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人权理事会
第五十四届会议
2023年9月11日至10月6日
议程项目9
种族主义、种族歧视、仇外心理和相关不容忍行为，
《德班宣言和行动纲领》的后续行动和执行情况

拟订补充标准特设委员会第十三届会议报告* **

主席兼报告员：卡德拉·艾哈迈德·哈桑(吉布提)

概要

本报告根据人权理事会第3/103号决定以及理事会第6/21号和第10/30号决议提交。报告概述拟订补充标准特设委员会第十三届会议的议事情况和届会期间进行的实质性讨论。

* 本报告逾期提交，以纳入最新信息。

** 本报告附件不译，原文照发。

一. 导言

1. 拟订补充标准特设委员会根据人权理事会第 3/103 号决定以及理事会第 6/21 号和第 10/30 号决议提交本报告。

二. 会议安排

2. 特设委员会第十三届会议于 2023 年 5 月 22 日至 6 月 2 日在日内瓦威尔逊宫举行，在此期间共举行 17 次会议。

A. 出席情况

3. 出席会议的有会员国代表、政府间组织和具有经济及社会理事会咨商地位的非政府组织代表(见附件三)。

B. 会议开幕

4. 联合国人权事务高级专员办事处法治、平等和不歧视处临时处长 Abdoul Thioye 宣布拟订补充标准特设委员会第十三届会议开幕。

5. Thioye 先生说，《世界人权宣言》宣告人人生而自由，在尊严和权利上一律平等，而且人人有资格享有一切权利和自由，不得有任何区别，包括种族区别。《宣言》通过 75 年后，没有一个国家能够声称已无种族主义。在全球各地，种族主义、种族歧视、仇外心理和相关不容忍正在抬头。

6. Thioye 先生回顾说，高级专员的“人权 75”倡议敦促会员国采取具体和强有力的行动，实现《世界人权宣言》中的平等和不歧视承诺。他表示，拟订《消除一切形式种族歧视国际公约》附加议定书的工作比以往任何时候都需要取得进展。

C. 选举主席兼报告员

7. 在第 1 次会议上，特设委员会以鼓掌方式选举吉布提常驻联合国日内瓦办事处和其他国际组织代表卡德拉·艾哈迈德·哈桑为主席兼报告员。

8. 主席兼报告员感谢特设委员会再次选举她担任这一职务，并承诺继续以包容方式主持工作，反映所有观点。她表示，她指望委员会在整个届会期间予以合作，并建设性地参与。

9. 主席兼报告员回顾说，特设委员会第十二届会议商定，根据其任务授权，将组建一个代表不同区域和法律制度的法律专家小组，负责向主席兼报告员提供准确的指导和意见，以便编写主席兼报告员的文件。委员会概要列出了供参与这项工作的专家考虑的问题、议题和建议。[1] 人权理事会在其第 51/32 号决议中肯定了取得的成果。

[1] A/HRC/51/57, 第 79 段。

10. 专家们已得知特设委员会第十二届会议为他们概要列出的问题、议题和建议，并在闭会期间进行了法律研究和分析，以便提供这些意见和指导。

11. 主席兼报告员指出，特设委员会正处于可以开始有条理和有重点地审议补充标准的可能实质性内容这一工作阶段。她表示，委员会将在其任务规定的指导下，即作为优先和必要事项，以一项公约或以《消除一切形式种族歧视国际公约》某(些)附加议定书的形式拟出补充标准，[2] 利用第十三届会议继续在关键议题和问题上取得实质性进展。她指出，委员会将审议主席文件，并指出第十三届会议的工作应继续推进在这些关键议题和问题上取得的实质性进展。

12. 主席兼报告员鼓励特设委员会按照《德班行动纲领》的规定，加紧努力，加强对各地越来越多的种族主义和种族歧视受害者提供的保护，并强调指出委员会关于附加议定书的工作应始终加强而绝不能削弱《公约》的现有规定。

13. 最后，主席兼报告员希望，有前几届会议奠定基础，特设委员会将会顺利开展其核心授权工作。她鼓励各代表团和与会者在本届会议期间为达成共识作出实质性贡献。

D. 通过议程

14. 在第 1 次会议上，特设委员会通过了第十三届会议的下列议程：

1. 会议开幕。
2. 选举主席兼报告员。
3. 通过议程和工作方案。
4. 介绍 A/HRC/51/57 号报告[3] 第 79 段(a)至(d)并与法律专家进行讨论。
5. 根据人权理事会第 51/32 号决议，介绍和讨论主席关于“将种族主义和仇外性质的行为刑罪化的附加议定书草案”的可能范围、用语、要素和结构的文件草稿。
6. 以国际公法为背景介绍和讨论《消除一切形式种族歧视国际公约》附加议定书的程序方面。
7. 届会的结论和建议。
8. 通过第十三届会议的结论和建议。

