal offences, not only direct incitement, for example, planning a racist campaign, or contributing to or encouraging the crime. She also encouraged the Committee to consider defences, excluding either *mens rea* or the lawfulness of the *actus reus*. These, she stated, may be things like extreme circumstances that warrant self-defence. Finally, she stated that the Committee should consider aggravating and mitigating circumstances where the intention to discriminate could be considered as an aggravated circumstance of an existing crime leading to a stricter sentence, instead of the *mens rea* of a new crime.

92. For examples on the substance of criminalization, Professor Bonafe directed the Committee to the Apartheid Convention, national legislation implementing article 4 of the ICERD, and the European Union legal framework. For examples on procedure, she drew the Committee’s attention to the core crimes conventions, or customary law – such as the Genocide Convention, Geneva Conventions and Protocols (war crimes) the ICC Statute (for the crime of aggression) and the draft convention on crimes against humanity – and transnational crimes or domestic offences – such as transnational criminal law conventions, terrorism conventions, human rights conventions, and environment conventions.

93. In her discussion of social media networks as duty bearers, Professor Bonafe raised two potential options. The first is to take the path of criminalization using language such as “to hold accountable companies, etc...” She noted that the criminalization of companies as legal persons would be very innovative, and that it is hardly accepted as a general notion under the law. The second path, she stated, is the more common one where there is civil liability under national law. She highlighted that a potential difficulty with this would be indirect responsibility where something that is prohibited is published or not removed or intervened quickly enough. She suggested that there could be cooperation between national authorities and social media networks to adopt a code of conduct and accept a review of their implementation that is scrutinized by national authorities.

94. Ms. Bonafe then discussed international responsibility, which she described as the inter-state relationship under international law. She noted that this includes obligations to legislate, investigate, prosecute, cooperate, prevent, prepare, etc. She explained that the implementation of international responsibility at the international level includes a wrongful act, reparation, and implementation. Under national law she explained that there can be either a vertical relationship (State-private actor), where the State has to protect fundamental rights and provide remedies in case of breach; or a horizontal relationship (private-private) under national law, where the State has to provide for civil liability (between the author and the victim). She explained that international law sets the obligations incumbent upon State, and that national law implements those obligations by adopting legislative, preventative, administrative and/or implementation measures.

95. Professor Bonafe concluded by discussing civil liability. At the national level, she noted that it applies to both natural persons and legal persons, could be based on international

obligations, and depended on the national rights of actions (such as jurisdiction, legal standing, and type of consequences). At the international level, she explained that there is increasing attention on reparations before international courts, such as commissions of inquiry, claims commissions, and direct negotiations between parties on issues such as cessation, non-repetition, restitution, compensation (for material damage), and satisfaction (for moral damage).

96. The representative for South Africa noted the difficult task before the Committee, given differing views on the necessity of criminalization. He spoke about the difficulties in the process for developing a similar law in South Africa, and the importance of balancing various inalienable rights. He noted that hate speech required clear intention for harm, especially under criminal law where the level of proof is much higher. He suggested that the Committee also consider restorative justice measures including education and civil work. He noted the need for political will to move forward, and asked Professor Bonafe if she could provide definitions that could help the Committee move forward.

97. The representative of the EU stated that criminalization should be the last resort, used only for the most serious of cases. She agreed that definitions should be clear and specific, but stated that the Committee was still at the level of discussing definitions. She suggested that Professor Bonafe's presentation indicated that there was still great work ahead for the Committee. She explained that the EU framework requires member states to consider racist and xenophobic motivation as an aggravating circumstance in national level actions. She said that the EU assists members with implementing the framework at the national level, but as it was very complicated and detailed endeavour, she questioned the feasibility of reaching a definition at the international level due to the balance which must be struck. She asked about Professor Bonafe's views on this point.

98. The representative of the International Human Rights Association of American Minorities (IHRAAM) stated that enforcing criminalization was not possible since States had yet to make declarations and refused to accept the jurisdiction of the CERD. He asked Professor Bonafe how these States could be held accountable.

