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14th SESSION OF THE AD HOC COMMITTEE ON THE ELABORATION OF COMPLEMENTARY STANDARDS

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Updated Chairperson's Draft document concerning the possible scope, terms, elements and structure of the "draft additional protocol to the Convention criminalizing acts of a racist and xenophobic nature" pursuant to resolution A/HRC/RES/51/32

FOR DISCUSSION PURPOSES ONLY

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ABBREVIATIONS

CERD: Committee on the Elimination of Racial Discrimination

ICC: International Criminal Court

ICCPR: International Covenant on Civil and Political Rights

ICERD: International Convention on the Elimination of All Forms of Racial Discrimination

ICESCR: International Covenant on Economic, Social and Cultural Rights

ICJ: International Court of Justice

ICTR: International Criminal Tribunal for Rwanda

ILC: International Law Commission

UDHR: Universal Declaration of Human Rights

Introduction

1. Criminalization conventions are generally drafted along a similar structure that reflects the main aspects that need to be defined when States undertake to prohibit and prosecute offences commonly defined in the international instrument (see Annex 1). The clauses of criminalization conventions can be divided into two main groups: 1) clauses that are necessary to define the offence and the obligations that States assume concerning its insertion in national criminal codes, investigation, prosecution, legal assistance, etc., and 2) clauses that are accessory to that end and that can vary according to the specific needs of each drafting process.

2. The report on the work of the Ad Hoc Committee at its 10th session mentions in paragraph 108 some core aspects of the criminalization of racist and xenophobic acts that are proposed to be included in the future complementary standard (see Annex 2)[1]. These aspects cover the future content of both necessary criminalization clauses and accessory clauses that have been elaborated having especially in mind the context of the fight against "racism, racial discrimination, xenophobia and related forms of intolerance".

3. The following document attempts to reorganize the aspects listed in paragraph 108 along the lines of the classical structure of criminalization conventions, to provide insights into some additional aspects that should be included in the possible future "complementary standard", and to highlight some drafting options that may be considered. Annex 3 is a first tentative re-organization of Paragraph 108. Further details are provided in the following comments.

4. It is to be noted that criminal sanctions should be reserved for the most egregious forms of conduct based on racial discrimination; further, non-punitive measures or civil remedies, as part of a multi-pronged approach, could be considered for less serious types of conduct, consistent with articles 6 and 7 of the International Convention on the Elimination of All Form s of Racial Discrimination ("ICERD"). With respect to less egregious forms of conduct, civil remedies, rehabilitation, reconciliation and non-penal measures (especially for children and youth) may be appropriate consequences of responsibility regimes.

N. 1 – Preamble

5. Criminalization conventions, as international treaties more generally, use the Preamble to make reference to the broad objectives they pursue, the general principles that have inspired the drafting process and the legal instruments that constitute the legal framework for the application of the convention or protocol (there is no substantive difference between the two), first and foremost – in our case – the ICERD.

6. The preamble is the ideal location for references to soft law instruments. In the specific field under review, there are many soft law instruments that may be recalled such as UN General Assembly resolutions, declarations and programmes of Action, General recommendations of

[1] A/HRC/42/58: "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", p. 18.

the Committee on the Elimination of Racial Discrimination ("CERD"). The Preamble seems to be the appropriate location for the inclusion of the instruments mentioned in Paragraph 108 (i).

7. The following principles and purposes could also be considered for inclusion:

To advance the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) in light of contemporary developments;

To consolidate and complement the existing international legal framework which prohibits racial discrimination and criminalizes the most serious forms thereof, such as genocide, apartheid and crimes against humanity;

To align ICERD's prohibitions with international standards required for the proscription of hate speech and hate crimes;

To actualize the various goals of criminal law, including prevention, retribution, deterrence, reconciliation, rehabilitation, and its expressive and symbolic functions;

To implement ICERD articles 2, 3, 4, 6 and 7, specifically the obligations to adopt immediate and effective protection, remedies, reconciliatory and educative measures to promote dignity, equality and social harmony;

To underscore that both the criminal law and civil law and human rights frameworks should be used to respond in a manner consonant with the gravity of the conduct falling within the ambit of the ICERD and that the criminal law should be reserved for the most egregious forms of conduct;

To harmonize the ICERD obligations with the broader international/UN human rights treaty system, especially the right to freedom of expression and opinion and permissible restrictions thereto; and

To fill the gaps in the ICERD and codify and progressively develop international law to take into account the relationship between racial discrimination and other grounds of discrimination such as xenophobia and religion,

To effectively implement the provisions of the Durban Declaration and Programme of Action,

A clause may also be added to underscore the importance not only of (criminal) responsibility but also of the victims' entitlement to some form of (civil) redress, for instance: *"The most serious violations of international obligations relating to the prohibition of all forms of racial*

discrimination entail obligations aimed to establish the responsibility of the authors and to provide remedies for the victims of such violations."

N. 2 – Relation with "main convention – ICERD."

8. Because the "complementary standard" is to be an additional protocol to the ICERD, it is important that the relation between the two instruments be clarified. Typical clauses in that regard would clarify the relationship between those instruments, for instance by ensuring their consistent interpretation. Article 4 of ICERD may deserve special reference in that regard.

9. Article 1 of the Protocol on Smuggling of Migrants to the 2000 Palermo convention can be used as a model in that regard:

> *Article 1. Relation with the United Nations Convention against Transnational Organized Crime*
>
> 1. This Protocol supplements the United Nations Convention against Transnational Organized Crime. It shall be interpreted together with the Convention.
>
> 2. The provisions of the Convention shall apply, mutatis mutandis, to this Protocol unless otherwise provided herein.
>
> 3. The offences established in accordance with article 5 of this Protocol shall be regarded as offences established in accordance with the Convention.

N. 3 – Purposes

10. It is quite common to find at the beginning of criminalization conventions, clauses stating the general purpose that they pursue, that is the main reasons that prompt the adoption of a criminalization convention. Standard language in that regard is generally very simple "*The purposes of this Convention are: (a) To promote and strengthen measures to prevent and combat corruption more efficiently and effectively; (b) To promote, facilitate and support international cooperation and technical assistance in the prevention of and fight against corruption, including in asset recovery; (c) To promote integrity, accountability and proper management of public affairs and public property*." (e.g. 2003 UN Corruption convention).

11. This portion of the convention could also articulate a (non-exhaustive) list of harms the additional protocol seeks to address.

N. 4 – Use of terms

12. Apart from the legal definition of the offences to be criminalized (below), some criminalization conventions also define some key words or expressions that are recurring in the text and that are used with specific meaning in the instrument. These are **words and expressions belonging to the vocabulary of the convention and do not necessarily correspond to legal concepts.**

13. The Ad Hoc Committee will have to make the decision on which key words or expressions may be defined in this section, as the necessity for doing so will depend upon the context in which the words or expressions are utilized in the additional protocol. Some words or expressions that the Committee may consider defining in this section can be found in Annex 5 to this document. The Committee could minimally consider the following:

Definition of "victims" model

ICC RPE - Rule 85 - Definition of victims

For the purposes of the Statute and the Rules of Procedure and Evidence:

(a) "Victims" means natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court;

(b) Victims may include organizations or institutions that have sustained direct harm to any of their property which is dedicated to religion, education, art or science or charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes.

Definition of "harm" model

ICC, Prosecutor v. Ongwen, 2024, para. 168.

[168.] The Chamber notes that physical harm encompasses physical and bodily injury, impairment of the body, pain, and illness. The Chamber emphasises that 'the concept of physical harm is not restricted to the infliction of a physical or bodily injury', and notes that 'hurt, pain or suffering otherwise not caused by a bodily injury can also amount to physical harm'. Moral harm may include psychological harm or trauma, mental pain and anguish, emotional distress, psychosocial harm, and loss of life plan. Material harm refers to loss of or damage to property, loss of earnings, opportunity to work, reduced standard of living and socio-economic opportunities, and loss of schooling and vocational training. Community harm is that suffered by persons as members of a group, family and or community. Lastly, transgenerational harm relates to the phenomenon in which traumatised parents set in cycle of dysfunction, handing-down trauma to their children, who themselves did not directly experience the atrocities their parents endured, affecting their children's emotional behaviour, attachment, and well-being as a result.

Definition of "national origin"

CERD General recommendation 30 (2004), UN doc. CERD/C/64/Misc.11/rev.3

para. 4 "Under the Convention, differential treatment based on citizenship or immigration status will constitute discrimination if the criteria for such differentiation, judged in the light of the objectives and purposes of the Convention, are not applied pursuant to a legitimate aim, and are not proportional to the achievement of this aim. Differentiation within the scope of article 1, paragraph 4, of the Convention relating to special measures is not considered discriminatory;").

Definition of "race"

ICTR Genocide cases have gradually moved away from an objective definition of "racial group" (the same applies to the other three groups protected under the Genocide convention)

and have focused on the social dynamic of mutual recognition of the victims' and perpetrators' groups. Geneticists have demonstrated that the notion of "race" has no scientific basis (Cavalli Sforza, Feldman, *Cultural transmission and evolution*, Princeton University Press, 1981)

- *Akayesu,* TJ 2 September 1998, para. 514: "The conventional definition of racial group is based on the hereditary physical traits often identified with a geographical region, irrespective of linguistic, cultural, national or religious factors."
- *Kayishema and Ruzindana*, TJ 21 May 1999, para. 98: "A racial group is based on hereditary physical traits often identified with geography."
- *Rutaganda,* TJ 6 December 1999, para. 56: "[T]here are no generally and internationally accepted precise definitions [of] national, ethnical, racial and religious groups;" each should "be assessed in the light of a particular political, social and cultural context."
- *Musema,* TJ 27 January 2000, para. 161: "the Chamber notes that, for the purposes of applying the Genocide Convention, membership of a group is, in essence, a subjective rather than an objective concept. The victim is perceived by the perpetrator of genocide as belonging to a group slated for destruction. In some instances, the victim may perceive himself/herself as a member of said group"

Therefore, it is suggested that "race" be defined in a way that reflects the underlying social dynamic rather than an alleged scientific basis.–

N. 5 - Definition of the main conduct to be criminalized

14. These clauses are among the most important clauses in criminalization conventions. According to the principle of legality that is recognized under both international and national criminal law, the conduct to the criminalized must be precisely defined so as to be known to the future authors. The **principle of legality** provides, inter alia, that criminal responsibility cannot be engaged for conduct that was not prohibited by the law before its commission (*nullum crimen sine lege*).

Definition of the "principle of legality" model:

1998 ICC Statute - Arti–le 22 - Nullum crimen sine lege

1. A person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court.
2. The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted.
3. This article shall not affect the characterization of any conduct as criminal under international law independently of this Statute.

1998 ICC Statute - Arti–le 23 - Nulla poena sine lege

A person convicted by the Court may be punished only in accordance with this Statute.

1998 ICC Statute - Arti–le 24 - Non-retroactivity ratione personae

1. No person shall be criminally responsible under this Statute for conduct prior to the entry into force of the Statute.
2. In the event of a change in the law applicable to a given case prior to a final judgement, the law more favourable to the person being investigated, prosecuted or convicted shall apply.

15. The same is true for penalties (*nulla poena sine lege*). As to the latter, international criminalization conventions generally accord States the freedom to establish appropriate penalties and do not go beyond requiring "appropriate/serious" penalties under implementing national criminal legislation.

16. The International Convention on the Elimination of All Forms of Racial Discrimination identifies the following offences (article 4(a) and (b)):

- dissemination of ideas based on racial superiority or hatred;
- incitement to racial discrimination;
- acts of violence against any race or group of persons of another colour or ethnic origin;
- incitement to such acts; and
- the provision of any assistance to racist activities, including the financing thereof
- participation in organizations

17. The language of article 4(a) and (b) of the ICERD is considered to be outdated. A translation of the current terminology concerning the two hate offences contained in the Convention could be considered to be identified for criminalization. These are hate speech and hate crimes.

A) Subjects

18. In developing procedural guarantees that apply to the prosecution of those responsible for having committed international crimes, **international criminal law** focuses first on the **perpetrators**: the definition of crimes and the modes of liability, *i.e.* how those crimes could be committed. Two main developments follow: first, the elaboration of more general procedural safeguards concerning the trial and the accused/culprit. Accordingly, international criminal law instruments gradually included rules on the principles of legality, the standards for the determination of sentences and more generally the rights of fair trial and due process.

19. The pertinent international legal rules are to be found both in **international criminal law** rules applying to international courts (they concern three main stages: the conduct of investigation, the conduct of trial and the execution of sentence) and in **international human rights law** rules (applying generally to domestic courts because treaty obligations are to be implemented by member States). The link between these two fields of international law is essentially due to the fact that international criminal law rules are to be applied in accordance with international human rights as stated in Article 21 of the ICC Statute: prosecutions must be "consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender…, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status".

20. International human rights treaties generally afford protection by taking into account two main situations: that of the person whose **liberty** is constrained (and needs protection because the person makes the object of investigation, preventive measures, detention, expulsion etc.) and that of the person who is actually facing **trial** (and is entitled to judicial protection, presumption of innocence, right of defence and legal assistance, fair trial etc.).

21. The document adopted by the Ad Hoc Committee at its 10th session "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"[2] contains some elements regarding the issue of the "authors" of racist conduct to be criminalized under the complementary standard, which requires some preliminary remarks. Paragraph 108 on that elements document expresses the intention (in its very first lines) to criminalize certain racist conducts "irrespective of the author". The meaning of this intention should be clarified because different regimes of responsibility apply to different "authors" (States, natural persons, legal persons) and the criminalization of the conduct of legal persons (to be found also in (f) of Paragraph 108) might be more demanding for certain States.

22. A future protocol may include a specific clause prohibiting racist conduct taken by **States** or States authorities. The commission of such racist conduct will entail the consequence of the regime of **State responsibility** under customary international law, that is claims by other States to comply with primary obligations, to make reparation and to settle the dispute at the international level. This is explicitly provided in some criminalizing conventions, while others implicitly refer to State responsibility (as recognized for example by the International Court of Justice with respect to the Genocide Convention).

23. The draft protocol could also include a "without prejudice" clause saying that the protocol is without prejudice to the establishment of State responsibility for the corresponding wrongful act, in accordance with customary international law rules as codified by the ILC in 2001.

24. A possible future protocol may then prohibit racist conduct when committed by private individuals or entities. With respect to **private natural persons**, the regime of **criminal responsibility** would be applicable once the criminalization obligations (of the future protocol) are implemented in the national criminal law of the member States. The main aspect in this regard is the precise definition of the prohibited conduct.

25. The drafting of the provision concerning the criminal responsibility of **private legal entities** may be more delicate. First, there is the need to define precisely the conduct that would entail the **criminal responsibility** of legal persons. There are two references that should be coordinated as reflected in paragraph 108: responsibility for "broadcasting" under letter (f) and more generally responsibility for "disseminating" under letters (a) and (c) that is meant to refer to all authors ("irrespective of the authors"). Second, different theories and approaches are adopted by national legal orders to attach criminal liability to fictious legal entities (for instance, via the governing bodies or through the policies of the entity). These forms of criminal

[2] A/HRC/42/58 at page 18.

liability of legal persons may be unknown to some national legal orders and therefore need clear indications would be required in a future protocol concerning attribution of responsibility and its establishment.

26. A possible future protocol may finally also include provisions on the **civil responsibility** under national law of private persons or private legal entities. Paragraph 108 Iter (e) seems to rely on this different logic. The content of paragraph 108 letter (e) might be separated from this first part dedicated to criminalization so to be included (below) in the section dedicated to additional State obligations (e.g. under N. 19). Inspiration can be drawn from the draft convention currently negotiated by a working group of the Human Rights Council concerning human rights and business enterprises (see relevant conventions in Annex 4).