E. 工作安排

15. 在第 1 次会议上，主席兼报告员介绍了本届会议的工作方案草案。该草案获得通过。工作方案载于本报告附件二。主席兼报告员请与会者作一般性发言。各代表团祝贺主席兼报告员再次当选并作了开幕发言。

16. 科特迪瓦代表以非洲集团的名义发言。他重申，非洲集团支持特设委员会的任务。他强调需要更广泛地认识系统性种族主义。非洲集团谴责这种种族主义，

[2] 人权理事会第 3/103 号决定以及第 6/21 号和第 10/30 号决议。

[3] 特设委员会第十二届会议报告。

因为它影响非洲人民和非洲人后裔的生活。在确定殖民主义和歧视的恶劣影响以及查明结构性种族歧视和种族主义这一迫切需要反思的问题上，《德班宣言和行动纲领》向前迈出了重要一步。他强调，联合国会员国必须保持德班承诺所创造的势头。他指出，废除奴隶制和殖民主义并没有消除结构性的种族歧视，并解释说，必须将种族主义的当代表现视为尚未成功补救的种族不公正和不平等的延伸。非洲集团认为，殖民主义、奴隶制和贩运被奴役者是多种偏见和侵犯人权行为的根源，并注意到《德班宣言和行动纲领》强调，跨大西洋奴隶贸易和殖民主义仍然是针对非洲人和非洲人后裔的种族主义、种族歧视、仇外心理和相关不容忍行为的根源。非洲集团认为，各国有义务因奴隶制和殖民主义而进行赔偿，如今却在很大程度上依然未予承认。

17. 巴基斯坦代表以伊斯兰合作组织的名义发言。他表示，种族主义和民粹主义意识形态正在助长基于种族、肤色、宗教或信仰以及族裔的针对个人的暴力行为。一些国家颁布的立法助长了社会上对穆斯林的歧视，对穆斯林妇女和女童的陈规定型观念，并在这种意识形态的影响下限制她们戴头巾或面纱。他指出，难民、移民和土著社区常常成为结构性和系统性歧视的目标和受害者，损害了他们的尊严、权利和自由。他表示，一些国家容忍或支持反穆斯林的仇恨，而且媒体将其宣传为表达自由、反恐或国家安全措施。他表示，未能通过适当立法和有效执法防止伊斯兰恐惧症的表现令人震惊。伊斯兰合作组织谴责最近在三个国家发生的焚烧《古兰经》事件。该代表说，这是结构性伊斯兰恐惧症的一部分，并非孤立事件，而是多年来所发生事件的延续。他注意到有关国家未能有效应对或追究行为人的责任，指出这使全球对各国履行其国际人权法义务的承诺更感关切。这表明保护人们不受基于宗教或信仰的歧视的国际法律标准存在实质性空白。现状不如人意，需要采取与当代挑战和相应解决办法相称的行动。他对法律专家参加第十三届会议表示赞赏，并期待就一系列问题和附加议定书有待列入的要素与专家们探讨。他重申，必须按照人权理事会第 51/32 号决议的规定，在甄选协助特设委员会主席兼报告员的法律专家时确保地域平衡和法律制度的多样性，因为这对确保以包容和透明的方式执行委员会的任务至关重要。他期待根据法律专家和会员国的意见拟订附加议定书草案，以推进谈判，并向主席兼报告员保证，伊斯兰合作组织将在会议期间建设性地进行参与。

18. 伊拉克代表说，消除种族主义、种族歧视和仇恨是《世界人权宣言》的核心。他指出，尽管各国为打击种族主义和保障言论自由作出了努力并采取了举措，但许多人仍沦为种族主义仇恨言论导致的种族主义、种族歧视、仇恨和暴力的受害者。他重申伊拉克支持特设委员会制定关于《消除一切形式种族歧视国际公约》的国际标准，从而克服种族主义和基于宗教或信仰的歧视，特别是伊斯兰恐惧症。该代表指出，社交媒体上的仇恨言论继续存在，往往导致暴力，妨碍行使人权。

19. 沙特阿拉伯代表说，沙特阿拉伯赞同巴基斯坦代表伊斯兰合作组织所作的发言。她回顾说，2023 年 3 月 15 日是“打击伊斯兰恐惧症国际日”的第一个纪念日。她对伊斯兰恐惧症事件激增包括在一些国家焚烧《古兰经》表示关切。她说，表达自由权不允许煽动歧视、敌视或暴力。她回顾说，和平、和谐、相互容忍和包容的文化对消除一切形式的种族主义、种族歧视、仇外心理和相关不容忍行为至关重要。该代表回顾特设委员会任务的重要性，并表示这一附加议定书将是弥补目前在打击一切形式种族主义，包括仇外心理方面存在的法律和规章空白