99. Professor Bonafe responded that the purpose of her presentation was to provide options, rather than definitions. She noted that there are different degrees of seriousness and responsibility, the most serious being international crimes, where the conduct is prohibited no matter the author or perpetrator. She noted that this carries with it a number of consequences. She explained that her presentation presented a number of levels for the Committee to choose from in carrying out its work – for example, transnational crime. One suggestion, she said, could be to limit the object of criminalization to activities such as spreading, broadcasting, encouraging, and inciting others, that have a social impact or harm. She also suggested considering consequences, noting that if a crime is transnational because of the impact (for example, it occurs online), jurisdiction is not necessarily universal. She said that universal jurisdiction as such no longer exists, and suggested that the Committee could broaden it to personal jurisdiction of where the harm occurs.

100. Ms. Bonafe also stressed that in the future the ultimate content of the additional protocol should be reflected in the title of the protocol. In reading the current title, one could assume that criminalization is the main object and purpose, but that upon reading the document that is not necessarily the case.

101. Professor Bonafe suggested that the Committee also consider the jurisprudence of the media trials at the International Criminal Tribunal for Rwanda on the role of radio broadcasts as a way to connect racial discrimination and incitement to discrimination. The representative of the EU responded that the problem was that there is no common understanding of hate speech, and that by focusing on criminalization of hate speech, there could be significant negative impacts on freedom of opinion and expression. She noted that this was central to the EU's reluctance, and questioned whether international criminalization of hate speech this is the way forward.

102. Professor Bonafe indicated that her role as a legal expert was not to comment on the decisions and diplomatic work of the Committee. She did offer to clarify that the level of proof between civil and criminal proceedings is different, as it is higher in criminal cases and lower for civil responsibility. She explained that it is more difficult to prove that a crime has

been committed, and that legal order requires ensuring that the prohibited conduct has taken place.

103. The Chair-Rapporteur thanked the expert for her presentation and her suggestions. She added that the work of the Committee would not be prevented from moving forward owing to the difficulties which might be foreseen. She underlined the importance of continued legal expert advice and study to help guide the work of the Committee, from their various legal positions and that it was welcome to bring these views and discussions into the Ad Hoc Committee. As Chair-Rapporteur she intended to contribute to the fulfilment of the Committee's mandate, noting that there were enough elements from the body of the work of the Committee over the years to task experts and include national and regional expertise in this collective work.

104. At its 8th meeting on 22 July, the Committee continued its context discussion on the principles and elements of criminalization under item 6. Mr. Mark A. Drumbl, Professor of Law and Director of the Transnational Law Institute at the School of Law, Washington and Lee University in the United States of America gave a presentation on the topic.

105. In his presentation, Mr. Drumbl commended the Ad Hoc Committee for thinking about how the ICERD and related mechanisms could be enhanced through elaboration and implementation, and offered some "big picture" considerations for the Committee to consider as it moves forward with its mandate.

106. Mr. Drumbl highlighted six themes related to the principles and elements of criminalization: 1) definitions; 2) thresholds; 3) limits of criminal law; 4) the place of civil law; 5) punishment and remedy; and 6) the intersectionality between racism and xenophobia, and children, youth, and young people.

107. On the issue of definitions, Professor Drumbl noted there is no existing definition of "racism" or "xenophobia" in international law, but that terms like these are frequently used in political and social discourse. He stated that, while there might be a consideration of knowledge about what these terms mean, legal definitions require a different level of precision than common understanding, and this precision is necessary for any legal protocol. He noted that words and phrases can have multiple meanings – that the legal definition need not be the only definition – but that without such a clear definition there can be no criminal law protocol. He recalled the debate over the definition of terrorism, which led to decades where there was not a singular definition of that term and caused legal fragmentation and opened the potential for abuse of legislation, and cautioned the Committee to think clearly in advance about defining these terms to avoid that kind of fragmentation. He stated that this alone is a central issue justifying the elaboration of an additional protocol. He drew the Committee's attention to the crime of apartheid as a useful example of how a clear definition could be attained under a legal framework.