B) Racist offences

27. Paragraph 108 (a) and (c) mention two conducts, namely, "Dissemination of hate speech" and "Dissemination of ideas and materials that advocate and promote racial superiority, intolerance and violence". **In order to be the object of criminalization, the respective offences will have to be defined**, including both their **material elements** (*actus reus*) and **the mental element** (*mens rea*). It is one of the hard tasks of the present drafting effort.

28. Another important aspect that may be mentioned is consistency not only with external sources such as article 4 of the ICERD, but also internally between the clauses of the future protocol. Paragraph 108 (f), in a different context, refers to criminal liability for "broadcasting racist and xenophobic content or material". Racist propaganda might be included in the clause criminalizing the main conduct (N. 5) or racist propaganda can be made an inchoate crime (N. 6).

29. The following definitions of three main offences could be considered: 1) hate speech; 2) hate crimes; and, 3) participation in racist organizations.

1) Hate speech[3]

30. The criminalisation of hate speech is to be reserved for serious cases, while other cases are to be remedied by means other than the criminal law.

31. The **hate speech offence** has the following elements: Any person commits an offence if he or she advocates hatred on the ground of race and incites harm.

32. The requirements in the definition are connected and must be read together. The speaker must intend to advocate hatred against a group of persons on the ground of race, as defined in the ICERD (the so-called "target group"). The expressive conduct in issue must *cumulatively* advocate hatred, on a prohibited ground, and incite harm.

33. The specific **elements** of the crime are defined as follows:

a) **Expressive conduct** includes a wide range of expressive acts, including, but not limited to, speech, written words, symbols, gestures, cartoons, memes, flags, songs, chants,

[3] "Speech" has developed in some jurisdictions to include a wide range of expressive acts, including speech, written words, symbols, gestures, cartoons, flags, songs, chants, posts on social media, broadcasts and images.

posts on social media, broadcasts and images. Both online and offline expressive acts are included in the ambit of the crime[4].

b) **Advocate** requires the active instigation, urging of or promotion of hatred on the grounds of race, colour, descent, and national or ethnic origin. Mere communication is not included in the ambit of the offence. Advocacy is a purposive activity which goes to the speaker's intent (*mens rea*)[5].

c) **Hatred** is an intense emotion of derision, aversion and enmity towards the group targeted[6].

d) **On a prohibited ground** – the existing listed grounds in the ICERD encompass an identified group of persons on the grounds of race, colour, descent, and national or ethnic origin. The Committee may consider under its current mandate whether hate speech amounting to xenophobia and/or discrimination based on religion or belief should be enumerated as additional grounds.

e) **Incite** is the intention to influence others to engage in harmful conduct– that is, where the hatemonger aims to incite their audience to react by way of serious discrimination, hostility or violence towards the group directly and/or to create or perpetuate subordination [7].

f) **Harm -** the gravity of the harm targeted is severe. Under established law, harm includes both physical and psychological harm to the victims of the speech (the "direct harm") and the creation of an environment in which intolerance against the targeted group becomes ingrained in society and leads to persecution, crimes against humanity and genocide (the "indirect harm")[8].

34. The factors that should be considered for prosecutorial, judicial, and sentencing discretion are:

- a powerful, authoritative or manipulative **speaker** (authority, credibility and reach) should be treated differently to a young person indoctrinated into group-based hatred;
- a vulnerable and susceptible **audience**, for example children and youth;
- a vulnerable **target group**, which is already dehumanised or subordinated in society;
- the socio-historical and political **context and dynamics**, including patterns of discrimination, incidents of multiple discrimination, intersectionality, the words used in the message, and contextual risk factors for mass violence, genocide, and crimes against humanity;
- the **mode, reach, frequency of the message**, including whether or not it occurs publicly; and
- the **beginning** of the **continuum of destruction** against the target group.[9]

35. States parties should include in their legislative framework **defences** such as the bona fide engagement in artistic creativity, academic discourse, scientific research, and necessity in the

[4] The EU's Digital Services Act contains an excellent example of best practice for the regulation of online hate speech by States parties at the domestic level.

[5] See generally for the elements of the crime of hate speech: Human Rights Committee General Comment No. 34 Article 19 Freedom of expression and Opinion - CCPR/C/GC/34; CERD General Recommendation No. 35 Combating Racist Hate Speech *CERD/C/GC/35, 26 September 2013;* The Rabat Plan of Action on the Prohibition of Advocacy of National, Racial or Religious Hatred that Constitutes Incitement to Discrimination, Hostility or Violence A/HRC/22/17/Add.4, annex; The Camden Principles of Freedom of Expression and Equality; UN Strategy and Plan of Action on Hate Speech 2019 ; UN Strategy and Plan of Action on Hate Speech, Detailed guidelines on implementation for UN Field Presences, September 2020, available at https://www.un.org/en/hate-speech/un-strategy-and-plan-of-action-on-hate-speech

[6] Ibid.

[7] Ibid.

[8] Ibid.

[9] CERD General Recommendation No. 35 Combating Racist Hate Speech, *CERD/C/GC/35 par 15.*

public interest, which would include the standard whistle-blower and journalistic privileges. The onus of proving the elements of the offence rests on the prosecution, whereas the onus of proving a defence rests on the accused.

36. The Committee could give consideration to the rise in instances of group-based hatred against certain racial, ethnic, national or religious communities worldwide.[10] Actions could include criminal measures for appropriate cases, civil remedies, positive measures, awareness campaigns, victim support, and early warning systems.

2) Hate crimes

37. Hate crimes are a separate category of offences under national criminal legislation that **address existing criminal acts committed with a biased or prejudiced motive[11].**

38. Two main forms of hate crimes legal models are available, namely the discriminatory selection model and the animus model. A third model is represented by a combination of both of them. State parties are entitled to make use of any hate crime model which is compatible with their domestic legal system. Most States parties have already introduced hate crime laws, whereas some States have not, and this is a gap in the treaty's enforcement, which an Additional Protocol could help resolve. To the extent that the ICERD text in article 4(a) is not clear, the introduction and implementation of hate crime laws constitutes compliance with the ICERD obligation to criminalize "acts of violence" that are committed on the basis of race, such as:

- Assault, robbery, murder, rape and other crimes committed based on a prohibited ground (race, as defined, or the extended interpretation of race, which could include xenophobic violence, such as the looting of shops belonging to foreigners, the criminal harassment of migrants, forms of racial profiling such as assault, bullying or harassment – i.e existing criminal conduct possibly disguised as being justifiable in respect to profiling of certain groups;[12] and
- The incitement of criminal conduct based on a prohibited ground (race, as defined, or the extended interpretation thereof, which could include incitement to xenophobic violence, such as the assault of migrant workers).[13]

39. In the **discriminatory selection model**, the victim is chosen because of a protected identity characteristic. Thus, actual hatred against the victim or the group to which the victim belongs is not needed to establish the offence. The "because of" requirement makes it necessary to prove a causal link between the perpetrator's conduct and the selection of the victim. Hate crimes falling within the ambit of this model usually take the form of penalty enhancement legislation, where the existing sentence for the base crime is increased because of the perpetrator's bias, prejudice or hate towards the victim's group characteristics. The element of hate is only relevant during the sentencing stage after the perpetrator has been convicted and found guilty of the base

[10] See resolution adopted by the General Assembly on 22 December 2023 – A/RES/78/234 and prior resolutions, and also data produced by the EU-funded project 'European Observatory on Online Hate' showing a 30% increase in the level of "hateful toxicity" since the start of 2023. https://eooh.eu/, and A/78/538 Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, Ashwini K.P. October 2023.

[11] See generally Council of Europe Framework Decision 2008/913/JHA of 28 November 2008 on combatting certain forms and expressions of racism and xenophobia by means of criminal law, OJ L 328, 6.12.2008; EC Joint Communication to the European Parliament and the Council "No place for hate: a Europe united against hatred" JOIN(2023) 51 final, 6.12.2023.

[12] For racial profiling, see Preventing and countering racial profiling of people of African descent, report of the Secretary-General (A/73/354) submitted pursuant to General Assembly resolution 69/16,

[13] Note that incitement to criminal conduct is a crime in its own right but can also amount to hate speech.

offence. In this model, existing crimes in domestic law are aggravated because of the element of group-based hatred in their commission. Depending on national criminal legislation, there would be no need to introduce new, substantive hate crime offences.

40. The ***animus* model** focuses on the moral culpability of the offender. The offender's prejudice, bias or hate is an element of the offence. The prosecution must show that there was an element of prejudice, bias or hate when the offence was committed. New free-standing crimes are usually created and the offender is sentenced for a named hate crime offence.

41. A third hate crime model also available to State parties is the **hybrid model**, which combines the discriminatory selection and animus models. An ordinary base crime can be aggravated both in definition, and also at the sentencing stage. Instead of enacting new substantive offences with enhanced sentences for each offence, the hate component is added to the base offence using the animus model, and thereafter, if proven, the judge will enhance the offender's punishment. This model works similarly to sentence enhancement laws, but with the key criteria that the offence is re-labelled as a hate crime upon conviction and must be recorded as such in a hate crime register.

42. The animus and hybrid models symbolize the community's rejection of acts that are committed with a discriminatory motive and demonstrates to the victim(s) and society at large that the values of communal pluralism and mutual respect for all people, regardless of their race, colour, descent, national or ethnic origin (ICERD), is valued. The Committee could extend these grounds to include xenophobia (foreignness) and/or religion or belief.

43.The hate threshold in the offence can vary along a spectrum, from prejudice or intolerance to hate because the base crime is a recognized criminal offence. For this reason, it is not necessary to include group-based hatred as an element of the offence, as is necessary for the crime of hate speech.

44. The enactment of new hate crime laws or the re-labelling of existing crimes committed with a biased motive as hate crimes could also allow for the collection of data on group-based hatred and developing patterns of discrimination and responses at a national level, including the training of public officials.

45. States parties should ensure that the **standard defences** to criminal liability apply.

3) Participation in racist organizations

46. This crime, as per the ICERD's original text, is too vague in its current form and should not be confused with participation in an existing crime, i.e. as part of aiding and abetting or any other offence.

47. International criminal law does not allocate criminal responsibility based solely on membership in an organization deemed to be criminal, as such an approach could lead to collective punishment. For criminal liability to attach, some causal *nexus* must be found

between an individual and the commission of a racially motivated hate act. Mere membership in a racist organisation could constitute evidence that the act in question was racially motivated, but more is needed to found criminal responsibility. Specifically, active formation of and subsequent involvement in an organisation which is directly linked to the dissemination of hate speech (as defined above) and the incitement or commission of hate crimes (also as defined above).

48. Commission of crimes can be direct (i.e., by actually committing the act or ordering it) or indirect (aiding and abetting, providing material assistance, forming part of an enterprise that committed the act with others). The jurisprudence of the international criminal tribunals establishes detailed modes of liability that address each of these ways to connect an individual with a collective crime. These modes of liability could be explored and incorporated into the development of the ICERD or for specific inclusion in the additional protocol. It is also necessary to align with existing international criminal law standards for criminal responsibility.

49. In the case of racially motivated racist speech and acts, it is also important to recognize the vulnerability of young people and minors who may be recruited into and socialised into such groups and to delineate their role in the commission of crimes linked to the group.

50. The imposition of criminal responsibility requires that States parties precisely define all elements of the crime of participation.

C) Racial profiling

51. Racial profiling is not only a form of discrimination, but it also results in discriminatory decision-making. It aggravates already prevalent forms of discrimination against vulnerable target groups. Although it is accepted that racial profiling undermines international human rights law, international human rights treaties do not regulate racial or ethnic profiling directly.[14]

52. Racial profiling might be conscious or unconscious, individual or institutional and structural. This recognition impacts on criminal responsibility. But, **where racial profiling encompasses and/or is accompanied by acts which are already criminalised in existing domestic frameworks, then such acts will amount to criminal conduct.** Examples include assault, harassment, theft and other such offences committed as part of identity checks. The definition of a **hate crime includes an existing criminal act committed on the basis of a ground of identity.** So, where racial profiling takes the form of criminal behaviour, and hate crimes on the ground of race are prohibited in domestic systems, the act will amount to a hate crime and should be prosecuted as such.

53. The naming of behaviour that often accompanies racial profiling as criminal conduct highlights that such conduct amounts to a hate crime and should be criminalised. Similarly, **when the act of racial profiling includes speech that advocates hatred, the perpetrator could also be accused of engaging in hate speech.** The level of seriousness would determine

[14] Racial profiling was however considered in the 2009 decision of the Human Rights Committee in *Williams Lecraft v Spain*[14] as a form of racial discrimination. Here, a woman of African descent was subjected to a police identity check at a railway station on the grounds of her ethnicity. The Committee found that where such checks occur on the basis of (or are motivated by) physical or ethnic characteristics they will violate international human rights law and the right to non-discrimination under the ICCPR.

whether the hate speech amounts to the crime of hate speech or whether the human rights framework should be employed.

D) Xenophobia

54. A question the Committee must address is whether the existing grounds in the ICERD (race, colour, descent or national or ethnic origin) can be read to include xenophobia or xenophobic discrimination; or, whether a new ground of discrimination specifically addressing xenophobia, such as foreignness, could be listed in the additional protocol. The latter approach would enable hate speech and hate crimes to be prohibited not only on the grounds of race, but also on the grounds of foreignness and specifically encompass criminal acts of xenophobia, xenophobic hate speech, and xenophobia discrimination.

Background

55. Xenophobia has generally not been addressed explicitly as discrimination on the ground of foreignness or citizenship, but rather it has been subsumed under the grounds of race, national origin, or descent. As a result, xenophobia has not been regulated directly, and the problem of "foreignness" has been ignored or treated as a subsidiary issue to an enumerated ground. If xenophobia is to be regulated effectively, it must be named specifically and regulated as its own issue. The issue that arises is that, despite widespread recognition that xenophobia is a current and ongoing problem, existing international law does not treat foreignness as a prohibited ground of discrimination. The text of the ICERD itself permits discrimination between citizens and non-citizens, leading to the argument that foreignness should not be recognized as a separate ground of discrimination.

56. The opening text to Article 4 of the ICERD requires States parties to declare various offences punishable by law on the grounds of race, colour or ethnic origin. It is noteworthy that the concept "*national origin*" does not appear in the text of Article 4, although mention is made of the need to eradicate racial discrimination, racial superiority, and all acts of incitement to "such discrimination".

57. Article 1(1) of the ICERD "defines "*racial discrimination*" as meaning "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 an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life."

58. Article 1(2) of the ICERD provides that the Convention "shall not apply to distinctions, exclusions, restrictions or preferences made by a State Party to this Convention between citizens and non-citizens." The difference between the term "citizens" versus "non-citizens" is not defined in the Convention.[15]

[15] See the CERD's General recommendation No. 30 (2004) on discrimination against non-citizens, stating that "differential treatment based on citizenship or immigration status will constitute discrimination if the criteria for such differentiation, judged in the light of the objectives and purposes of the Convention, are not applied pursuant to a legitimate aim, and are not proportional to the achievement of this aim". See too para 33 of the General Recommendation, namely that States parties take measures "to eliminate discrimination against non-citizens in relation to working conditions and work requirements, including employment rules and practices with discriminatory purposes or effects". Also, in General Recommendations No. 34 (2011) on racial discrimination against people of African descent, and No. 27 (2000) on discrimination against Roma, the Committee calls for protection of racial and ethnic groups that are especially vulnerable to discrimination on the basis of xenophobia.