的一个重要工具。她重申沙特阿拉伯愿意建设性地参与拟订补充标准，以加强反对种族主义、种族歧视、仇外心理和相关不容忍行为的现有国际人权架构。

20. 委内瑞拉玻利瓦尔共和国代表对仇恨言论、仇外心理、煽动仇恨、极端主义运动以及新纳粹或极右政党的抬头表示关切。这危及已在促进弱势群体特别是非洲人后裔的权利方面取得的进展。他指出，尽管针对委内瑞拉的单方面强制性措施造成困难，但委内瑞拉政府正在采取行动，从多层面着手消除贫困和不平等，增强最弱势社会群体的权能，不加以歧视。该代表欢迎特设委员会为拟订《消除一切形式种族歧视国际公约》补充标准所做的工作，期待在制订新标准方面取得进一步进展，从而打击当代一切形式的歧视，包括煽动种族和宗教仇恨。他重申委内瑞拉玻利瓦尔共和国承诺打击种族主义、种族歧视、仇外心理和相关不容忍行为。这种行为损害基本人权，依然是人类面临的严重挑战。

21. 巴西代表对特设委员会的任务以及人权理事会第 51/32 号决议规定的所有其他任务表示支持。她重申巴西承诺打击种族主义、种族歧视、仇外心理和相关不容忍行为，并指出巴西《宪法》和《刑法》已将种族主义视为犯罪。她说，自 1989 年以来，巴西一直靠一项具体法律惩罚被视为基于种族、肤色、族裔或国籍的歧视行为。2023 年对该法律作了修订。她向主席兼报告员保证，巴西将在本届会议期间建设性地进行参与。

22. 尼日利亚代表发言表示尼日利亚赞同科特迪瓦和巴基斯坦分别代表非洲集团和伊斯兰合作组织所作的发言，并重申尼日利亚支持特设委员会的任务。她指出，种族主义、种族歧视、仇外心理和相关不容忍行为有多种表现形式。最近在世界某些地区公开展现民粹主义、右翼极端主义和伊斯兰恐惧症的事件表明有必要制定补充标准。她欢迎制定补充标准，并强烈谴责一切形式的种族主义、种族歧视、仇外心理和相关不容忍行为，特别是针对移民和非洲人后裔的这种行为。她希望并期待第十三届会议的审议结果将为拟订补充标准的实质性谈判确定方向。

23. 古巴代表重申古巴对特设委员会任务的承诺，表示随时准备继续建设性地致力于执行这一任务并取得进展。她指出，在过去二十年执行《德班宣言和行动纲领》的过程中以及在《消除一切形式种族歧视国际公约》生效半个多世纪之后，挑战依然存在。她回顾说，这些文书没有得到充分执行，歧视继续以惊人的速度扩散，许多国家存在结构性和体制性的种族主义。她指出，基于仇恨少数群体、移民、难民和整个国家的仇恨言论和暴力行为增加。她解释说，在古巴，基于国籍、族裔或宗教的仇恨言论、不容忍和至上主义意识形态为法律所禁止，在古巴不存在。她指出，古巴的《宪法》和 2019 年的全民投票加强了平等权利并禁止歧视。她表示古巴承诺打击可危害社会的种族陈规定型观念和偏见。

24. 南非代表发言表示南非赞同非洲集团的发言。他指出，与许多其他历史性公约不同，《消除一切形式种族歧视国际公约》自 1965 年通过以来一直没有更新。许多公约是在人权并未平等落实、全世界大量人口仍为殖民压迫的枷锁所束缚的时候起草的。他说，必须通过任择议定书更新公约，而且除了《消除一切形式种族歧视国际公约》之外，几乎所有的公约都是这样做的。他说，当时并非所有国家都能作为非殖民实体参与《消除一切形式种族歧视国际公约》的拟订工作。他指出，自那时以来，世界发生了重大变化，对种族主义、其原因和影响的认识也发生了重大变化；特别是认识到世界上一些地方的治理制度系统性地使一

个种族比其他种族更受益。该代表回顾说，2001 年在南非德班举行的反对种族主义世界会议提供了所有自由国家对种族主义、种族歧视、仇外心理和相关不容忍行为的最新理解。令人失望的是，《德班宣言和行动纲领》通过 20 多年后仍未得到充分执行。该代表强调指出，没有参与 1965 年《消除一切形式种族歧视国际公约》拟订工作的团体认为，《公约》在什么构成系统性、结构性和体制性种族主义以及种族主义如何影响世界各地人民的生活等方面存在空白。他敦促通过制定一项补充标准的方式，对这些问题形成共识，从而确保所有国家在打击种族主义、种族歧视、仇外心理和相关不容忍行为方面协同一致。他鼓励所有国家秉持开放的心态开展工作，在本届会议上达成共识。