108. Professor Drumbl indicated that it is important to be very clear about what kinds of acts the Committee would decide to criminalize. In considering this issue – that is, the thresholds for criminalization – he identified a number of questions for the Ad Hoc Committee to consider: What has to happen before something that is "racist" or "xenophobic" becomes a crime? Is this based on feelings or thoughts? Would that be overbroad? Is this addressing governmental policies or practices? While this would narrow matters, he noted that governmental policies are not routinely criminalized. He asked if it would be words, policies and practices that lead to violence and death that are criminalized, and stated that this would be the most obvious candidate to include in a criminal law framework. In this regard, he drew the Committee's attention to the criminal law concept of incitement and the work and rich jurisprudence of the International Criminal Tribunal for Rwanda, which prosecuted and punished media leaders, musicians, and singers for hate speech that incited genocide. He emphasized the importance of clarity on what *actus reus*, or acts, the Committee intended to prosecute and punish, and noted with respect that the documents drafted by the Ad Hoc Committee to date were unclear on this front.

109. Professor Drumbl discussed the limits of criminal law, and explained that criminal law typically addresses explicit violence that leads to physical harm, and that it blames the individual for structural harms (for example, holds a small number of people responsible for genocide). He clarified that criminal law deals with physical injury rather than moral injury;

and that it cannot address the phenomenon of “weathering,” which is the day-to-day exhaustion caused by the trauma that comes from the type of marginalization that arises from constantly having to justify oneself and one’s existence to others. He noted that criminal law does not address structural responsibility – where corporations, institutions, and states are key actors – and that, generally, criminal law attaches very poorly to organizations and states.

110. He also explained that definitions at international law are universal, but that racism and its effects can be very local, noting that an utterance of hatred in one place may lead to no violence, whereas in another location it could lead to intense violence. He urged the Ad Hoc Committee to take into account local contexts, as it could be central to the harm that any policy, statement, or act could engender. He stated that international law is always about the universal and the particular, and implored the Committee not to lose sight of the particulars of local context.

111. Mr. Drumbl suggested that, instead of seeing them in opposition, the Ad Hoc Committee adopt an approach that considers both criminal law and civil law, stating that the goals of retribution and deterrence are best addressed by synergizing criminal law and civil law. He noted, specifically, that criminal law places the blame solely on individuals, and enables states to escape scrutiny.

112. In his discussion of punishment and remedy, Professor Drumbl urged a focus on rehabilitation and reprogramming over imprisonment. He explained that criminal law generally punishes by imprisoning people, but that imprisoning a racist or xenophobic actor can often entrench those attitudes rather than freeing the person from them. He suggested that remedies focus on re-humanizing the perpetrator and encouraged the Committee to consider psychological and sociological work that de-programmes hate and thinks of resocialization, remediation, and the return of the wrongdoer to healthy societal life. He noted explicitly that to leave the idea of punishment only to national legal systems and traditional law is insufficient.

113. Professor Drumbl concluded his presentation by suggesting that the Ad Hoc Committee also consider the intersectionality between children, youth, young people and racism. He noted that young people need special attention under international law, and explained that frequently children are socialized into ethnic or racial hatred and that, especially during the COVID-19 pandemic when schools were closed, children have been at greater risk of exposure to and interaction with online hate groups. He suggested that an additional protocol consider the right of the child to be free from brain washing, manipulation, recruitment and the mental pollution of racism and xenophobia, and that it be considered a particularly pernicious act to recruit young people into hate groups. He encouraged the Committee to consider it an aggravating factor should an individual be involved in racist indoctrination of young people, and noted that the intergenerational effects of racism and xenophobia are profound, and particularly repulsive when adults manipulate young minds in these spaces.

114. During the interactive discussion, the representative of South Africa sought insight regarding clear definitions and requested Mr. Drumbl assist the Committee with clearer definitions on some of the terminology he mentioned.