59. Article 1(3) of the ICERD then adds that "[N]othing in this Convention may be interpreted as affecting in any way the legal provisions of States Parties concerning nationality, citizenship or naturalization, provided that such provisions do not discriminate against any particular nationality."

60. A distinction between citizenship and nationality is also not made in the ICERD.

61. The ICERD differs from other international treaties, such as the International Convention on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), both of *which apply to all persons regardless of nationality or statehood*. Although we address this issue in more detail below, we note that both treaties define discrimination broadly "as any distinction, exclusion, restriction or preference or other differential treatment that is directly or indirectly based on, inter alia, race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

Possible modes for addressing xenophobia in the additional protocol

62. There are three primary options that the Committee may wish to consider regarding the issue of xenophobia: 1) the Committee could add foreignness or nationality as a specific new ground of discrimination in the additional protocol, which would ensure the criminalisation of hate speech on the basis of foreignness, or a hate crime on the basis of foreignness, or the banning of xenophobia organisations or xenophobic profiling; 2) the Committee could add analogous grounds to the ICERD by making the enumerated grounds of discrimination non-exhaustive through use of a clause such as appears in the ICCPR, defining discrimination as occurring on a number of listed grounds and on the basis of any other status; 3) the Committee could elect to retain the existing grounds of discrimination in the ICERD, recognizing that xenophobia would only be regulated by the Convention and fall within CERD's mandate through a broad interpretation of "race, colour, ethnic or national origin."

63. In its consideration of which option to adopt, the Committee should consider the following factors and consequences:

- Recognition of a specific new ground (option 1) would symbolise that discrimination, hate speech, superiority and criminal acts based on xenophobia are unacceptable and signify to victims that they are worthy of protection. It would also require States parties take steps (through punitive, remedial and positive measures) to eliminate such behaviour and attitudes from state practice;
- If the aim is to regulate xenophobia, the terminology used should be specific – with foreignness more closely aligned to xenophobia than nationality;
- Adopting option 1 would be ground-breaking, as because xenophobia is not regulated at "hard law" level, unless, of course, a case is made out that acts and speech motivated by xenophobia fall within the realm of customary international law within a particular State party;
- The result of a grounds-based approach would be that the substantive harm caused by xenophobia would be dealt with at treaty level and would enable the CERD and other tribunals to adjudicate cases of xenophobia head-on;
- The grounds-based approach would, however, require the optional protocol to clarify the way in which articles 1(2) and 1(3) of the main treaty should be interpreted and applied. Note that it would still be permissible for States parties to reserve rights to certain groups on the basis of citizenship (such as the right to vote), but that such

distinctions would need to comply with the standard test in international human rights law for a limitation to a right;
- The grounds-based approach would also require that the optional protocol clarify that the ground of foreignness applies to the measures required by article 4 of the ICERD;
- The analogous grounds approach (option 2) would permit CERD to address xenophobia as a specific ground of discrimination or hate, as opposed to subsuming it under the existing grounds in the ICERD;
- The analogous grounds approach would enable new related forms of discrimination and hate to be recognised as new grounds of othering develop;
- The open-ended approach could permit States parties to use their discretion regarding the onus of proof – for example, in some countries, where discrimination is based on a non-listed ground, the complainant would be required to prove that the discrimination has occurred and / or that the discrimination is unfair;
- The analogous grounds approach is aligned with other international treaties;
- Option 3 would likely result in a retention of the existing uncertainty regarding the status of xenophobia as a ground of discrimination

64. Regardless of whether the duty of States parties to regulate discrimination, hate speech and hate crimes on the basis of xenophobia can be read into the ICERD, if a decision is reached to include xenophobia within the ambit of the Protocol, then the need to supplement the ICERD, we believe, should be recorded in the Protocol. A provision in these terms would remove any doubt as to the intention to regulate xenophobia within the realm of the ICERD. For example, the Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (the Palermo Convention), specifically provides in article 1 that the Protocol supplements the Convention against Transnational Organized Crime and is to be interpreted together with the Convention. Moreover, the provisions of the Convention apply, mutatis mutandis, to the Protocol unless states otherwise and the offences established in accordance with article 5 of the Protocol are recorded as being offences established in accordance with the Convention.

E) Discrimination based on religion or belief

65. In paragraph 108 (d), to the issue of "contemporary forms of discrimination based on religion or belief", is mentioned in square brackets. From the standpoint of criminalization there may be two options or alternatives to consider: a) provide for a separate main offence of acts or incitement to actions relating to discrimination, hostility or violence on grounds of racial and religious hatred' (or by adding the ground of 'religion' under art 1(1); or, b) treat them as aggravating factors of criminal responsibility, where they operate in tandem with one of the five enumerated prohibited grounds of discrimination (race, colour, descent or national or ethnic origin) under article 1(1), ICERD.

Background

66. Human Rights Council Resolution 6/21 mandated the Ad Hoc Committee "to provide new normative standards aimed at combatting all forms of contemporary racism including incitement to racial and religious hatred." Discrimination based on religion or belief overlaps with the notion of religious hatred, as hatred stems from discriminatory attitudes, which may result in conduct causing physical or psychological harm. Combating racial and religious hatred requires addressing attitudes (prejudices, bias, stereotypes) and conduct (e.g. hate speech, violence).

67. Religion is invoked twice in the text of the ICERD[16], but the Convention does not directly address the phenomenon of "incitement to racial and religious hatred," which is a gap the additional protocol could address. It should be recalled that religious discrimination is not equivalent to religious hatred or intolerance; one may discriminate without hatred (i.e. inadvertently, indirectly), and religious discrimination may occur without regard to race or may take place within the same racial grouping.

68. It is noteworthy that "belief" encompasses non-theistic or atheistic beliefs that often occur on an individualistic basis, in contrast to "religion", which typically incorporates a communal element or way of life. Consequently, discrimination based on religion or belief should address harms caused to both individuals and groups.

Possible modes for addressing all contemporary forms of discrimination based on religion or belief in the additional protocol

69. Because discrimination based on religion or belief is not included in the enumerated grounds within article 1(1) of the ICERD, the Committee must give consideration as to how, or whether, to address it in the additional protocol. There are two preliminary considerations in this respect: first, there are existing United Nations human rights treaties that protect freedom of religion[17] and which prohibit discrimination on the grounds of religion[18].

70. The second consideration is that there may also be overlap with the ICCPR article 20(2), "any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law." The terms in this Convention – "racial or religious hatred" may suggest that article 20(2) does not contemplate a linkage of these two traits and could encapsulate hatred on any of the three enumerated grounds. nationality, race, religion - independently. Article 20(2) only operates at the public law (state) level and would not address private advocacy of hatred, or any advocacy of hatred that incited non-violent acts of racial or religious discrimination.

71. In its consideration of discrimination based on religion or belief, the Committee may consider the working definition of "intolerance and discrimination based on religion or belief" outlined in article 2 of the 1981 Declaration on the Elimination of All Forms of Intolerance and of Discrimination based on Religion or Belief: "…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".[19] If the intent in the additional protocol is to address "racial and religious hatred", this definition may be insufficient, and it may be appropriate to formulate a clause similar to: "any act or incitement to action relating to discrimination, hostility or violence on grounds of racial and religious hatred shall be prohibited by law."

72. The ICERD is intended to encompass "all forms" of racial discrimination, which invited an expansive interpretation of the enumerated grounds in article 1(1). Religion has frequently—

[16] The preamble recalls that one of the purposes of the United Nations is to ensure respect for human rights and fundamental freedoms "without distinction as to race, sex, language or religion"; and article 5(d)(vii) obliges states to guarantee to all persons without distinction as to race, etc. equality before the law and in the enjoyment of rights including "the right to freedom of thought, conscience and religion."
[17] See ICCPR, article 18.
[18] See ICCPR, article 2; UDHR articles 2, 7, 18.
[19] Declaration on the Elimination of All Forms of Intolerance and of Discrimination based on Religion or Belief, article 2.

though notably not consistently—treated by CERD as falling within its mandate, using the "living tree" model of statutory interpretation. To more fulsomely incorporate religion and belief within CERD's jurisdiction, the Committee could consider adding it as a ground of discrimination to article 1(1) of the ICERD. Experts differed in their interpretations as to whether this may be contrary to the historical context where two separate conventions on racial and religious discrimination were being developed. Experts had slightly divergent views on whether the separation of racial discrimination and discrimination based on religion or belief into two separate conventions in the 1960s led to the legal interpretation that the issues should remain distinct, but all agreed that this separation need not preclude an intersectional approach to the inclusion of religion or belief.

73. If the Committee's intent is to address the intersection of race and religion as motivational forces for discrimination and/or intolerance, the additional protocol could affirm the intersectionality (or multiple discrimination) approach already taking place within CERD practice[20].

74. Alternatively, the additional protocol could provide that, where there is an intersection of race and religion, this could have a 'multiplier effect' that may cause greater harm to individuals caught at those intersections. In such a context, the conflation of race and religion or belief would justify treating religion or belief as an aggravating factor, thereby triggering more onerous sanctions to be applied. Such an approach could be formulated as: 'Where a person is convicted of an offence which is aggravated by race and religion or belief, the court may apply enhanced penalties. A set of factors could be developed as guidelines for assessing the degree of aggravation and could accommodate local factors.

N. 6 - Definition of accessory conducts to be criminalized

75. Paragraph 108 letter (b) refers to two technical aspects that can be kept separate from criminalization in the strict sense, that is from the obligations under N. 5. Reference to "inciting", evokes an accessory crime that can be criminalized independently of the commission of the main offence defined in N. 5. The definition of incitement should be provided separately. On the other hand, the reference to "aiding and abetting", i.e. complicity, does not represent an autonomous crime but a mode of liability. It is possible to envisage a separate clause in this regard. Other modes of liability could be taken into account, such as joint perpetration and superior responsibility, just as other autonomous crimes could be envisaged. Notably, the "participation" in organizations which promote and incite racial discrimination under article 4(b) ICERD is not a technical legal term and would require careful definition to be criminalized.

N. 7 - Consistency clauses

76. A separate clause may be included to ensure consistency with other international conventions or general international law rules (either customary law or general principles). The experts suggest making reference to human rights treaties in general. References to specific treaty commitments, such as the Convention on the Rights of the Child, may be in order.

77. Recall, for example, art. 4 (para.1) of the Palermo convention on transnational crime: "*States Parties shall carry out their obligations under this Convention in a manner consistent*

[20] E.g. CERD General Recommendations 32, 33 34, 35, 36; Periodic report of Norway, 1984; Periodic report of Georgia, 2005.

with the principles of sovereign equality and territorial integrity of States and that of non-intervention in the domestic affairs of other States–."

N. 8 - Inter-State obligations

78. This is another fundamental provision (or set of provisions) in which many different obligations can be elaborated. It can include obligations directed at States and directly prohibiting racist conduct by States parties. In addition, obligations can be formulated in terms of State vigilance activities (due diligence, prevention, punishment, etc.), such as the obligation not to allow private actors to commit certain offences in their territory. In this second case, the future protocol would establish obligations that States will have to implement in their domestic legal orders. These obligations typically impose on States a number of duties, such as the obligation to adopt all necessary measures (legislative, administrative, etc.) to prevent and punish the covered offences.

79. An example of inter-State obligations is provided by paragraph 108, especially letter (e), which "Compel social media networks to remove expediently, in accordance with national legislation, racist and xenophobic content from online media platforms, including social media". In order to reach that goal, the clause could be formulated as a duty of Member States to adopt national legislation compelling social media at the national level. Consideration could be given to developing more detail in order to cover the specific actions that States must take in that regard.

80. An additional protocol can update ICERD which was adopted at a time before the advent of the internet and social media and so address this gap in ICERD in relation to this new communications technology. The principle of international cooperation is implicit in the ICERD preamble which provides that states shall "adopt all necessary measures" to eliminate, prevent and combat racist speech with the view "to build an international community free from all forms of racial segregation and racial discrimination." ICERD provisions should be read in light of this principle, except where a provision expressly provides for states to act within their jurisdiction i.e. territorial jurisdiction: arts 3 and 6 of the ICERD.

81. Given the nature of online speech and its global reach, paragraph 108(h), A/HRC/42/58 provides that the additional protocol 'shall call upon States to increase international cooperation, including harmonisation of legal norms and regulations in the field of fighting racism.'

N. 9 - Duty to criminalize

82. The generic obligation to criminalize a certain offence (previously defined by the instrument) is commonly specified in a series of more precise obligations concerning, first, the **duty to legislate**. Future member States assume the obligation to introduce covered offence in the national criminal legislation. The clause should refer to all conducts that need to be criminalized, not just the main offence but also other accessory offences.

N. 10 - Duty to establish criminal jurisdiction

83. The second, more specific obligation concerns the **duty to establish** criminal jurisdiction, namely, to modify the procedural criminal code so that national criminal courts have the power to prosecute those that will be accused of committing the covered offence. There are different options in that regard especially as regards the criteria that would establish a link between the

offence and the national legal order entailing the duty to establish criminal jurisdiction, such as the commission of the offence on the territory of the State (territorial criterion of criminal jurisdiction), the commission of the offence by nationals of the State (active personality criterion of criminal jurisdiction), and the commission of the offence against the nationals of the State (passive personality criterion of criminal jurisdiction).

84. Under international law, criminal jurisdiction is presumptively territorial: *Lotus* case (France v Turkey, ICJ, 1927), However, the increase in cross-border crimes has given rise to non-territorial bases of jurisdiction, on the basis of the nationality, passive personality, protective and universality principle.

85. Extra-territorial jurisdiction refers to the competence of a state to make, apply and enforce rules of conduct with respect to persons, property and events beyond its territory, which may be prescriptive, adjudicative or enforcement. Traditionally, this is viewed as an exceptional ground of jurisdiction. Cyberspace does not pose a structural challenge to prescriptive or rule-making jurisdiction, though it does to enforcement jurisdiction.

86. The principle of enforcement jurisdiction is primarily territorial, and it is in seeking compliance with laws that the competence of a state may conflict with another, raising the issues of intervention in internal affairs, territorial integrity and compatibility with international law.[21]

87. States may by mutual consent adopt treaties dealing with the more serious offences, which seek provide a 'seamless web' of accountability e.g. extradition treaties. Other multilateral treaties provide for a form of quasi-universal jurisdiction to ensure against a 'safe haven' for offenders, by requiring a state party to exercise jurisdiction over a person present within that state's territory in certain circumstances, through an obligation to 'prosecute or extradite' (*aut dedere, aut judicare*)[22].