25. 中国代表欢迎召开本届会议，并遗憾地指出，自《德班宣言和行动纲领》通过以来的二十多年里，尽管国际社会作出了努力，但消除种族主义、种族歧视、仇外心理和相关不容忍行为的工作仍然任重道远。她指出，跨大西洋奴隶制和殖民主义是种族主义、种族歧视、仇外心理和相关不容忍行为的主要根源之一，其对享受所有人权的负面影响持续存在。中国呼吁各方解决与殖民主义遗留问题有关的问题，特别是对享有人权的负面影响，维护国际正义和公平，以促进国际人权治理朝着更加公平、公正、合理和包容的方向发展。她重申中国在整个会议期间的建设性参与。

26. 伊朗伊斯兰共和国代表发言表示，伊朗赞同巴基斯坦代表伊斯兰合作组织所作的发言。他表示，伊朗伊斯兰共和国极为关切反伊斯兰事件继续发生而且正在增加，并谴责最近焚烧《古兰经》的事件。他对世界各地针对穆斯林和其他宗教团体的有系统和体制化的面对面和网上歧视深表关切。他指出，在表达自由和反恐原则下继续实行妖魔化和“他化”政策，以及仇恨言论和污名化是新殖民主义、种族隔离政策、针对非洲人、非洲人后裔和亚伯拉罕宗教信徒的陈规定型观念、暴力、仇外心理和不容忍的负面遗产。他说，这危害和平与安宁，加剧纷争，并在全世界传播仇恨、恶意和敌意。他表示，伊朗认为，没有充分执行《德班宣言和行动纲领》这一里程碑框架是令人关切的问题。他强调《德班宣言和行动纲领》作为《消除一切形式种族歧视国际公约》补充文件的作用，并建议在起草附加议定书时予以认真考虑。伊朗完全支持特设委员会的任务，因此请主席兼报告员确保开始就《公约》议定书草案进行谈判，将种族主义和仇外性质的行为刑罪化。他强调，任何拖延完成这一任务的行为都将推迟将这些暴行的行为人绳之以法的工作，而追究这种责任是委员会的职责。他表示，委员会必须避免偏离其最初的授权任务，必须找到必要的政治意愿，填补《公约》中现有的法律和概念空白，以针对各种形式和表现的种族主义、种族歧视、仇外心理(包括伊斯兰恐惧症)和相关的不容忍行为，并为受害者提供充分补救。他重申伊朗伊斯兰共和国全力支持委员会并与委员会建设性合作。

27. 欧洲联盟代表谈到纪念《世界人权宣言》已通过七十五周年，指出《宣言》保障人人不受任何歧视地享有所有人权。她说，将这些规范变为现实仍然存在挑战。她解释说，《2020-2025 年欧洲联盟反种族主义计划》旨在将平等置于欧洲联盟所有政策领域的中心，并力促通过和执行国家的反种族主义行动计划。该代表说，欧洲联盟禁止公开煽动基于种族、肤色、宗教、血统或民族或族裔的暴力或仇恨。她指出，欧洲联盟的立法打击种族主义和仇外罪行，而且欧洲联盟成员国有义务惩罚公开煽动针对依据种族、肤色、宗教、血统或民族或族裔界定的某一群人或此类群体某一成员的暴力或仇恨行为。对任何其他刑事罪行，成员国有

义务确保将种族主义和仇外动机视为一种加重处罚情节，或者在量刑时考虑这种动机。欧洲联盟正在采取具体行动，打击网上的仇恨言论，并正致力于记录和报告仇恨犯罪、收集数据、对国家执法当局进行培训和建设能力、为仇恨犯罪的受害者提供支持以及打击网上的仇恨言论。这些措施是在《消除一切形式种族歧视国际公约》的框架下采取的。欧洲联盟认为，该《公约》是能够应对新挑战和正在出现的挑战的活文书。根据《公约》采取行动的可能性无穷无尽。这就是为什么欧洲联盟依然认为《公约》并无实质性也无程序性空白的原因，没有必要制定补充标准或附加议定书。欧洲联盟认为，《公约》已经论及仇恨言论、仇恨犯罪、种族优越观念、种族定性以及享有人权方面的歧视；真正的障碍在于充分和有效地执行《公约》。该代表建议，《消除一切形式种族歧视国际公约》应与其他现有文书包括《公民及政治权利国际公约》第十九条和第二十条一并阅读。她说，限制表达自由和见解自由权的指南应源自《公民及政治权利国际公约》第二十条。她重申，欧洲联盟将继续利用其掌握的一切资源打击种族主义和种族歧视，并重申打击种族主义是一项法律、政治和道德义务。