115. The representative of the Sikh Human Rights Group NGO delivered a statement supporting making hate speech a criminal offence, and expressing a lack of understanding of the reservation by some countries, particularly as some speech is already treated as a penal offence in the same countries. He expressed the NGO’s view that hate speech is an offensive manner of expression suggesting a lack of either intellectual dexterity to communicate without offense or a lack of linguistic tools to communicate without offense. Thus, to align the right to criticize with the right to offend in keeping with long established civilisations and to develop civil approaches, his organization supported that hate speech be criminalised. He stated that freedom of expression should not be confused with the right to offend and cited the ancient Indian text of *Natyashastra* written more than 2000 years ago, which explains how language and arts can be very effective in expressing criticism without offending.

116. The representative of the NGO *Ascendance Africaine Ocean Indien* asked Professor Drumbl to provide the Committee with some information about the work he has done with children to assist the Committee in understanding how to approach children. The

representative of the NGO IHRAAM asked how acts of state-sponsored aggression or legislative, organizational, or structurally racist policies could be taken into account, and also asked if Mr. Drumbl could speak to continuing corporate-based oppression.

117. The representative of Sudan asked Professor Drumbl about what the most effective tool is to find a solution: a focus on criminalization or other policies, remedies, cultural aspects, or transitional justice.

118. Mr. Drumbl responded that provision of a definition was not an easy task and he stated that the most important element that differentiating pride from hate is subordination and that subordination should be a central term to any definition of racism. He explained that this subordination includes the idea that race and diversity comes with ordinality, hierarchy, or superiority and that subordination is a very important term when a racially motivated act is informed by the idea that difference equals hierarchy. He suggested that it is important to determine what defines a race, and for this he encouraged the Committee to look to the work the International Criminal Tribunal for Rwanda on defining issues of race and ethnicity.

119. On the issue of remedy, Mr. Drumbl noted that restorative justice measures could be useful, but cautioned that not all afflicted communities would welcome a perpetrator in their spaces to make amends and that to force this would put the burden of restoration on the victims, which should not be the case.

120. Professor Drumbl noted that xenophobia is a different kind of conduct than racism, though it can occur within a racial group or community. He noted that it is the fear of the foreign, and that it has an important link with migrants. He explained that there is far less policy that addresses the criminalization of xenophobia than racism, and advised the Committee to focus on racism initially because xenophobia could be very complicated and could include nationality.

121. Speaking to his work with children and youth, Professor Drumbl stated that, when re-socializing a young person who has been socialized into racism or xenophobia, it is important to remember that they often see themselves fighting in self-defence against an enemy of some kind. He said that a child needs to be taught how to hate and the best way to teach this is to emphasize that the other is a danger or a threat and that the best resocialization does not only reprogramme the mind, but also offers social, economic, and educational support and stability. He explained that young people socialized into hate require different forms of rehabilitation and the most important being made to feel confident enough that they have a place in society that is not under threat or assault. He stated that this suggests that one of the most important anti-racism strategies is the sense that there is enough for all and that everyone has a place in the future.

122. Mr. Drumbl suggested that an unspoken problem with transitional justice and post-conflict reconstruction is that international policy makers, funders, and donors see any proper form of transitional justice as one that embraces liberal market capitalism. He cited Francis Fukuyama's work, noting that central to transitional justice is the idea of free market capitalism, which is accompanied by the limited liability of companies. He stated that there can never be accountability for corporate acts in the current economic system, and noted that the most important reforms would be at the domestic level, so as to place responsibility on the State to address the protected status of corporations. He suggested one remedy may be to limit the ability of corporations to do business if patterns of institutional racism can be demonstrated. He noted this is one of the limitations of focusing on criminal law as it looks only at the most spectacularly ugly or violent conduct. This is why criminal law should be positioned as complementary to other methods of justice. He highlighted the importance of focusing on the day to day harms, and that lessons could be drawn from consumer activism.

123. Regarding acts of aggression, Professor Drumbl suggested the Committee consider the idea of timing. He explained that criminal law could only criminalize conduct that occurs after the definition and crystallization of the criminal law: for example, the Holocaust could not be prosecuted as genocide because the crime of genocide did not exist when it occurred. He stated that historical injustice is critically important, but that criminalizing can never reach back in time to deal with historical injustices, which is why he urged the Committee to explore other remedies not limited by retroactivity.