88. Jurisdiction for online hate speech crimes is usually based on the territoriality[23] and nationality principle. The Westphalian understanding of the territoriality principle assumes that activities can be tethered to the physical territory of a State – something which cyberspace has complicated since an activity can have linkages to a multitude of territories simultaneously. As such, there have been proposals to "abandon territoriality as a relevant jurisdictional principle, and instead to use notions such as genuine connection and reasonableness to assess the legality of jurisdictional assertions in cyberspace."[24]

[21] *Island of Palmas case* (Netherlands v USA, 1928) (exclusive competence of state regarding its own territory)
[22] e.g. *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (1984), *Optional Protocol to the Convention on the Rights of the Child on the* [22] [22] *Sale of Children, Child Prostitution and Child Pornography* (2000) and the art 9(2) *International Convention for the Protection of All Persons From Enforced Disappearances* (2010), *Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances* (1988), 1971 *Montreal Convention on the Suppression of Unlawful Acts against the Safety of Civil Aviation.*
[23] This has been case law where reliance was place on the objective territoriality principle: the French Yahoo! Case (online auction of Nazi memorabilia from US website: French organization asked Yahoo to remove such materials from US websites or make auctions of them inaccessible to web users in France and its territories, as the the sale of pro Nazi material was prohibited under the French Penal Code) and a case from the German Federal Court (1 StR 184/00, 12 Dec 2000) (An Australian citizen was accused of denying the holocaust on his Australia-based website).
[24] Cedric Ryngaert, 'Extraterritorial Enforcement Jurisdiction in Cyberspace: Normative Shifts' (2023) 24 German Law Journal 537-550, p.537

89. Certain countries have legislation on online hate speech that apply extra-territorially e.g. Germany, France,[25] UK,[26] Australia [27]and Singapore.[28] Thus if a person in country X is able to access a homepage on a website based in country Y, them mere possibility of access could entail the commission of an offence in X.[29] Nonetheless, extra-territorial clauses may be difficult to enforce, but may provide a symbolic statement of what is considered normative.

90. In the context of an additional protocol, the Committee could consider the following elements:

- **'Criminalising & Establishing Jurisdiction' clause:** It should state the duty of state parties to adopt legislative and other measures to criminalise racist/xenophobic acts as offences and to establish jurisdiction over the relevant offence, on both territorial[30] and extra-territorial grounds, which may be listed.[31] Typically, jurisdiction is triggered where the conduct takes place on a state's territory or has an 'effect' on it, or is committed by a national or where a legal person has its office in the territory of the member-state.
- **'Resolving concurrent claims of jurisdiction':** where more than one state party claims jurisdiction over a relevant offence, the parties shall have a duty to consult each other to determine which jurisdiction is most appropriate for prosecution e.g. article 7(5), *International Convention for the Suppression of the Financing of Terrorism* (1999).

[25] Avia Bill (2020) – online hate speech which implicates "activity on French territory" regardless of whether online platforms are established in France or other EU Member states fall under the terms of the Bill. "French Anti-Hate Speech Bill Restricting Online Civic Space closer to Final Approval: see its Controversial provisions: https://ecnl.org/news/french-anti-hate-speech-bill-restricting-online-civic-space-closer-final-approval-see-its This was held unconstitutional by the French Consel Constitutionnel, Decision No. 2020-801 DC of 18 June 2020

[26] Online Safety Act (2023) applies to companies outside UK providing services if they "have links with the UK": s4(2)(a) (eg significant number of UK users)

[27] Online Safety Act (2021), s23 (Act extends to "acts, omissions, matters and things outside Australia"). The Explanatory Memorandum clarified that s23 "displaces the common law presumption that statutes do not apply extra-territorially."

[28] Section 7(1) of the Protection from Online Falsehoods and Manipulation Act (2019) provides: "A person must not do any act in or outside Singapore to communicate a statement knowing or having reason to believe that it is a false statement of fact, and the communication of that statement is likely to … incite feelings of enmity, hatred or ill-will between different groups of persons.' The Singapore Maintenance of Religious Harmony Act provides extra-territorial coverage for religious offences even if committed overseas but where it targets Singapore and has an impact on Singapore e.g. where a religious leader in country X urges his affiliate group to attack another religious group in Singapore: while acknowledging the difficult of extra-territorial enforcement, it "signals our commitment to protect our religious harmony even when the threats originate from beyond our shores." Second Reading Speech, Sun Xueling, SPS (Home Affairs) 7 Oct 2019 at para 59-61 at https://www.mha.gov.sg/mediaroom/parliamentary/second-reading-speech-for-the-maintenance-of-religious-harmony-amendment-bill---speech-by-sun-xueling-senior-parliamentary-secretary-ministry-of-home-affairs-and-ministry-of-national-development/. The Online Criminal Harms Act (2023) s19 also has extra-territorial affect where a designated online service provider, (individual or entity) is situated in or outside Singapore. Under this Act, a Stop Communication Direction may be issued to someone who posts texts/images inciting violence against people of a certain race. Where the orders are disregarded by individuals or entities outside Singapore, the options are to prosecute for non-compliance where possible, or to issue orders eg Access Blocking orders, restricting access to the non-compliant online service, to prevent criminal activity and content from being accessed by persons in Singapore. As there is no personal liability for non-compliance, there is no need for extradition in that instance

[29] Other jurisdictions like the US, China, India, Japan, Iran and South Africa have hate speech laws but do not appear to say anything expressly on extra-territoriality.

[30] An expansive reading of territoriality (subjective and objective) is reflected in art 9, EU Framework Decision 2008/931/JHA:…each Member State shall take the necessary measures to ensure that its jurisdiction extends to cases where the conduct is committed through an information system and:
(a) the offender commits the conduct when physically present in its territory, whether or not the conduct involves material hosted on an information system in its territory;
(b) the conduct involves material hosted on an information system in its territory, whether or not the offender commits the conduct when physically present in its territory.

[31] Eg. Art 22, Convention on Cybercrime (ETS No 185).

- **'Prosecute or Extradite' clauses**: This promotes international cooperation between states and ensures against 'safe havens'. *E.g.* the *EU Convention on Cybercrime* and draft *UN Cybercrime Convention*[32] has prosecute or extradite clauses
- **'Promoting international cooperation based on common interests':[33]Exchange of best practices (procedure and evidence), cross-border information sharing and investigatory techniques; research and training in educational, professional, technical and administrative spheres and coordinating measures against hate speech:** – care should be taken not to allow intrusive surveillance which could threaten human rights e.g. of privacy and free expression. An appeal process, for example, to raise instances of incorrect or inappropriate content removal,[34] may be provided, and/or judicial oversight may be available.

91. Determining which jurisdiction has authority to punish the actions of the perpetrator is necessary. From the victim's point of view, if his national state has jurisdiction, justice is possible only if the perpetrator is extradited to the victim's country. If the perpetrator's state has jurisdiction, the victim may encounter hurdles to obtaining access to justice in a foreign country.

92. These difficulties may be addressed by:
- Attempts to harmonise the laws relating to cyberhate
- Mutual legal assistance treaties – to secure foreign-based evidence.
- Extradition treaties – to secure custody of a fugitive located outside the sovereign –state

N. 11 - Duty to exercise criminal jurisdiction

93. A third criminalization obligation is normally included concerning the **duty to exercise** criminal jurisdiction. It is an important clause because it will define the legal orders that would be the first to act for the prosecution of the covered offence and those that would have the power to intervene subsidiarily. The clauses on the exercise of jurisdiction generally identify situations that trigger the duty to investigate and to prosecute (such as the presence of the accused in the territory of the State). In addition, they try to avoid impunity gaps by providing for options at the stage of prosecution. The most common clause is the "*aut dedere aut judicare*" clause by which the duty to prosecute is regarded as the primary obligation but it can be disregarded when the accused is extradited to another State willing to exercise criminal jurisdiction.

94. With respect to hate speech, the following factors should be considered for prosecutorial discretion, whether the elements of the crime have been proven by the prosecution, and for judicial discretion in the determination of the penalty to be imposed (**Prosecutorial discretion and aggravating and mitigating factors**):

a) a powerful, authoritative or manipulative speaker (authority, credibility and reach) should be treated differently to a young person indoctrinated into group-based hatred;

[32] A/AC.291/22/Rev.2.
[33] ASEAN Declaration to Prevent and Combat Cybercrime (2017).
[34] This has arisen in relation to Facebook's moderation of content in the Arabic language as dialects are unique to specific regions. This poses "challenges to both human moderators and automated moderation systems, which are unable to catch harmful content in different dialects requiring interpretation in localized contexts." Ayako Hatano, 'Regulating Online Hate Speech through the Prism of Human Rights Law: The Potential of Localised Content Moderation' (2023) 41(1) The Australian Yearbook of International Law 127-156, p.149.

b) a vulnerable and susceptible audience, for example children and youth;
c) a target group, which is already dehumanised or subordinated in society;
d) the socio-historical and political context and dynamics, including patterns of discrimination, incidents of multiple discrimination, intersectionality, the words used in the message, and contextual risk factors for mass violence, genocide, and crimes against humanity;
e) the mode, reach, frequency of the message, including whether or not it occurs publicly; and
f) the beginning of the continuum of destruction against the target group.

95. References to the principle of proportionality (necessity could be omitted) in relation to sentencing can be inserted after the provision that establishes criminal jurisdiction at the national level: adopting penalties is a consequence of the duty of the forum State to criminalize the racist conduct. Here the protocol might draw inspiration from the ICC Statute provisions. A clause addressing the principle *non bis in idem* could also be included.

1998 ICC Statute—Article 78—Determination of the sentence

1. In determining the sentence, the Court shall, in accordance with the Rules of Procedure and Evidence, take into account such factors as the gravity of the crime and the individual circumstances of the convicted person.
2. In imposing a sentence of imprisonment, the Court shall deduct the time, if any, previously spent in detention in accordance with an order of the Court. The Court may deduct any time otherwise spent in detention in connection with conduct underlying the crime.
3. When a person has been convicted of more than one crime, the Court shall pronounce a sentence for each crime and a joint sentence specifying the total period of imprisonment. This period shall be no less than the highest individual sentence pronounced and shall not exceed 30 years imprisonment or a sentence of life imprisonment in conformity with article 77, paragraph 1 (b).

1998 ICC Statute—Article 20 Ne bis in idem

1. Except as provided in this Statute, no person shall be tried before the Court with respect to conduct which formed the basis of crimes for which the person has been convicted or acquitted by the Court.
2. No person shall be tried by another court for a crime referred to in article 5 for which that person has already been convicted or acquitted by the Court.
3. No person who has been tried by another court for conduct also proscribed under article 6, 7, 8 or 8 *bis* shall be tried by the Court with respect to the same conduct unless the proceedings in the other court:
(a) Were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; or
(b) Otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to jus–ice.

N. 12 - Extradition

96. Clauses that make extradition possible are among the most common clauses in criminalization conventions. Their purpose is to make extradition possible by excluding that the covered offence is not considered by the member States as a political offence (for which

extradition is not possible). The other principal content of extradition clauses concerns the requirements for granting the extradition request (such as "dual criminality").

N. 13 - Duty of mutual assistance

97. The fact that many States could possibly be involved in the prosecution of the covered offence renders it necessary to envisage some forms of legal assistance at different stages of the criminal procedure. The clause may especially regard legal assistance in collecting evidence or testimony.

N. 14 - Cooperation

98. Most criminalization conventions also include a general obligation of member States to cooperate in the prevention and punishment of the covered offence. More specific obligations may concern the exchange of information, warning duties on the risk that the offence may be about to be committed, etc. Paragraph 108 (h) already provides that "The additional protocol shall call upon States to increase international cooperation, including harmonization of legal norms and regulations in the field of fighting racism".

N. 15 - Fair trial rights

99. Some criminalization conventions include a clause on the duty to respect the fundamental fair trial rights of the accused at all stages of prosecution.

Option 1: Broad reference to human rights in general

1998 ICC Statute Article 21(3)

Article 21 of the ICC Statute: prosecutions must be "consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender…, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status"

Option 2: Reference to fair trial rights

1996 ILC Draft Code - Article 11 Judicial guarantees

1. An individual charged with a crime against the peace and security of mankind shall be presumed innocent until proved guilty and shall be entitled without discrimination to the minimum guarantees due to all human beings with regard to the law and the facts and shall have the rights:

(*a*) In the determination of any charge against him, to have a fair and public hearing by a competent, independent and impartial tribunal duly established by law;

(*b*) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

(*c*) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

(*d*) To be tried without undue delay;

(*e*) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have

legal assistance assigned to him and without payment by him if he does not have sufficient means to pay for it;

(*f*) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(*g*) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;

(*h*) Not to be compelled to testify against himself or to confess guilt.

2. An individual convicted of a crime shall have the right to his conviction and sentence being reviewed according to law.

100. The scope of the additional protocol should be consistent with international human rights law on the permissible/legitimate restrictions on freedom of expression and opinion, and should respect criminal laws settled commitment to legality, proportionality, due process, and necessity, such that it is not permissible for domestic laws to criminalize insult, offence, hurt–feelings.

N. 16 - Victims' rights

101. In a similar vein, criminalization conventions may include clauses on victims' rights with respect to two aspects: 1) rights concerning their participation during the criminal procedure (for example, they may deserve special protection as witnesses), and 2) rights deriving from the establishment of criminal responsibility (especially their right to reparation and to access to justice in order to claim damages). This reflects the growing attention to victims under international criminal law in general.

Definition of the rights of the victims
2005– Basic Principles - VII. Victims' right to remedies

11. Remedies for gross violations of international human rights law and serious violations of international humanitarian law include the victim's right to the following as provided for under international law:
(a) Equal and effective access to justice;
(b) Adequate, effective and prompt reparation for harm suffered;
(c) Access to relevant information concerning violations and reparation mechanisms.

Definition of the victims' right to reparation

It is suggested to include first this right because it provides the overarching guarantee for victims' redress. The right to reparation then covers multiple forms of redress not necessarily judicial protection, as reparation can be decided through a process of inter-State negotiation, transitional justice mechanisms created at the national level, decisions of both international and national courts, etc. The 2005 UN Basic principles resolution include provisions that can be used as a model (Section IX of resolution A/RES/60/147).

Definition of the victims' right to judicial protection

This right is generally provided under human rights treaties and has two main implications. First, it entails the establishment of national (civil) jurisdiction so to ensure victims' access to court. A specific provision to that end could be included in the draft additional protocol making at least *renvoi* to national jurisdiction. Second, this individual right to judicial protection risks to be practically meaningful only for some victims, namely those who have available judicial means, resources to exercise effectively this right and whose claims are eventually successful. For these reasons and in order for reparations to be non-discriminatory, it would be appropriate to include a clause aiming at the coordination of individual rights of access to courts with collective forms of reparation (such as those that may be decided by international human rights and national courts) and national schemes of reparation.

Definition of additional rights

The provisions dedicated to victims' rights could possibly be complemented by clauses relating to the following rules:

- Principle of non-discrimination of victims;
- Principle of prioritization of most vulnerable victims;
- Reparation of transgenerational harm;
- Individual and collective reparations based on the type of harm;
- Coordination of different mechanisms of reparation;
- Principle of victims' participation in the definition of reparation measures;
- Monitoring system for the implementation o– reparations.

N. 17 - State responsibility

102. As mentioned above, certain conventions may contain a clause underscoring that breaches of the convention obligations (such as implementing obligations or preventive obligations) by States entail their international responsibility (see para. 11). Such clauses are not strictly necessary as they refer to obligations already existing under customary international law. But they can be useful in dispelling doubts in that regard.

103. Recall that State responsibility is not the only consequence of the breach of the convention obligations. The most important consequences of the commission of the covered crimes will operate at the domestic level. These include civil and criminal responsibility of the natural and legal persons responsible for the crimes defined by the convention, both nonstate and state actors. Special regimes of responsibility are to be envisaged in the case of social med–ia providers.

N. 18 - Preventive/promotion measures

104. Criminalization conventions include a variety of clauses on preventive or promotion measures that members States are called to adopt. The purpose of such clauses is to offer complementary means in the fight against the covered phenomena assuming that criminal prosecution is only an aspect of a larger set of actions that can be taken in that regard. In line with this assumption, Paragraph 108 dedicates ample room to preventive measures in letter (g) and offers a long list of obligations that are meant to counter racist and xenophobic discrimination.