三. 讨论情况

A. 介绍特设委员会第十二届会议报告第 79 段(a)至(d)并与法律专家进行讨论

28. 在 2023 年 5 月 22 日举行的第 1 次会议上，特设委员会审议了议程项目 4, 即与法律专家讨论第十二届会议报告[4] 第 79 段(a)至(d)。下列法律专家与特设委员会就其编写的题为“专家就 A/HRC/51/57 号报告第 79 段(a)至(d)中的四个问题[5] 提出的初步意见和建议”的文件进行了讨论：巴哈马最高法院前法官、Eugene Dupuch 法学院副导师 Rhonda Bain；意大利罗马第一大学国际法教授 Beatrice Bonafe；南非纳尔逊·曼德拉大学法学院公法系主任 Joanna Botha；美利坚合众国华盛顿与李大学 1975 届校友、法律教授兼跨国法研究所所长 Mark Drumbl；新加坡国立大学法学院教务长教席教授张黎衍。专家们讨论了有关将种族主义和仇外行为刑罪化的附加议定书草案的结构、范围、要素和条款的问题。介绍和随后讨论的摘要载于本报告附件一。

29. 2023 年 5 月 22 日第 2 次会议以及 2023 年 5 月 23 日第 3 次和第 4 次会议上，特设委员会参考法律专家的意见继续在议程项目 4 下进行讨论。介绍和随后讨论的摘要载于本报告附件一。

[4] A/HRC/51/57。

[5] 这四个问题如下：

(a) 为了在国家、区域或国际一级将种族主义和仇外性质的行为定为犯罪，需要在法律上界定哪些要素？

(b) 一份旨在将种族主义和仇外性质的行为定为犯罪的法律文件将采用什么结构？

(c) 这一文件的范围应当是什么？

(d) 至少应当定义哪些术语？

B. 介绍和讨论主席的文件草稿

30. 在 2023 年 5 月 24 日举行的第 5 次会议上，特设委员会审议了议程项目 5, 即根据人权理事会第 51/32 号决议，讨论主席关于将种族主义和仇外性质的行为刑罪化的附加议定书草案的可能范围、用语、要素和结构的文件草稿。主席表示，文件草稿已提供给会议室的所有与会者，并通过电子邮件发给所有区域协调员、代表团和特设委员会成员。[6]

31. 主席兼报告员介绍了要求她编写的主席文件草稿。她回顾特设委员会在第十二届会议成果文件中的建议，即根据委员会的任务授权，组建一个代表不同区域和法律制度的法律专家小组，负责向主席兼报告员提供准确的指导和投入，帮助编写主席兼报告员的文件。[7]

32. 主席兼报告员解释说，文件基于标准国际案文，提出了附加议定书的大致结构，其附件中还载有设法将特设委员会第十届会议通过的实质性要点纳入附加议定书框架的草案。[8] 主席的文件还基于委员会前两天与法律专家进行的讨论以及专家们为第十三届会议编写的关于范围、要素、条款和结构这四个问题的文件。

33. 主席兼报告员提议，在特设委员会审查了主席的文件草稿之后，她将突出指出重点领域，指导委员会的工作。这之后，她请委员会就该文件发表总体看法并作一般性发言。伊朗伊斯兰共和国代表、巴基斯坦代表以伊斯兰合作组织的名义和欧洲联盟代表要求有更多时间审查文件并获得指示，以便能够建设性地参与并就文件提出意见和作出评论。

34. 巴西代表支持推迟讨论主席文件草稿的提议，并建议主席兼报告员在第 6 次会议上介绍和概述主席文件草稿。这能使各代表团有足够的时间对此进行磋商。

35. 主席兼报告员决定将对主席文件草稿的讨论推迟到下次会议，以便特设委员会进行审查，并请委员会就案文提出初步意见。会议休会。

36. 在 2023 年 5 月 24 日第 6 次会议上，特设委员会继续在议程项目 5 下根据人权理事会第 51/32 号决议，审议主席关于将种族主义和仇外性质的行为刑罪化的附加议定书草案的可能范围、用语、要素和结构的文件草稿。

37. 主席兼报告员介绍了案文，并向特设委员会概述了文件，指出了需要委员会成员提出意见、想法和进一步审议的关键各节和问题。

38. 她首先回顾说，刑罪化公约的起草有一个具体结构，以反映各国在着手规定被禁止的罪行和起诉罪行时所要界定的主要方面。她指出，刑罪化公约中的条款可分为两大类：(a) 界定罪行所必需的条款，以及国家在国家刑事法院、调查、起诉和法律援助方面承担的义务；(b) 附属条文，随每次草拟过程而变。她评论

[6] 主席的文件草稿可查阅 https://www.ohchr.org/sites/default/files/documents/hrbodies/hrcouncil/adhoc-complementary-standards/chairpersons-draft-document-24052023.pdf.