124. The Chair-Rapporteur asked that Professor Drumbl elaborate upon his statement that while international law is important because of its universality, racism is local and that the additional protocol should contemplate local contexts. Mr. Drumbl explained that the same statement, policy, or pronouncement made in one place could have no effect (people consider it “crazy talk”), but in another place it could be as incendiary as a match on a pile of wood. In the elaboration of a definition of racism, he encouraged the Committee to focus on the potentiality of harm. He provided an example of how, in a few countries redistribution policies have been put in place to remedy historical injustice and promote equity, but in certain political constituencies they are denounced as racist because they operate on identity paradigms of racial difference. This, he stated, is why language of subordination is key, as is recognizing that certain kinds of differences can make an action far more serious and dangerous in one place compared to another. As for how this could be achieved in a definition, Professor Drumbl suggested that part of a definition of racism should gesture towards the reality of how life is lived historically in a jurisdiction. As the Committee deals with the cyber elements, he suggested it think very actively about locating jurisdiction in the place where the harm is felt. He believes these balances the freedom of expression issue, as in some places saying one thing could be protected by freedom of expression because it does not cause any harm, but it could cause great harm in another place. He noted once more that it would be useful to review jurisprudence of the International Criminal Tribunal for Rwanda on this issue.

Annex II

Programme of work – Resumed 11th and 12th sessions, Ad Hoc Committee on the Elaboration of Complementary Standards, 18–29 July 2022

(as adopted 19.07.22)

1st week

	Monday 18.07	Tuesday 19.07	Wednesday 20.07	Thursday 21.07	Friday 22.07
10:00–12:00	<u>Resumed 11th session</u> <u>Item 9</u> Brief Updates by the Chairperson General discussion and exchange of views <u>Item 10</u> Conclusions and recommendations of the session	<u>12th session</u> <u>Item 1</u> Opening of the Session Yury BOYCHENKO, OHCHR <u>Item 2</u> Election of the Chairperson <u>Item 3</u> Adoption of the Agenda and Programme of Work -- General statements	<u>Item 5</u> Context discussion 2: All contemporary forms of discrimination based on religion or belief Erica HOWARD, Professor of Law, Middlesex University United Kingdom Discussion	<u>Item 6</u> Context discussion 3: Principles and elements of criminalization Beatrice BONAFE, Professor of International Law, Sapienza University, Rome Discussion	<u>Item 7</u> Introduction of the Chairperson's Annotation of the "Summary of issues and possible elements discussed pertaining to the implementation of General Assembly resolution 73/262 and Human Rights Council resolution 34/36 on the commencement of the negotiations on the draft additional protocol to the Convention 'criminalizing acts of a racist and xenophobic nature'" General statements
15:00–17:00	<u>Item 8</u> Preventive measures to combat racist and xenophobic discrimination Anna SPAIN BRADLEY, Vice Chancellor for Equity, Diversity and Inclusion, University of California Los Angeles, former Professor of Law, University of Colorado, USA Discussion <u>Item 10 continued</u> Adoption of the conclusions and recommendations of the 11th session	<u>Item 4</u> Context discussion 1: Historical impact of colonialism on the law Antony ANGHIE Professor, College of Law University of Utah José Manuel BARRETO Fellow, Department of Law Universitat Bielefeld Professor, Faculty of Law Catholic University of Colombia Discussion	<u>Item 5 continued</u> Context discussion 2: All contemporary forms of discrimination based on religion or belief Rabiat AKANDE Assistant Professor Osgoode Hall Law School, York University, Canada Discussion	General conclusions of the context discussions	<u>Item 6 continued</u> Context discussion 3: Principles and elements of criminalization Mark A. DRUMBL Professor, Director of the Transnational Law Institute School of Law, Washington and Lee University, United States of America Discussion