105. Diverse remedies can be provided in respect of racial discrimination crimes, including but not limited to rehabilitation and social reintegration, especially in the case of minors and youth who have been indoctrinated and socialized into cultures of hate. The additional protocol to the ICERD would also be the occasion to elaborate upon preventative and conciliatory measures (e.g. education).

106. The ICERD does not lay out mechanisms for mediation reconciliation and rehabilitation to combat acts of a racist and xenophobic nature. These approaches are complementary to criminal law sanctions and may be appropriate responses to less egregious acts of racial discrimination or xenophobia.

107. The additional protocol could elaborate upon "all appropriate means" that states are instructed to take under article 2 of the ICERD, which extends to private actors in addition to public institutions[35]

108. The additional protocol could build upon remedies currently provided for under the ICERD, such as article 6, requiring states to provide "effective protection and remedies" through "competent national tribunals and other state institutions". Furthermore, the adoption of measures beyond legal sanctions is within the obligations enumerated by article 2(1)(e).

109. ICERD article 7 requires states to take measures, through education and information, to combat prejudices leading to racial discrimination and to promote "understanding, tolerance and friendship" among "racial or ethnical groups". The additional protocol could enjoin states to take concrete measures not only to criminalise offences, but also to devise mechanisms that could rehabilitate offenders.

110. The draft additional protocol put forth at paragraph 108 of the Ad Hoc Committee's report of the 10th session (A/HRC/42/58) itemized matters beyond strict criminal law measures at paragraph 108(g). It refers to preventive measures intended to combat acts of racial discrimination and/or xenophobia, including through education and awareness-raising. Mediation, reconciliation, and rehabilitation would be well-placed in such a model, as they could fall within a generous reading of the current draft provisions.

111. To fully combat acts of a racist and xenophobic nature, it is important to adopt a holistic and multi-pronged approach that includes a suite of tools drawing from both criminal law and civil law. This approach would be reflective of the structure of the ICERD as article 4 speaks to criminalization, whereas article 7 recognizes the role of preventive measures such as teaching, education, culture and information. Thus, in addition to fulfilling the Committee's criminalization mandate through criminal law provisions for the most egregious acts, the additional protocol could also detail conciliatory or non-criminal methods of addressing racial discrimination through non-judicial remedies and processes.

112. The additional protocol could identify they types of harm to which mediation, reconciliation, and rehabilitation mechanisms may be suited to address, and identify factors that would provide guidance on when criminal or civil law remedies would be appropriate. Different responses may be appropriate depending on the gravity of the harm.

113. Consideration should be given to the following factors when deciding whether a conciliation mechanism is appropriate:

(a) **Gravity of the harm**: conciliation mechanisms are not appropriate where violence or fear for physical safety are involved. These situations call for a criminal law response.

[35] ICERD, article 2(1)|(d), "any persons, groups or organizations".

Cases involving incitement to violence, genocide or terrorism are not suitable for conciliation[36].

(b) **Intent**: was the hate speech or conduct non-intentional and careless, or deliberate and driven by animus and malice?

(c) **Impact**: what was the impact on the community at large? Is a clear denunciation in the form of criminal prosecution necessary to maintain social boundaries and cohesion?

(d) **Voluntary participation in a manner which preserves human dignity**: for example, coerced apologies may be excessively humiliation and disproportionate.

(e) **Prospects for education, rehabilitation, and the possibility of good faith**: where words are spoken carelessly rather than with malice, or where expressions may raise concern about tolerance and civility as opposed to giving rise to criminal or civil sanctions, such cases may be correctable in a manner that advances understanding and friendly relations[37]. If there is no violence, but the moral injury is great, this may not be suitable to reconciliatory proceedings[38].

Informal or non-judicial processes should not deny the victim the choice of seeking a legal remedy: extra-legal customary reconciliation sessions should not be imposed upon victims, as this can exacerbate power imbalances–and unfair bias.

N. 19 - Additional State obligations

114. Similar obligations appear in criminalization convention as additional clauses complementing State obligations. The main difference with the previous category is that the additional obligations tend to be connected with the implementation of the convention's main criminalization obligations, such as the duty to instruct military commanders or to notify the national legislative and other measures adopted by the States to comply with the convention. Criminalization conventions include a variety of clauses on preventive or promotional measures. In addition, given the unique nature of the conduct the additional protocol seeks to address, clauses providing for non-punitive conciliatory processes and measures with a view to rehabilitation and restoration may also be appropriate, to diversify the suite of tools available to state parties in addressing the complex problems associated with acts of a racist or xenophobic nature. This facilitates the realization of the various goals of criminal law beyond its retributive and deterrent functions, to include rehabilitative, reconciliatory, educative and symbolic functions, which uphold social norms of tolerance, solidarity and peace–ul co-existence.

N. 20 - Institutional arrangements

115. Specific clauses are included when the criminalization convention creates a new institutional body or organization having supervising, cooperation and dispute settlement functions. When the convention is concluded in the framework of an existing institutional organization, especially in the UN practice of drafting human rights protocols, those functions are entrusted to existing monitoring bodies.

N. 21 - Empowerment of existing bodies

[36] See *Momodou Jallow v Denmark* (2018); *The Jewish Community of Oslo v Norway* (2003).
[37] See *Stephen Hagan v Australia* (2002).
[38] See *Gelle v Denmark* (2004), where people of Somali origin were compared to pedophiles and rapists.

116. Due to the existence of the CERD Committee, it would be important ensure consistency in the supervisions of the new obligations created by the future protocol. The inclusion of a clause entrusting the CERD Committee with monitoring functions over the new criminalization and preventive obligations of the protocol could provide the opportunity to link the two instruments and ensure a more efficient cooperation among member States.

N. 22 - Dispute settlement

117. The link with CERD could be advantageous also from the standpoint of arrangements concerning the settlement of disputes. One option is to simply refer to the existing dispute settlement mechanism already provided under the ICERD. Otherwise, a specific clause can be drafted, as is the case with the protocols to the 2000 Palermo convention.

N. 23 - Final clauses

118. A number of standard clauses will finally regard the signature of the protocol, its entry into force, amendments, depositary, official languages, etc.

N. 24 – Terminology to be defined in the context of criminal elements [See ANNEX 5]

119. Finally, there are a number of additional terms or notions which may require definition in the context of a possible additional protocol which includes criminal elements, such as **race, racism, religion or belief, xenophobia, hate, hate speech, hate crime, participation, and racial profiling.**

120. Inputs on whether or not to define additional terms and notions not included or defined in the ICERD, reference is made to annex 5 below concerning paragraph 101(i) of the 13th session report (A/HRC/54/65).

ANNEX 1 – The structure of criminalization conventions

1. Preamble	Preambular clauses mention general principles, relevant legal documents (including soft law), the reasons for the elaboration of the "instrument"
2. Relation with "main convention"	Typical clause to be found in a protocol that states the relationship with the "main convention"
3. Purposes	Clause stating the main purposes of the "instrument"
4. Use of terms	Definitions of the terms in use in the "instrument"
5. Definition of the conduct to be criminalized (main crime)	Definition of the main conduct being the object of the criminalization obligations (eg slavery)
6. Definition of the conduct to be criminalized (inchoate crimes and modes of liability)	Definition of additional conduct to be criminalized (eg forced marriage) and the types of participation to the crime that must be criminalized (eg attempt or conspiracy) à aggravating factors may be included here
7. Consistency clauses	Clauses expressing the need for consistency with certain international law rules
8. Inter-State obligations not to commit, to prevent, to punish … the underlying crime	Main obligations having an inter-State character and entailing international State responsibility as opposed to the criminalization obligations concerning private conduct (eg State terrorism as opposed to private actors terrorism under national law)
9. Duty to criminalize under national law	Obligation to introduce in the national criminal code The crimes defined in 5. and 6.
10. Duty to establish national criminal jurisdiction (connection and criteria)	Obligation to provide national legislation establishing domestic jurisdiction over the covered crimes
11. Duty to exercise of adjudicative jurisdiction (mostly *aut dedere aut judicare*)	Obligations to exercise jurisdiction (in broad sense: investigation, trial …) for the covered crimes especially in relation to other States Parties that may also exercise jurisdiction
12. Extradition	Clause providing for extradition and excluding that the covered crime be considered as a political offence
13. Duty of mutual legal assistance	Obligation to provide reciprocal assistance especially in criminal judicial matters (eg collection of evidence); it may take a variety of forms

14. Cooperation obligations	Obligation to cooperate in the fight against the covered crime; it may take a variety of forms
15. Fair trial rights	Obligation to respect fair trial rights of the accused of the covered crime before domestic courts exercising jurisdiction
16. Victims' rights	Obligation to protect the victims (mainly as witnesses) of the covered crimes
17. State responsibility	Explicit recognition of State responsibility (duty to make reparation *latu sensu*), which is otherwise implicit in 8.
18. Preventive/promotion obligations	More specific obligations concerning the prevention of the covered crime or the adoption of complementary measures (cultural, educational, communication… measures)
19. Additional State obligations	Additional State obligations concerning eg the implementation of the convention, the sharing of implementing legislation, the duty to notify situations that may lead to the commission of the covered crimes, etc.
20. Institutional arrangements	Provisions concerning the creation of the institutional framework (new international bodies) for the supervision, application, enforcement of the convention
21. Empowerment of existing bodies	Delegation of powers to existing international bodies in connection with the application and supervision of the implementation of the convention
22. Dispute settlement	Clauses for the diplomatic and/or judicial settlement of the disputes concerning the interpretation or the application of the convention
23. Final clauses	Signature, ratification, acceptance, approval and accession; reservations; entry into force; amendment; denunciation; deposit;– languages

ANNEX 2 - 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" (agenda item 8) [footnotes omitted]

108. States parties undertake to criminalize the following acts of a racist and xenophobic nature perpetrated online and offline against specific persons and specific groups irrespective of the author:

(4) (a) Dissemination of hate speech;

(b) Inciting, aiding and abetting the commission of racist and xenophobic hate crimes;

(c) Dissemination of ideas and materials that advocate and promote racial superiority, intolerance and violence;

(d) [All contemporary forms of discrimination based on religion or belief].
(e) Compel social media networks to remove expediently, in accordance with national legislation, racist and xenophobic content from online media platforms including social media;

(f) Hold accountable or liable persons and companies in the information and communications technology sector who broadcast racist and xenophobic content or material;

(g) States parties commit themselves to adopt the following preventive measures to combat racist and xenophobic discrimination:
(i) Promote cultural diversity through education and awareness;
(ii) Counter proliferation of contemporary forms of supremacist ideologies, including by awareness-raising about the horrific consequences of such ideologies in the past;
(iii) Put an end to discriminatory racial and ethnic profiling and derogatory stereotypes in all their forms;
(iv) Ensure non-discriminatory access to the enjoyment of all human rights, such as birth registration, access to health, education, employment and housing;
(v) Provide human rights education and training to civil servants working in the areas of justice, civil service, immigration, customs, law enforcement and social services;
(vi) Provide guidance on appropriate conduct by law enforcement officials;
(vii) Put in place systems of data collection, monitoring and tracking law enforcement and police activities;
(viii) Put in place mechanisms for the internal and external accountability of law enforcement personnel;
(ix) Ensure greater community involvement in the development of law enforcement policies and practices;
(x) Make improvements to the training and recruitment of law enforcement personnel;
(xi) Envisage setting up a data-collection system to better combat racist and xenophobic acts in accordance with national legislation, collected appropriately with the explicit consent of the victims, based on their self-identification and in accordance

with provisions on human rights and fundamental freedoms, such as data protection regulations and privacy guarantees. That information cannot be misused.

(h) The additional protocol shall call upon States to increase international cooperation, including harmonization of legal norms and regulations in the field of fighting racism;
(i) The preamble will make reference to relevant existing frameworks that cover racist and xenophobic discrimination.

ANNEX 3 – Tentative reorganization of paragraph 108

STARDARD STRUCTURE	KEY ELEMENTS OF PARA. 108
1. Preamble	(i) The preamble will make reference to relevant existing frameworks that cover racist and xenophobic discrimination
2. Relation with "main convention"	Reference to art. 4 CERD
3. Purposes	
4. Use of terms	
5. Definition of the conduct to be criminalized (main crime)	(a) Dissemination of hate speech; (c) Dissemination of ideas and materials that advocate and promote racial superiority, intolerance and violence; (d) [All contemporary forms of discrimination based on religion or belief]
6. Definition of the conduct to be criminalized (inchoate crimes and modes of liability)	(b) Inciting, aiding and abetting the commission of racist and xenophobic hate crimes; (d) [All contemporary forms of discrimination based on religion or belief]
7. Consistency clauses	
8. Inter-State obligations not to commit, to prevent, to punish … the underlying crime	States parties obligation to adopt nationalmeasures/legislation in order to (e) Compel social media networks to remove expediently, in accordance with national legislation, racist and xenophobic content from online media platforms, including social media;
9. Duty to criminalize under national law	States parties obligation to criminalize conduct under a), b), c) and d) States parties obligation to criminalize à (f) Hold accountable or liable persons and companies in the information and communications technology sector who broadcast racist and xenophobic content or material [specific clauses providing for legal persons' criminal responsibility]
10. Duty to establish national criminal jurisdiction (connection and criteria)	
11. Duty to exercise of adjudicative jurisdiction (mostly *aut dedere aut judicare*)	
12. Extradition	
13. Duty of mutual legal assistance	
14. Cooperation obligations	(h) The additional protocol shall call upon States to increase international cooperation,

	including harmonization of legal norms and regulations in the field of fighting racism;
15. Fair trial rights	
16. Victims' rights	
17. State responsibility	
18. Preventive/promotion obligations	(g) States parties commit themselves to adopt the following preventive measures to combat racist and xenophobic discrimination: (i) Promote cultural diversity through education and awareness; (ii) Counter proliferation of contemporary forms of supremacist ideologies, including by awareness-raising about the horrific consequences of such ideologies in the past; (iii) Put an end to discriminatory racial and ethnic profiling and derogatory stereotypes in all their forms; (iv) Ensure non-discriminatory access to the enjoyment of all human rights, such as birth registration, access to health, education, employment and housing; (v) Provide human rights education and training to civil servants working in the areas of justice, civil service, immigration, customs, law enforcement and social services; (vi) Provide guidance on appropriate conduct by law enforcement officials; (vii) Put in place systems of data collection, monitoring and tracking law enforcement and police activities; (viii) Put in place mechanisms for the internal and external accountability of law enforcement personnel; (ix) Ensure greater community involvement in the development of law enforcement policies and practices; (x) Make improvements to the training and recruitment of law enforcement personnel; (xi) Envisage setting up a data-collection system to better combat racist and xenophobic acts in accordance with national legislation, collected appropriately with the explicit consent of the victims, based

	on their self-identification and in accordance with provisions on human rights and fundamental freedoms, such as data protection regulations and privacy guarantees. That information cannot be misused. à To facilitate conciliatory processes in appropriate cases with a view to promoting relational welfare, racial harmony and social cohesion
19. Additional State obligations	
20. Institutional arrangements	
21. Empowerment of existing bodies	CERD Committee: Monitoring implementation of criminalization obligations and preventive obligations
22. Dispute settlement	
23. Final clauses	

ANNEX 4 – CRIMINALIZATION CONVENTIONS

The following instruments have been selected on the basis of a few criteria: 1) **binding** instruments (soft law has not been taken into account with two exceptions: 2019 ILC Draft convention crimes against humanity* and 2021 Third Revised Draft convention on human rights and business enterprises*); 2) **universal** treaties (regional treaties have not been taken into account); 3) **criminalization** purpose (of the entire convention or some of its clauses); 4) specific criminalization **obligations** and accessory clauses that may be relevant for the elaboration of the complementary standard. The selection is a personal selection and additional some relevant treaties are mentioned at the end.