[7] A/HRC/51/57, 第 79 段。

[8] 与执行大会第 73/262 号决议和人权理事会第 34/36 号决议“开始就《公约》附加议定书草案进行谈判，将种族主义和仇外性质的行为定为刑事犯罪”相关的问题和讨论的可能要点摘要 (A/HRC/42/58, 第 16 页)。

说，后一类需要特设委员会成员思考。她指出，主席文件草稿第 4 段反映了第十三届会议头两天的意见交流以及法律专家的进一步阐述。

39. 她概述了主席文件草稿中的序言部分，其中有些段落说明如何使用附加议定书序言；可参考的启迪附加议定书起草过程的宏大目标和一般原则；构成该文书法律框架的法律文书。之后是可参考的软法文书完整清单。她请特设委员会就哪些文书应列入清单建言。

40. 主席兼报告员随后讨论了附加议定书与主要公约的关系。她在回顾这一点时谈到特设委员会的授权工作是拟订《消除一切形式种族歧视国际公约》补充标准，并回顾说，法律专家明确强调必须界定附加议定书与《公约》之间的关系。她突出强调了专家们提供的关于《联合国打击跨国有组织犯罪公约》的例子，其中的序言反映了必要联系。

41. 她谈到确立文书宗旨的重要性，并指出大多数刑罪化公约都载有主席文件草稿中所反映的标准法律措词。她接着概述了文件中关于用语的部分。她回顾说，特设委员会就用语问题与法律专家进行了实质性讨论，并指出主席的文件草稿反映了这一点。她指出，除了罪行的法律定义外，一些刑罪化公约还提供案文中可能出现的、在该文书中具有特定含义的关键词和术语的定义。她指出，这可能是需要委员会进一步思考的一个领域，因为这些可能是《消除一切形式种族歧视国际公约》词汇中的词语或表达方式，不一定与法律概念相对应。

42. 主席兼报告员随后讨论了应刑罪化的主要行为的定义，并指出，根据国际刑法和国家刑法所承认的罪刑法定原则，这一条款是刑罪化公约中最重要的条款之一。她解释说，必须准确界定应刑罪化的行为，使未来的行为人知道。她回顾说，这一原则曾在特设委员会与法律专家的许多讨论中强调过，包括关于将《公约》第四条(子)和(丑)款的措辞现代化的讨论，从而使之更好地与目前有关仇恨言论和仇恨犯罪的术语保持一致。

43. 主席兼报告员概述了在应刑罪化的主要行为的定义之下应考虑的分节。其中第一个是“主体”，即根据补充标准打算刑罪化的种族主义行为的行为人。她回顾了特设委员会第十届会议报告[9] 第 108 段所载“与执行大会第 73/262 号决议和人权理事会第 34/36 号决议‘开始就《公约》附加议定书草案进行谈判，将种族主义和仇外性质的行为定为刑事犯罪’相关的问题和讨论的可能要点摘要”，其中表示打算将某些种族主义行为定为刑事犯罪，“不论其为何人所犯”。她指出，有必要澄清这一意图，因为不同的责任制度适用于不同的行为人，并表示这将是委员会需要进一步思考的一个领域。

44. 她回顾说，主席的文件草稿第 14 段讨论了对国家或国家当局实施种族主义行为会产生习惯国际法规定的国家责任的后果这一情况列入一项禁止国家或国家当局的种族主义行为的具体条款问题。这将包括在国际一级作出赔偿和解决争端。主席兼报告员请特设委员会成员就个人或实体实施被禁止的种族主义行为的情况以及法律专家对刑法和民事责任的区分发表意见。

45. 主席兼报告员讨论了关于种族主义罪行的分节，并回顾第 108 段(a)和(c)中提到的两种行为形式：传播仇恨言论；传播倡导和促进种族优越、不容忍和暴力的

[9] A/HRC/42/58。

思想和材料。她回顾说，为了将这些刑罪化，需要分别界定这些罪行；这包括罪行的物质要件(犯罪行为)和心理要件(犯罪意图)。主席文件草稿的这一分节还回顾了基于宗教或信仰的当代形式的歧视。主席兼报告员指出，在第 108 段中，由于缺乏一致意见，特设委员会将这一问题置于方括号内。她回顾说，专家们提出了可以解决这一问题的两种办法：一是可以将其单独作为一项主要罪行处理，二是可以将其作为加重刑事责任的因素处理，与《公约》第一条所列的禁止理由之一共同发挥作用。主席兼报告员还指出，委员会需要考虑这一问题是否需要对刑罪化行为作出定义，或者是否应将宗教或信仰视为犯罪未遂和(或)责任模式。她指出，另一个重要领域是附加议定书内各条款之间的内部一致性，并以第 108 段(f)为例提请注意这一点，其中提到“广播种族主义和仇外内容或材料”的刑事责任，指出种族主义宣传可列入将主要行为刑罪化的条款，或可定为犯罪未遂。