2nd week

	Monday 25.07	Tuesday 26.07	Wednesday 27.07	Thursday 28.07	Friday 29.07
10:00–12:00	<u>Item 7 continued</u> Chairperson’s Annotation of the “Summary of issues and possible elements discussed pertaining to the implementation of General Assembly resolution 73/262 and Human Rights Council resolution 34/36 on the commencement of the negotiations on the draft additional protocol to the Convention ‘criminalizing acts of a racist and xenophobic nature’” Discussion	<u>Item 7 continued</u> Chairperson’s Annotation of the “Summary of issues and possible elements discussed pertaining to the implementation of General Assembly resolution 73/262 and Human Rights Council resolution 34/36 on the commencement of the negotiations on the draft additional protocol to the Convention ‘criminalizing acts of a racist and xenophobic nature’” Discussion	<u>Item 7 continued</u> Chairperson’s Annotation of the “Summary of issues and possible elements discussed pertaining to the implementation of General Assembly resolution 73/262 and Human Rights Council resolution 34/36 on the commencement of the negotiations on the draft additional protocol to the Convention ‘criminalizing acts of a racist and xenophobic nature’” Discussion	<u>Item 7 continued</u> Chairperson’s Annotation of the “Summary of issues and possible elements discussed pertaining to the implementation of General Assembly resolution 73/262 and Human Rights Council resolution 34/36 on the commencement of the negotiations on the draft additional protocol to the Convention ‘criminalizing acts of a racist and xenophobic nature’” Discussion	<u>Item 8 continued</u> Conclusions and recommendations of the session
15:00–17:00	<u>Item 7 continued</u> Discussion	<u>Item 7 continued</u> Discussion	<u>Item 7 continued</u> Discussion	<u>Item 8</u> Conclusions and recommendations of the session	<u>Item 11</u> Adoption of the conclusions and recommendations of the 12th session

Annex III

List of attendance

Member States

Algeria, Angola, Azerbaijan, Barbados, Bolivia (Plurinational State of), Botswana, Brazil, Burkina Faso, Cameroon, China, Colombia, Côte d'Ivoire, Cuba, Czechia, Djibouti, Egypt, Eswatini, Finland, Gambia, Guatemala, India, Iran (Islamic Republic of), Iraq, Ireland, Italy, Japan, Lao People's Democratic Republic, Lesotho, Libya, Malawi, Mauritania, Mexico, Morocco, Mozambique, Myanmar, Namibia, Nepal, Netherlands, Nigeria, Pakistan, Panama, Portugal, Qatar, Russian Federation, Rwanda, Senegal, South Africa, South Sudan, Sudan, Switzerland, Tunisia, Uganda, United Republic of Tanzania, Uzbekistan, Venezuela (Bolivarian Republic of), Zambia, Zimbabwe.

Non-Member States represented by observers

Holy See, State of Palestine

Intergovernmental organizations

European Union, Organization of Islamic Cooperation

Non-governmental organizations in consultative status with the Economic and Social Council

Africa Culture Internationale, African Center for Democracy and Human Rights Students, Athletes United for Peace, Forum Azzahrae pour la Femme Marocaine, Indian Council of South America and the Indigenous Peoples and Nations Coalition, Institute of Noahide Code, International Human Rights Association of American Minorities (IHRAAM), International Human Rights Council, International Youth and Student Movement for the United Nations (ISMUN), Sikh Human Rights Group, United Nations of Youth Network-Nigeria, World Jewish Congress

Non-governmental organizations not in consultative status with the Economic and Social Council

Action Citoyenne pour l'information et l'éducation au développement durable (ACIEDD), Africa Alliance for Health Research and Economic Development (AAHRED), African Commission of Health Promoters and Human Rights, All Rights for All (ARFA-Pakistan), Confederacion regional Indigena Puno Conreinputu, International Organizations of Parliamentarians, Iran National Team for Inventions and Innovations/Sustainable Development Program Human Rights Society and Social Research Office, Maat for Peace, Development and Human Rights, ONG Ascendances Afro Ocean Indien, Peck and Peck, Women20, World Against Racism Network