1) Core crimes

- 1948 Genocide convention
- 1949 Geneva Convention I (idem Convention II)
- 1949 Geneva Conventions III and IV
- 1977 Protocol I to Geneva Conventions
- *2019 ILC Draft Convention on Crimes against humanity*

2) Human rights

- 1965 Convention elimination racial discrimination
- 1974 Apartheid convention
- 1984 Torture convention
- 1992 Enforced disappearances convention
- *2021 Draft convention human rights and business enterprises**

3) Transnational crimes

- 1926 Slavery convention
- 1956 Slave trade convention
- 1980 Vienna convention nuclear material
- 1988 SUA convention
- 1989 Mercenaries convention
- 2000 Palermo convention and two protocols
- 2003 Corruption convention

4) Terrorism conventions

- 1963 Offences on board convention
- 1970 Unlawful Seizure convention
- 1971 Montreal convention#
- 1973 Crimes against Internationally Protected Persons convention
- 1979 Hostages convention
- 1980 Nuclear Material convention
- 1988 Violence at Airports convention
- 1988 Protocol SUA on Fixed Platforms
- 1991 Plastic Explosives convention
- 1997 Terrorist Bombings convention
- 1999 Financing of Terrorism convention
- 2005 Nuclear Terrorism convention

- 2005 Amendment 1980 Nuclear Material convention
- 2005 Protocol SUA Maritime Navigation
- 2005 Protocol SUA on Fixed Platforms
- 2010 Unlawful Acts Relating to International Civil Aviation convention
- 2010 Protocol 1970 Unlawful Seizure convention
- 2014 Protocol 1963 on Board Aircraft convention

Other possibly relevant conventions

- Drug conventions
- 2001 Council of Europe convention on cybercrime

ANNEX 5—INPUTS ON PARAGRAPH 101(i) of A/HRC/54/65

101. Delegations and Ad Hoc Committee Participants raised the following issues and elements during the 13th session and requested further elaboration, in order to assist the Chairperson and the Committee in view of the upcoming 14th session
(i) Inputs on whether or not to define additional terms or notions not included or defined in the International Convention on the Elimination of All Forms of Racial Discrimination, such as "hate", "hate speech", "hate crime", "harm", "intersectionality", "ethnic origin", "national origin", "Indigenous populations", "Indigenous Peoples", "race", "racism", "racist", "racial profiling", "religion or belief", "structural racism", and "xenophobia".

Guiding principles regarding definition:

The legal experts advised that the decision to define could be complex under international treaty law, as definitions could be helpful, but in certain circumstances they may distract from practical and actionable solutions. They noted, however, that the Ad Hoc Committee's mandate was to commence "negotiations on the draft additional protocol to the Convention criminalizing acts of a racist and xenophobic nature"[39], and as such was primarily concerned with criminal law measures. The experts advised that treaties and provisions prohibiting criminal conduct required exact definitions, as criminal conduct must be prohibited with clarity, precision, and notice to ensure that people understand what acts are criminal and what are not. It was emphasized that all criminalizing conventions must provide a definition of the prohibited conduct.

The experts explained that existing international criminal conventions did not all take the same approach to definitions, but that all of them provided a level of definition necessary to protect the principles of criminal law and human rights. They cited the Genocide Convention, the Rome Statute for the International Court, and the Convention Against Torture as examples of international criminal conventions that clearly articulated definitions of criminal conduct. They also discussed that where lack of international consensus existed, such as the definition of terrorism as a "State" wrongful act under international law, it fell to all the different conventions criminalizing specific acts of terrorism to provide detailed definitions within their particular frameworks (i.e. violence at sea, hijacking, bombing, etc.)[40]. Thus, although one consolidated definition did not exist for this term, a patchwork of other definitions provided the components necessary to address the relevant criminal conduct.

The experts were clear that precise definitions were necessary for any specific conduct that was the object of criminalization provisions; however, there was more flexibility regarding definitions of generalized underlying notions, civil law, and human rights law measures, which could remain open to interpretation.

The experts also advised that agreed-upon definitions in international criminal conventions were not always representative of full-bodied solutions to an issue. They cited the definition

[39] A/RES/73/262; A/HRC/RES/34/36
[40] See the list of the 9 terrorist conventions annexed to the 1999 International convention for the suppression of financing terrorism. For example, the International Court of Justice had recently the occasion to clarify the definition of the conduct criminalised by the latter convention - that is "financing terrorism" under Article 1 (ICJ Ukraine v Russia judgment on the merits 31 January 2024 §40-64) - despite the lack of consensus on the notion of terrorism already mentioned.

of the term genocide in the Genocide Convention, and how the negotiated definition was much narrower than the definition put forth by Raphael Lemkin, who coined the term in 1944. They noted that just because a term is defined in an international legal instrument did not mean that the definition was adequate or representative to address the root issue because the definition had to emerge through consensus and could become frozen in time[41]. They noted that there are extensive debates among scholars and practitioners of international treaty law regarding codification (where everything is clearly defined and contextualized) versus progressive development.

In addition to strict codification, the experts put forth three further considerations for addressing definitions for the Committee: 1) Definition at the national level; 2) Inclusion of deliberately vague definitional clauses; and 3) Contextual definitions.

1) Definition at the national level
The experts expressed that, because definitions could become fixed in time, one method to address this problem could be to refrain from definition at the international level, and allow for terms to evolve progressively over time, including by inputs from national levels. They noted that States could be provided a 'margin of appreciation' or a 'margin of maneuver' in implementation of international treaty terms.

2) Inclusion of deliberately vague definitional clauses
The experts recalled that the Rome Statute of the International Criminal Court provided a definition of one of the crimes against humanity as "other inhumane acts of a similar character intentionally causing great suffering or serious injury to body or to mental or physical health"[42]. It was noted that this was deliberately included and left undefined *in addition to other clearly defined crimes* so as to encompass conduct that was not yet identified in the Rome Statute. The experts relayed, however, that this provision was widely criticized due to its lack of consistency with the principle of legality. They noted that, in earlier international law, this catchphrase was used to criminalize acts such as forced marriage.

3) Contextual definitions
The experts expressed that definitions could hinge on the context in which the acts were evaluated. They noted that a definition of 'race' for the purposes of criminally charging an individual for racist acts would differ from a definition of 'race' that operated to protect people from discrimination in the allocation of state benefits, or the definition used for census purposes for inclusion programs. They emphasized that the context mattered, and that the definitions negotiated by the Committee must account fully for the context of its criminalizing mandate.

The experts observed that the terms identified in paragraph 101(i) had been subject to extensive definitional discussion for decades, and to date no settled definitions had emerged.

[41] Article 10 of the ICC Statute can be usefully cited in this regard: "Nothing in this Part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute." The provision was especially devised to avoid that treaty law could freeze the development of customary international law.

[42] Rome Statute, article 7(a)(k)

They did note, however, that discussing the meaning of terms in the context of an additional protocol to the ICERD could be a productive exercise.

Suggestions and sources for discussion of definitions:

Hate:
The experts relayed that, according to the United States Department of Justice, the term 'hate' 'does not mean rage, anger, or general dislike. In this context "hate" means bias against people or groups with specific characteristics that are defined by the law.'

They clarified that this definition had been used mainly for hate crimes, where an existing crime was committed on the basis of bias, prejudice, or hate. The hate threshold in this context would be lower, because the parallel crime attracted criminal responsibility with the element of prejudice aggravating the crime and the sentence.

The experts specified that hate was an element of the offence of hate speech and should be defined. They explained that, whilst its precise meaning in other disciplines was debated, in hate speech law, "hate" or "hatred" is defined as "an intense emotion of derision, aversion and enmity towards the group targeted".

For further guidance, see:

- HRC General Comment No. 34 Article 19 Freedom of expression and Opinion – CCPR/C/GC/34
- CERD General Recommendation No. 35 Combating Racist Hate Speech *CERD/C/GC/35, 26 September 2013*
- The Rabat Plan of Action on the Prohibition of Advocacy of National, Racial or Religious Hatred that Constitutes Incitement to Discrimination, Hostility or Violence A/HRC/22/17/Add.4, annex
- The Camden Principles of Freedom of Expression and Equality
- UN Strategy and Plan of Action on Hate Speech 2019
- UN Strategy and Plan of Action on Hate Speech, Detailed guidelines on implementation for UN Field Presences, September 2020, available at https://www.un.org/en/hate-speech/un-strategy-and-plan-of-action-on-hate-speech[KG2]

Hate Speech:
The experts recalled that the UN Strategy and Plan of Action on Hate Speech (2018) defined hate speech as: "any kind of communication in speech, writing or behavior, that attacks or used pejorative or discriminatory language with reference to a person or a group on the basis of who they are, in other words, based on their religion, ethnicity, nationality, race, color, descent, gender or other identity factor". They clarified, however, that there was no formal definition of hate speech in international law.
They advised that, from a definitional perspective, the additional protocol must focus on the crime of hate speech, and that this definition must capture the most egregious types of speech. They suggested that remedial measures be used for speech that did not cause the same level of harm as "discriminatory speech"—a term they employed with some reticence, noting that hate speech at the human rights level should not be equated with unfair discrimination.

The experts recalled their previous recommendation that hate speech be defined as "the advocacy of hatred on the ground of race and which incites harm." They explained that the requirements in the definition were connected, as the speaker had to intend to advocate hatred against a group of persons on the ground of race, as defined in the ICERD (the "target group"), which could be extended to include religion or belief and/or foreignness. They specified that the expressive conduct at issue had to cumulatively advocate hatred, on a prohibited ground, and incite harm.

The experts put forth suggestions for specific elements of the crime:

a) **Expressive conduct –** the experts advised including a wide range of expressive acts, including speech, written words, symbols, gestures, cartoons, memes, flags, songs, chants, posts on social media, broadcasts and images. Both online and offline speech should be included in the ambit of the crime.
They noted that online content could also be defined, which would include hate speech, but also be broad enough to include disinformation and any other online concerns.

b) The experts explained that "**advocate"** required the active instigation, urging of or promotion of hatred on the grounds of race, colour, descent, or national or ethnic origin. They advised that mere communication was not included in the ambit of the offence. They recalled that advocacy was a purposive activity which spoke to the speaker's intent (*mens rea*).

c) The experts cited "**hatred"** as an intense emotion of derision, aversion and enmity towards the group targeted.

d) **On a prohibited ground** – the experts explained that this related to an identified group of persons on the grounds of race, colour, descent, and national or ethnic origin. They noted that the prohibited grounds could be further developed to include religion or belief and/or foreignness.

e) The experts advised that to **incite** was the intention to influence others to engage in harmful conduct– where the hatemonger aimed to incite their audience to react by way of serious discrimination, hostility or violence towards the group directly and/or to create or perpetuate subordination.

f) **Harm –** the experts relayed that the gravity of the harm targeted was severe. They explained that under established law, harm included both physical and psychological harm to the victims of the speech (the "direct harm") and the creation of an environment in which intolerance against the targeted group became ingrained in society and led to persecution, crimes against humanity and genocide (the "indirect harm"). They noted that the harm caused depended on the context in which the hate speech was advocated.

For further guidance, see:

- CERD/C/GC/35/: 6]: racist hate speech includes "all the specific speech forms referred to in article 4 directed against groups recognized in article 1 of the Convention — which forbids discrimination on grounds of race, colour, descent, or national or ethnic origin — such as indigenous peoples, descent-based groups, and immigrants or non-citizens, including migrant domestic workers, refugees and asylum

seekers, as well as speech directed against women members of these and other vulnerable groups." Further "In the light of the principle of intersectionality, and bearing in mind that "criticism of religious leaders or commentary on religious doctrine or tenets of faith" should not be prohibited or punished, the Committee's attention has also been engaged by hate speech targeting persons belonging to certain ethnic groups who profess or practice a religion different from the majority, including expressions of Islamophobia, anti-Semitism and other similar manifestations of hatred against ethno-religious groups, as well as extreme manifestations of hatred such as incitement to genocide and to terrorism. Stereotyping and stigmatization of members of protected groups has also been the subject of expressions of concern and recommendations adopted by the Committee." [7] racist hate speech "is not confined to explicitly racial remarks," as it can "employ indirect language in order to disguise its targets and objectives."

- HRC General Comment No. 34 Article 19 Freedom of expression and Opinion – CCPR/C/GC/34
- CERD General Recommendation No. 35 Combating Racist Hate Speech *CERD/C/GC/35, 26 September 2013*
- The Rabat Plan of Action on the Prohibition of Advocacy of National, Racial or Religious Hatred that Constitutes Incitement to Discrimination, Hostility or Violence A/HRC/22/17/Add.4, annex
- The Camden Principles of Freedom of Expression and Equality
- Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law
- UN Strategy and Plan of Action on Hate Speech 2019
- UN Strategy and Plan of Action on Hate Speech, Detailed guidelines on implementation for UN Field Presences, September 2020, available at https://www.un.org/en/hate-speech/un-strategy-and-plan-of-action-on-hate-speech
- EU Digital Services Act Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act) available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32022R2065
- **ICERD,** Article 4: States Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination and, to this end, with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of this Convention, inter alia: (a) Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof; (b) Shall declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial

discrimination, and shall recognize participation in such organizations or activities as an offence punishable by law; (c) Shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination

- I**CCPR,** Article 19: 1. Everyone shall have the right to hold opinions without interference. 2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice. 3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order (ordre public), or of public health or morals.
- **ICCPR**, Article 20: 2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

Hate Crime:
The experts relayed that, according to the United States Department of Justice, which had prosecuted many such cases, a hate crime was 'a crime motivated by bias against race, color, religion, national origin, sexual orientation, gender, gender identity, or disability.'.

They noted that hate crimes were a separate category of offences under national criminal legislation that addressed existing criminal acts committed with a biased or prejudiced motive or which introduced criminal liability for conduct which was committed with a biased or prejudice motive and where such motive is an element of the offence.

The experts explained that the hate threshold in the offence differed from that as defined for a hate crime and could vary along a spectrum, from prejudice or intolerance to hate because the base crime was a recognized criminal offence.