46. 主席兼报告员随后讨论了仇恨言论，并提醒特设委员会注意专家们的解释，即仇恨言论罪应保留给最严重的案件，对不太严重的案件可通过刑法以外的其他手段补救。她指出文件第 24 段中与仇恨言论罪相对应的要件清单，以及第 25 段中供起诉和司法裁量以及量刑裁量所要考虑的因素。

47. 主席兼报告员讨论了主席文件草稿中关于仇恨犯罪一节，并回顾说，这是国家刑事立法中的一个单独的罪行类别，用以针对出于偏见或成见动机的现有犯罪行为。她重点指出了文件对两种主要的仇恨犯罪形式的讨论——歧视性选择模式和意图模式，以及将歧视性选择模式与意图模式相结合的第三种混合模式。她还提请特设委员会注意关于缔约国应确保适用刑事责任的标准辩护这一建议。

48. 接着，主席兼报告员回顾了文件中关于参加种族主义组织的讨论。她回顾说，《消除一切形式种族歧视国际公约》对这一罪行的论述过于含糊；专家们强调指出这是一个需要特设委员会进一步阐述的领域。她提醒委员会说，这一罪行不同于伙同作案(即参与现有罪行)，而且法律专家建议委员会确定承担刑事责任要求达到的参加种族主义组织的程度。

49. 主席兼报告员随后讨论了应刑罪化的从属行为的定义。她回顾第 108 段(b)提到可与严格意义上的刑事定罪分开的两个方面。文件中指出，“煽动”行为的定义应单独作出，并指出所提及的“协助和教唆”则是一种责任模式，而非独立罪行。

50. 在讨论关于一致性条款这一节时，主席兼报告员重点指出有建议列入一个单独条款，以确保与其他国际公约一致。专家们建议特设委员会一般性地提及人权条约，并提及具体的条约承诺。

51. 主席兼报告员审查了关于国家间义务这一节，其中载有的条款为附加议定书和公约提供了标准结构。她随后指出关于刑罪化义务、确立刑事管辖的义务和行使刑事管辖的义务各节。她回顾说，后者是一项重要条款，因为确定了哪个国家应首先采取行动起诉犯罪以及哪些国家有权随后进行干预的顺序。她指出，文件概述了在涉及仇恨言论时起诉裁量应考虑的因素，包括检方是否已证明犯罪要素，以及在确定应判处的惩罚时，司法裁量应考虑的因素。

52. 主席兼报告员指出，文件讨论了引渡、提供互助的义务、合作、公平审判权、受害者权利、国家责任以及预防和促进措施。所有这些都是刑事公约的标准条款。她重点强调了对预防和促进措施的讨论，指出这些措施提供了解决社会问题的补充方法。她回顾说，法律专家强调，刑事起诉只是有待考虑的一个方面，

并指出，第 108 段(g)阐述了各国有义务采取的一系列预防措施，以打击种族主义和仇外歧视。她回顾说，附加议定书为拟订预防和调解措施提供了空间和机会。

53. 主席兼报告员回顾说，关于新增国家义务一节是刑罪化公约的标准条款，关于体制安排、增强现有机构权能、解决争端和最后条款各节也如此。

54. 她着重指出，主席文件草稿的最后一段载有一些新增的术语，需要在包括犯罪要素的附加议定书中加以界定。这些术语包括种族、种族主义、宗教或信仰、仇外、仇恨、仇恨言论、仇恨犯罪、参与和种族定性。她回顾说，这些术语已在本届会议头两天与专家们讨论过，但所列术语需要特设委员会进一步审议。她指出，下周专家们将在线与委员会讨论，建议委员会准备好评论意见和问题，以便届时与他们进一步讨论。主席兼报告员请与会者发言，并欢迎委员会发言。

55. 伊朗伊斯兰共和国代表说，将种族主义和仇外性质的行为刑罪化的授权任务只是特设委员会授权任务的一部分。他指出，附加议定书的序言必须反映人权理事会和大会的所有相关决议，诸如人权理事会第 6/21 号和第 34/36 号决议以及大会第 71/181 号决议。他说，虽然考虑法律专家的看法和意见很重要，但理事会第 6/21 号决议还包括借机纳入人权机制的贡献。他指出可请人权理事会咨询委员会对附加议定书的可能要素进行研究。他表示相信设立特设委员会的理由之一是填补 1965 年通过的《消除一切形式种族歧视国际公约》在法律、概念和程序方面的空白，因此，必须提出一份整体考虑这些要素的草稿。