For further guidance, see:

- The definition of hate crime provided in the Chairperson's draft text of the 13th session
- **ICERD,** Article 1: 1. 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 an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life. 2. This Convention shall not apply to distinctions, exclusions, restrictions or preferences made by a State Party to this Convention between citizens and non-citizens. 3. Nothing in this Convention may be interpreted as affecting in any way the legal provisions of States Parties concerning nationality, citizenship or naturalization, provided that such provisions do not discriminate against any particular nationality.
- **ICERD**, Article 2: 1. States Parties condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial

discrimination in all its forms and promoting understanding among all races, and, to this end: (a) Each State Party undertakes to engage in no act or practice of racial discrimination against persons, groups of persons or institutions and to ensure that all public authorities and public institutions, national and local, shall act in conformity with this obligation; (b) Each State Party undertakes not to sponsor, defend or support racial discrimination by any persons or organizations; (c) Each State Party shall take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists; (d) Each State Party shall prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organization; (e) Each State Party undertakes to encourage, where appropriate, integrationist multiracial organizations and movements and other means of eliminating barriers between races, and to discourage anything which tends to strengthen racial division. 2. States Parties shall, when the circumstances so warrant, take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms. These measures shall in no case entail as a con sequence the maintenance of unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved

- **ICERD**, Article 3: States Parties particularly condemn racial segregation and apartheid and undertake to prevent, prohibit and eradicate all practices of this nature in territories under their jurisdiction.
- **ICERD**, Article 4: States Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination and, to this end, with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of this Convention, inter alia: (a) Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof; (b) Shall declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organizations or activities as an offence punishable by law; (c) Shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination
- **ICERD**, Article 5: In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without

distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights: (a) The right to equal treatment before the tribunals and all other organs administering justice; (b) The right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual group or institution; (c) Political rights, in particular the right to participate in elections-to vote and to stand for election-on the basis of universal and equal suffrage, to take part in the Government as well as in the conduct of public affairs at any level and to have equal access to public service; (d) Other civil rights, in particular: (i) The right to freedom of movement and residence within the border of the State; (ii) The right to leave any country, including one's own, and to return to one's country; (iii) The right to nationality; (iv) The right to marriage and choice of spouse; (v) The right to own property alone as well as in association with others; (vi) The right to inherit; (vii) The right to freedom of thought, conscience and religion; (viii) The right to freedom of opinion and expression; (ix) The right to freedom of peaceful assembly and association; (e) Economic, social and cultural rights, in particular: (i) The rights to work, to free choice of employment, to just and favourable conditions of work, to protection against unemployment, to equal pay for equal work, to just and favourable remuneration; (ii) The right to form and join trade unions; (iii) The right to housing; (iv) The right to public health, medical care, social security and social services; (v) The right to education and training; (vi) The right to equal participation in cultural activities; (f) The right of access to any place or service intended for use by the general public, such as transport hotels, restaurants, cafes, theatres and parks.

- **ICERD**, Article 6: States Parties shall assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention, as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination.
- **ICCPR,** Article 19: 1. Everyone shall have the right to hold opinions without interference. 2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice. 3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order (ordre public), or of public health or morals.
- **ICCPR**, Article 20: 2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.
- **Outcome document of the Durban Review Conference:** [57] “calls on States to combat impunity for acts of racism, racial discrimination, xenophobia and related

intolerance, to secure expeditious access to justice, and to provide fair and adequate redress for victims;" [60] "urges States to punish violent, racist and xenophobic activities by groups that are based on neo-Nazi, neo-Fascist and other violent national ideologies;" [68] "expresses its concern over the rise in recent years of acts of incitement to hatred, which have targeted and severely affected racial and religious communities and persons belonging to racial and religious minorities, whether involving the use of print, audio-visual or electronic media or any other means, and emanating from a variety of sources;" [69] "resolves to, as stipulated in art. 20 of the ICCPR, fully and effectively prohibit any advocacy of national, racial, or religious hatred that constitutes incitement to discrimination, hostility or violence and implement it through all necessary legislative, policy and judicial measures." [85] "notes with concern the increased instances of multiple or aggravated forms of discrimination and reiterates that such discrimination affects the enjoyment of human rights and can lead to particular targeting or vulnerability and urges States to adopt or strengthen programmes or measures to eradicate multiple or aggravated forms of discrimination, in particular by adopting or improving penal or civil legislation to address these phenomena;" [99] "calls upon States, in accordance with their human rights obligations, to declare illegal and to prohibit all organizations based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote national, racial and religious hatred and discrimination in any form, and to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination;" [101] "calls on States to ensure that investigations of all acts of racism and racial discrimination, in particular those committed by law enforcement officials, are carried out in an impartial, timely and exhaustive manner, that those responsible are brought to justice in accordance with the law, and that victims receive prompt, just and adequate reparation or satisfaction for any damage.

Harm:
The experts advised that this notion was widely defined in international case law, especially the International Criminal Court decisions concerning reparations. They provided the most recent example:

ICC, Prosecutor v. Ongwen, 2024, para. 168
168. The Chamber notes that physical harm encompasses physical and bodily injury, impairment of the body, pain, and illness. The Chamber emphasizes that 'the concept of physical harm is not restricted to the infliction of a physical or bodily injury', and notes that 'hurt, pain or suffering otherwise not caused by a bodily injury can also amount to physical harm'. Moral harm may include psychological harm or trauma, mental pain and anguish, emotional distress, psychosocial harm, and loss of life plan. Material harm refers to loss of or damage to property, loss of earnings, opportunity to work, reduced standard of living and socio-economic opportunities, and loss of schooling and vocational training. Community harm is that suffered by persons as members of a group, family and or community. Lastly, transgenerational harm relates to the phenomenon in which traumatised parents set in motion an intergenerational cycle of dysfunction, handing-down trauma to their children, who

themselves did not directly experience the atrocities their parents endured, affecting their children's emotional behaviour, attachment, and well-being as a result.

The experts cautioned that care must be taken to ensure that the definition of harm would not unduly limit the scope of the crime.

Intersectionality:
The experts explained that "intersectionality" was a sociological notion coined in 1989 by Ms. Kimberle Crenshaw, an African-American lawyer and feminist in a published article on the legal situation of black women who suffered from discrimination that could not be attributed exclusively to their status as women or as black people. They suggested that the concept of intersectionality could be defined as referring to the ways in which different forms of oppression or supremacy articulate and reinforce each other, leading to greater discrimination or maltreatment of individuals facing multiple forms of discrimination simultaneously.

The experts also discussed that intersectionality may be more usefully communicated as "multiple discrimination" in the additional protocol; however, it should be noted that CERD has used both terms, seemingly interchangeably, in its General Recommendations.

For further guidance, see:

- **CERD General Recommendations 25 32-35**
- **Durban Declaration and Programme of Action**, paragraph 2: "racism, racial discrimination, xenophobia and related intolerance are based on considerations of race, colour, ancestry or national or ethnic origin and that victims may experience multiple or aggravated forms of discrimination based on other related grounds, including discrimination on grounds of sex, language , religion, political or other opinions, social origin, fortune, birth or status."
- **General Assembly Resolution 69/16**
- **Programme of activities relating to the International Decade for People of African Descent of November 18 2014**
- **New York Declaration for Refugees and Migrants, September 19, 2016**

Ethnic Origin:
The experts explained that, according to the International Criminal Tribunal for Rwanda (ICTR) in its judgment in *Akayesu*, in the context of genocide 'an ethnic group is generally defined as a group whose members share a common language or culture' (ICTR, The Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment (2 September 1998), para. 513). They noted, however, that the ICTR had subsequently distanced itself from this baseline. They recalled that, in *Rutaganda*, the ICTR noted that 'the concepts of national, ethnical, racial and religious groups have been researched extensively and that, at present, there are no generally and internationally accepted precise definitions thereof. Each of these concepts must be assessed in the light of a particular political, social and cultural context.' (ICTR, The Prosecutor v. Rutaganda, Case No. ICTR-96-3-T, Judgment (6 December 1999), para. 55). Consequently, the membership of a group was presented as a subjective rather than an objective concept. The experts relayed that the ICTR went on to note: 'The victim is perceived by the perpetrator of genocide as belonging to a group slated for destruction. In some instances, the victim may perceive himself/herself as belonging to the said group.' They

explained that In 1999, in the case of *Kayishema and Ruzindan*a, the ICTR suggested either an objective or a subjective definition of an ethnic group: 'An ethnic group is one whose members share a common language and culture; or, a group which distinguishes itself, as such (self-identification); or, a group identified as such by others, including perpetrators of the crimes (identification of others)' (ICTR, The Prosecutor v. Kayishema and Ruzindana., Case No. ICTR-95-1-T, Trial Judgment (21 May 1999), para. 98)

National Origin:
The experts noted that this term does not appear in article 4 of the ICERD. They elaborated that the ICTR in *Akayesu* defined a national group as follows: 'Based on the *Nottebohm* decision rendered by the International Court of Justice, the Chamber holds that a national group is defined as a collection of people who are perceived to share a legal bond based on common citizenship, coupled with reciprocity of rights and duties' (ICTR, The Prosecutor v. Akayesu, Case No. ICTR-96-4-T. Judgment (2 September 1998), para. 512)

For further guidance, see:

- **CERD, General Recommendation 30**, which stated in paragraph 4: "Under the Convention, differential treatment based on citizenship or immigration status will constitute discrimination if the criteria for such differentiation, judged in the light of the objectives and purposes of the Convention, are not applied pursuant to a legitimate aim, and are not proportional to the achievement of this aim. Differentiation within the scope of article 1, paragraph 4, of the Convention relating to special measures is not considered discriminatory;")

Indigenous Populations:
The experts noted that CERD's General Recommendation 23 recognized that the situation of Indigenous people and discrimination against them fell within the scope of the Committee.

They recalled that there were no universally accepted definitions of Indigenous populations, but noted there were many working descriptions. They relayed that the United Nations Declaration on the Rights of Indigenous Peoples did not offer a definition, but it did acknowledge the historical injustices suffered by Indigenous Peoples through settler invasions, and their right to maintain their distinct socio-political, economic, and cultural institutions.

The experts suggested that the use of the term "indigenous populations" was somewhat anachronistic, and their guidance would be to refrain from defining it in the context of the additional protocol

For further guidance, see:

- **ILO Convention No. 107**, Article 1(1): "This Convention applies to--(a) members of tribal or semi-tribal populations in independent countries whose social and economic conditions are at a less advanced stage than the stage reached by the other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations; (b) members of tribal or semi-tribal populations in independent countries which are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or

colonisation and which, irrespective of their legal status, live more in conformity with the social, economic and cultural institutions of that time than with the institutions of the nation to which they belong."

- **ILO Convention No. 69**, Article 1: "1. This Convention applies to: (a) tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations; (b) peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions. 2. Self-identification as indigenous or tribal shall be regarded as a fundamental criterion for determining the groups to which the provisions of this Convention apply. 3. The use of the term peoples in this Convention shall not be construed as having any implications as regards the rights which may attach to the term under international law."
- **Jose R. Martinez Cobo, 'Study of the problem of discrimination against indigenous populations' (1986) UN Doc E/CN.4/Sub.2/1986/7/Add.4 at [379]: "**Indigenous communities, peoples and nations are those: (a) having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories; (b) consider themselves distinct (c) non-dominant; and (d) Are determined to preserve, develop and transmit to future generations their ancestral territories and identity as peoples in accordance with their own cultural patterns, social institutions and legal system. **[380]** This historical continuity may consist of the continuation, for an extended period reaching into the present, of one or more of the following factors: (a) Occupation of ancestral lands, or at least of part of them; (b) Common ancestry with the original occupants of these lands; (c) Culture in general, or in specific manifestations; (d) Language; (e) Residence in certain parts of the country, or in certain regions of the world; (f) Other relevant factors. **[381]** On an individual basis, an indigenous person is: (a) one who belongs to these indigenous populations through self-identification as indigenous and; (b) is recognised and accepted by these populations as one of its members.
- **'Working Paper by the Chairperson-Rapporteur, Mrs. Erica-Irene A. Daes, on the concept of "indigenous people"' (1996) UN Doc E/CN.4/Sub.2/AC.4/1996/2[69]** Factors relevant to the understanding of the concept of "indigenous" include: a) Priority in time, with respect to the occupation and use of a specific territory; b) The voluntary perpetuation of cultural distinctiveness, which may include the aspects of language, social organisation, religion and spiritual values, modes of production, laws and institutions; c) Self-identification, as well as recognition by other groups, or by State authorities, as a distinct collectivity; and d) An experience of subjugation, marginalisation, dispossession, exclusion or discrimination, whether or not these conditions persist. **[71]** "... precise universal definition, while of philosophical interest, would be nearly impossible to attain in the

current state of global realities, and would in any event not contribute perceptibly to the practice aspects of defending groups from abuse".

- **Eide & Daes, 'Working paper on the relationship and distinction between the rights of persons belonging to minorities and those of indigenous peoples' (2000) UN Doc E/CN/4Sub.2/2000/10 (52nd Sess) [28]** Factors which, singly or in some combination, have repeatedly been asserted as characteristics of either minorities or indigenous peoples: (a) Numerical inferiority; (b) Social isolation, exclusion, or persistent discrimination; (c) Cultural, linguistic or religious distinctiveness; (d) Geographical concentration (territoriality); (e) Aboriginality (i.e., being autochthonous). **[48]** I should like to suggest that the ideal type of an "indigenous people" is: (a) a group that is aboriginal (autochthonous) to the territory where it resides today; and (b) chooses to perpetuate a distinct cultural identity and distinct collective social and political organisation within the territory.

Indigenous Peoples:
The experts noted that inspiration for a definition of Indigenous Peoples could be drawn from the United Nations Declaration on the Rights of Indigenous Peoples—particularly articles 9 and 33–but that a commonly agreed international definition rooted in law does not currently exist.

For further guidance, see:

- **UNDRIP**, Article 9: "Indigenous peoples and individuals have the right to belong to an indigenous community or nation, in accordance with the traditions and customs of the community or nation concerned. No discrimination of any kind may arise from the exercise of such a right."
- **UNDRIP**, Article 33: "1. Indigenous peoples have the right to determine their own identity or membership in accordance with their customs and traditions. This does not impair the right of indigenous individuals to obtain citizenship of the States in which they live. 2. Indigenous peoples have the right to determine the structures and to select the membership of their institutions in accordance with their own procedures".
- **ILO Convention No. 169**, Article 1:"(a) Tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations; (b) Peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonization or the establishment of present State boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions."

Race/racism/racist:
The experts recalled that the ICERD itself did not define the terms race, racism, or racist, but rather racial discrimination. Furthermore, they noted that the definition of 'race' was a contested aspect of the convention as is evident from the *travaux préparatiores*. They relayed that the ICTR had defined a racial group, in the context of genocide, as: 'The conventional

definition of racial group is based on the hereditary physical traits often identified with a geographical region, irrespective of linguistic, cultural, national or religious factors' (ICTR, The Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment (2 September 1998), paras. 514 and 516). They suggested that, were the Committee to define race, it do so in a manner that reflected the underlying social dynamic rather than an alleged scientific basis.

For further guidance, see:

- **ICERD**, Article 1: 1. 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 an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.
- **Durban Declaration:** Preamble: "[…] Affirming that racism, racial discrimination, xenophobia and related intolerance constitute a negation of the purposes and principles of the Charter of the United Nations, Reaffirming the principles of equality and non-discrimination in the Universal Declaration of Human Rights and encouraging respect for human rights and fundamental freedoms for all without distinction of any kind such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, […]" [1]: "We declare that for the purpose of the present Declaration and Programme of Action, the victims of racism, racial discrimination, xenophobia and related intolerance are individuals or groups of individuals who are or have been negatively affected by, subjected to, or targets of these scourges;" [2]: "We recognize that racism, racial discrimination, xenophobia and related intolerance occur on the grounds of race, colour, descent or national or ethnic origin and that victims can suffer multiple or aggravated forms of discrimination based on other related grounds such as sex, language, religion, political or other opinion, social origin, property, birth or other status;" [14]: "We recognize that colonialism has led to racism, racial discrimination, xenophobia and related intolerance, and that Africans and people of African descent, and people of Asian descent and indigenous peoples were victims of colonialism and continue to be victims of its consequences. We acknowledge the suffering caused by colonialism and affirm that, wherever and whenever it occurred, it must be condemned and its reoccurrence prevented. We further regret that the effects and persistence of these structures and practices have been among the factors contributing to lasting social and economic inequalities in many parts of the world today;"
- **Durban Programme of Action:** [84]: "Urges States to adopt effective measures to combat criminal acts motivated by racism, racial discrimination, xenophobia and related intolerance, to take measures so that such motivations are considered an aggravating factor for the purposes of sentencing, to prevent these crimes from going unpunished and to ensure the rule of law;"
- **Outcome document of the Durban Review Conference:**[13]: "Reaffirms that any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law; reaffirms further that all dissemination of ideas based on racial superiority or hatred, incitement to racial

discrimination as well as all acts of violence or incitement to such acts shall be declared offence punishable by law, in accordance with the international obligations of States and that these prohibitions are consistent with freedom of opinion and expression"

- **CERD General Recommendation Number 24:** [Preamble]: "the consistent view of the Committee that the term 'descent' in article 1, paragraph 1, of the Convention does not solely refer to 'race' and has a meaning and application which complement the other prohibited grounds of discrimination against members of communities based on forms of social stratifications such as caste and analogous systems of inherited status which nullify or impair their equal enjoyment of human rights."
- **CERD General Recommendation Number 35:** [5]: "in the [ICERD], racism is referred to only in the context of 'racist doctrines and practices' in the preamble, a phrase closely linked to the condemnation in article 4 of dissemination of ideas of racial superiority."

Racial Profiling:
Regarding considerations for a definition of racial profiling, the experts recommended reviewing CERD General Recommendations 13, 31, 34, and 36; the Report of the Special Rapporteur on racism, racial discrimination, xenophobia and related forms of intolerance, follow-up to and implementation of the Durban Declaration and Programme of Action, 2015 (A/HRC/29/46); General Assembly Resolution A/RES/69/16 of November 2014; and the report of the Secretary-General (A/73/354) submitted pursuant to General Assembly resolution 69/16, encompassing a good practices and challenges booklet.
They noted that racial profiling was addressed in a number of regional human rights instruments and declarations, where it was frequently defined similarly to the following: 'a reliance by law enforcement, security and border control personnel on race, colour, descent or national or ethnic origin as a basis for subjecting persons to detailed searches, identity checks and investigations, or for determining whether an individual is engaged in criminal activity'.

The experts explained that racial profiling could be conscious or unconscious, individual or institutional and structural, and that this recognition had impacts on criminal responsibility**.** They clarified that where racial profiling encompassed and/or was accompanied by acts which were already criminalised in existing domestic frameworks, such acts would amount to criminal conduct (e.g. assault, harassment, theft, and other such offenses committed as part of identity checks).
The experts recalled that the definition of hate crimes included an existing criminal act committed on the basis of a ground of identity.

For further guidance, see:

- **Durban Programme of Action:** [72]: "the practice of police and other law enforcement officers relying, to any degree, on race, colour, descent or national or ethnic origin as the basis for subjecting persons to investigatory activities or for determining whether an individual is engaged in criminal activity"
- **Human Rights Council Resolution 16/18** [6(d)]: "religious profiling" which is "understood to be the invidious use of religion as a criterion in conducting questionings, searches, and other law enforcement investigative procedures"
- **CERD General Recommendation 36:** See, particularly, paragraphs 13-20

- **The UN Secretary-General Report A/73/354, 'Preventing and Countering Racial Profiling of People of African Descent'** (2019) paragraph 3 pages 1-2: 'There are multiple understandings of the concept of profiling in the context of law enforcement, profiling has been defined as "the systematic association of sets of physical, behavioural or psychological characteristics with particular offences and their use as a basis for making law enforcement decisions". In his report of 2015, the former Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, indicated that racial and ethnic profiling could be commonly understood to mean "a reliance by law enforcement, security and border control personnel on race, colour, descent or national or ethnic origin as a basis for subjecting persons to detailed searches, identity checks and investigations" or for determining whether an individual was engaged in criminal activity' (A/HRC/29/46, para 2)

Religion or Belief:
The experts noted that, from an international criminal law perspective, the ICTR defined a religious group as 'one whose members share the same religion, denomination or mode of worship' (ICTR, The Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment (2 September 1998), para. 515).

For further guidance, see:

- **ICCPR,** Article 18: 1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching. 2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice. 3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others. 4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.
- **ICCPR**, Article 20: 2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.
- **Universal Declaration of Human Rights,** Article 18: Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.
- **Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief,** Article 2: 1. No one shall be subject to discrimination by any State, institution, group of persons, or person on the grounds of religion or other belief. 2. 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.

- **Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief,** Article 3: Discrimination between human beings on the grounds of religion or belief constitutes an affront to human dignity and a disavowal of the principles of the Charter of the United Nations, and shall be condemned as a violation of the human rights and fundamental freedoms proclaimed in the Universal Declaration of Human Rights and enunciated in detail in the International Covenants on Human Rights, and as an obstacle to friendly and peaceful relations between nations
- **Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief,** Article 4: 1. All States shall take effective measures to prevent and eliminate discrimination on the grounds of religion or belief in the recognition, exercise and enjoyment of human rights and fundamental freedoms in all fields of civil, economic, political, social and cultural life. 2. All States shall make all efforts to enact or rescind legislation where necessary to prohibit any such discrimination, and to take all appropriate measures to combat intolerance on the grounds of religion or other beliefs in this matter.
- **Declaration on the Rights of Persons Belonging to National, Ethnic, Religious and Linguistic Minorities,** Article 1: 1. States shall protect the existence and the national or ethnic, cultural, religious and linguistic identity of minorities within their respective territories and shall encourage conditions for the promotion of that identity.
- **Declaration on the Rights of Persons Belonging to National, Ethnic, Religious and Linguistic Minorities,** Article 4: 1. States shall take measures where required to ensure that persons belonging to minorities may exercise fully and effectively all their human rights and fundamental freedoms without any discrimination and in full equality before the law.
- **Durban Declaration:** [60] “We also recognize with deep concern the existence in various parts of the world of religious intolerance against religious communities and their members, in particular limitation of their right to practice their beliefs freely, as well as the emergence of increased negative stereotyping, hostile acts and violence against such communities because of their religious beliefs and their ethnic or so-called racial origin” [61] “We recognize with deep concern the increase in anti-Semitism and Islamophobia in various parts of the world, as well as the emergence of racial and violent movements based on racism and discriminatory ideas against Jewish, Muslim and Arab communities”; [66] “We affirm that the ethnic, cultural, linguistic and religious identity of minorities, where they exist, must be protected and that persons belonging to such minorities should be treated equally and enjoy their human rights and fundamental freedoms without discrimination of any kind” [67] “We recognize that members of certain groups with a distinct cultural identity face barriers arising from a complex interplay of ethnic, religious and other factors, as well as their traditions and customs, and call upon States to ensure that measures, policies

and programmes aimed at eradicating racism, racial discrimination, xenophobia and related intolerance address the barriers that this interplay of factors creates"

- **Durban Programme of Action:** [49] "to take, where applicable, appropriate measures to prevent racial discrimination against persons belonging to national or ethnic, religious and linguistic minorities in respect of employment, health care, housing, social services and education, and in this context forms of multiple discrimination should be taken into account,"; [172] "to protect the national or ethnic, cultural, religious and linguistic identity of minorities within their respective territories and to develop appropriate legislative and other measures to encourage conditions for the promotion of that identity, in order to protect them from any form of racism, racial discrimination, xenophobia and related intolerance. In this context, forms of multiple discrimination should be fully taken into account."
- **Rabat Plan of Action:** [17-18] "at the international level, the prohibition of incitement to hatred is clearly established in article 20 of the International Covenant on Civil and Political Rights and article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination. In its general comment No. 34 (2011) on freedoms of opinion and expression, the Human Rights Committee stresses that "[p]rohibitions of displays of lack of respect for a religion or other belief system, including blasphemy laws, are incompatible with the Covenant, except in the specific circumstances envisaged in article 20, paragraph 2, of the Covenant. Such prohibitions must also comply with the strict requirements of article 19, paragraph 3, as well as such articles as 2, 5, 17, 18 and 26 of the ICCPR. Thus, for instance, it would be impermissible for any such laws to discriminate in favour of or against one or certain religions or belief systems, or their adherents over another, or religious believers over non-believers. Nor would it be permissible for such prohibitions to be used to prevent or punish criticism of religious leaders or commentary on religious doctrine and tenets of faith"." And that "article 20 of the Covenant requires a high threshold because, as a matter of fundamental principle, limitation of speech must remain an exception. Such threshold must take into account the provisions of article 19 of the Covenant. Indeed the three-part test (legality, proportionality and necessity) for restrictions also applies to cases involving incitement to hatred, in that such restrictions must be provided by law, be narrowly defined to serve a legitimate interest, and be necessary in a democratic society to protect that interest. This implies, among other things, that restrictions are clearly and narrowly defined and respond to a pressing social need; are the least intrusive measure available; are not overly broad, so that they do not restrict speech in a wide or untargeted way; and are proportionate so that the benefit to the protected interest outweighs the harm to freedom of expression, including with respect to the sanctions they authorize."
- **Human Rights Council Resolution 16/18:** [3] condemning "any advocacy of religious hatred that constitutes incitement to discrimination, hostility or violence, whether it involves the use of print, audio-visual or electronic media or any other means"; [5] calling on States to adopt "measures to criminalize incitement to imminent violence based on religion or belief,"; [6] calling on States to "take effective measures to ensure that public functionaries in the conduct of their public duties do

not discriminate against an individual on the basis of religion or belief" and "to make a strong effort to counter religious profiling, which is understood to be the invidious use of religion as a criterion in conducting questionings, searches, and other law enforcement investigative procedures."

- **CERD General Recommendation 35:** [6]: "in light of the principles of intersectionality, and bearing in mind that 'criticism of religious leaders or commentary on religious doctrine or tenets of faith' should not be prohibited or punished, the Committee's attention has also been engaged by hate speech targeting persons belonging to certain ethnic groups who profess or practice a religion different from the majority, including expressions of Islamophobia, anti-Semitism and other similar manifestations of hatred against ethno-religious groups, as well as extreme manifestations of hatred such as incitement to genocide and to terrorism, stereotyping and stigmatization of members of protected groups has also been the subject of expressions of concern and recommendations adopted by the Committee."

Structural Racism/Systemic Racism:
The legal experts did not define these terms, as they represent broad concepts rather than legal principles, and their mandate was to provide strictly legal advice to the Chairperson-Rapporteur.

Victims:

The experts explained that the definition of victims is strictly connected to that of "harm" under criminal law both at the international and national level. They elaborated that generally the notion of "victim" is based on "harm/injury" both under criminal and civil law, and provided the example of the ICC provision below, which reflected a common understanding of the notion.

For further guidance, see:

- **ICC RPE - Rule 85 - Definition of victims:** For the purposes of the Statute and the Rules of Procedure and Evidence: (a) "Victims" means natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court; (b) Victims may include organizations or institutions that have sustained direct harm to any of their property which is dedicated to religion, education, art or science or charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes.[KG10]

Xenophobia:
The experts recalled that xenophobia was addressed in the Vienna Declaration and Programme of Action of 1993 (the Vienna Declaration)[43], and the Durban Declaration and Plan of Action of 2002 (the Durban Declaration)[44].

[43] UN General Assembly, Vienna Declaration and Programme of Action, 12 July 1993, A/CONF.157/23.
[44] United Nations, Durban Declaration and Plan of Action, adopted at the World Conference Against Racism, Racial Discrimination, Xenophobia and Related Violence, 8 September 2001, endorsed by the GA Resolution 56/266 of 15 May 2002.

They elaborated that the Vienna Declaration urged "all Governments to take immediate measures and to develop strong policies to prevent and combat *all forms and manifestations of racism, xenophobia or related intolerance*, where necessary by enactment of appropriate legislation, including penal measures, and by the establishment of national institutions to combat such phenomena", and also welcomed the decision to appoint a Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance and appealed to all States parties to the ICERD to consider making the declaration under Article 14 of the Convention.

The experts noted, however, that all references to xenophobia in the Vienna Declaration were in general terms and were coupled with other forms of vulnerability, such as gender, poverty etc.[45] They stated that the Durban Declaration was more specific, as it recognized that "*xenophobia against non-nationals, particularly migrants, refugees and asylum-seekers, constitutes one of the main sources of contemporary racism* and that human rights violations against members of such groups occur widely in the context of discriminatory, xenophobic and racist practices". They noted that these sentiments were repeated throughout the Durban Declaration, with xenophobia either coupled with the terms, "racism", racial discrimination" and / or "related intolerances".

The experts found it noteworthy that, when mentioned as a specific problem to be addressed, xenophobia was linked with challenges related to race, migration, and the integration of migrants in societies[46]. It was not addressed as a harm causing practice *per se*. Through their analysis, the experts suggested that the Durban Declaration treated xenophobia as another form of racism – to some extent subordinating xenophobia under racism. They cited the wording in the preamble of the Durban Declaration as an example, where it was affirmed that "race, racism, xenophobia and related intolerance, *where they amount to racism and racial discrimination*, constitute serious violations of and obstacles to the full enjoyment of all human rights"[47].

The experts relayed that, despite the statements in both the Vienna and Durban Declarations that called on States parties to punish and eliminate xenophobia, and the various General Recommendations of the CERD Committee that specifically asserted that xenophobia must be overcome and addressed within the ICERD's scope, international law did not address xenophobia specifically. They explained that there was no international treaty which mentioned xenophobia or xenophobic discrimination by name, and that the meaning of the term xenophobia had not been defined specifically in an international convention.

The experts noted that the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance suggested that xenophobia should be defined as "behaviour specifically based on the perception that the other is foreign to or

[45] Xenophobia is mentioned five times in the Vienna Declaration. See generally E Tendayi Achiume "The Fatal Flaw" (2018) 56 *Columbia Journal of Transnational Law* 257 and Shreya Atrey "Xenophobic Discrimination" (2024) 87 (1) *The Modern Law Review* 80.

[46] See para 24 of the Programme of Action containing the following call under the heading Migrants: "Requests all States to combat manifestations of a generalized rejection of migrants and actively to discourage all racist demonstrations and acts that generate xenophobic behaviour and negative sentiments towards, or rejection of, migrants". The next paragraph links xenophobia with racism and related intolerances, even though it also falls under the heading "Migrants".

[47] But compare the Programme of Action, which deals with xenophobia under the heading "Migrants".

originates from outside the community or nation"[48]. The experts also found the Special Rapporteur's discussion of the intersection of xenophobia and race in the 2016 report worthy of the Ad Hoc Committee's consideration of how to address the issue of xenophobia in the additional protocol. They also referred the Ad Hoc Committee is specifically to the Special Rapporteur's 2018 Report for an analysis of the relationship between racial discrimination and related intolerance, and the 2021 Report's treatment of the historical basis of racism, racial discrimination and related intolerance and its roots and manifestations.

For further guidance, see:

- **ICERD,** Article 1: 1. 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 an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.
- **ICCPR,** Article 19: 1. Everyone shall have the right to hold opinions without interference. 2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice. 3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order (ordre public), or of public health or morals.
- **Durban Declaration,** [preamble]: "xenophobia, in its different manifestations, is one of the main contemporary sources and forms of discrimination and conflict, combating which requires urgent attention and prompt action by States, as well as by the international community"; [16]: "xenophobia against non-nationals, particularly migrants, refugees and asylum-seekers, constitutes one of the main sources of contemporary racism and that human rights violations against members of such groups occur widely in the context of discriminatory, xenophobic and racist practices."
- **Durban Programme of Action:** [84]: "urges States to adopt effective measures to combat criminal acts motivated by racism, racial discrimination, xenophobia and related intolerance, to take measures so that such motivations are considered an aggravating factor for the purposes of sentencing, to prevent these crimes from going unpunished and to ensure the rule of law."

[48] Para 26.