56. 南非代表指出，主席的文件草稿反映了过去几天与法律专家讨论的重要内容，并提出了许多需要进一步探讨的新问题。他说，草稿为特设委员会如何推进工作提供了指南，并说委员会需要处理的主要问题之一是填补《消除一切形式种族歧视国际公约》中没有的术语方面的空白，诸如种族主义、系统性种族主义以及在《公约》之后制定的其他更现代的软法文件中有的其他术语。该代表认同主席文件中很好地反映了将仇恨言论刑罪化和维持高门槛的问题。他指出，仇恨犯罪也应该有一个高门槛，而不仅仅是造成冒犯。他说，起草附加议定书的文字需要法律专门知识，表示主席的文件提供了供各国政府评估并随后提供国家立法实例和最佳做法的重要材料。

57. 主席兼报告员回答说，听取会员国关于国家间义务的最佳做法以及关于根据国家立法迫使社交媒体网络迅速从所有媒体平台上删除有害内容的做法也将非常有用。

58. 主席兼报告员还承认，特设委员会尚未确定如何在附加议定书中反映基于宗教或信仰的当代歧视形式的最佳方式。她说，可将此列为一项主要罪行，或作为犯罪未遂和责任模式列在加重处罚的因素之下。她解释说，委员会最好向专家明确说明委员会希望在这方面取得什么成效，以便专家们提供适当指导。

59. 巴基斯坦代表以伊斯兰合作组织的名义发言。他表示，据他理解主席的文件草稿将是一份不断演变的文件，其中反映届会期间举行的讨论，并可加以修订。他表示，这是一份很好的综合文件，包括了多个要素、序言和其他事项，并表示这份文件突出表明了需要以附加议定书的形式制定补充标准。

60. 巴基斯坦代表团认真听取了法律专家的发言，他回顾巴基斯坦代表团代表伊斯兰合作组织所作的开幕发言，其中强调专家中需要有不同法律制度的代表。他表示，这对透明度和坦诚讨论很重要，因为不同法律制度的广泛代表性将反映联

合国会员国的观点和存在分歧的问题。他请联合国人权事务高级专员办事处今后确保多样化法律制度这一要素，并确保法律专家的地域代表性。

61. 该代表认同附加议定书的序言部分应重申敲定和通过的几项公约和软法文书，并重申附加议定书的宗旨，其中包括打击种族歧视、种族主义的当代形式和种族主义的多种表现。他表示，序言务必说明需要一项附加议定书的前因后果。他回顾说，附加议定书将需要包括几大要素：仇恨言论、仇恨犯罪、刑事和民事责任、非国家行为体的活动，并提及种族定性。他强调除了呼吁缔约国追究社交媒体平台和工商企业对在线材料的责任外，还必须在附加议定书的条款中直接追究非国家行为体的责任。在这方面，他回顾了管辖权问题和该问题可能带来的挑战。他回顾专家所持的刑法要求高门槛的观点，并回顾需要在附加议定书中作出明确定义，建议请法律专家向特设委员会提供定义草案。他指出，委员会可以提供其中的一些要素，但表示法律专家的专门知识对周密拟订定义将必不可少。他指出法律专家曾表示门槛应该高，但也说这不是解决办法，并询问这个门槛应该是什么。他回顾《拉巴特行动计划》中的六步测试法、《打击基于宗教或信仰原因的不容忍、歧视和煽动仇恨和(或)暴力行为的伊斯坦布尔进程》、人权理事会第 16/18 号决议以及《公民及政治权利国际公约》第十九条和第二十条，提议可将这些要素纳入附加议定书。他表示，结构性种族主义有多种表现形式，包括暴力侵害移民和难民，并指出，针对种族主义的交织性以及种族主义与基于宗教或信仰的歧视和其他一些要素的联系依然至关重要。他回顾主席案文草稿第 19 段重点强调了种族主义罪行的要素，表示愿意讨论这一问题，但说巴基斯坦代表团需要更多时间审查文件的内容。

62. 主席兼报告员指出，来自特设委员会的这种意见非常有助于进一步提出问题和指导应纳入或参考的文件，以及可能有助于界定术语和要素的措辞。她指出，委员会应该告诉专家们委员会打算实现的目标，包括可能有所帮助的具体文件，从而使专家们能够指导如何以法律上无懈可击的方式实现这些目标。

63. 在 2023 年 5 月 25 日和 26 日举行的第 7、8 和 10 次会议上，特设委员会继续在议程项目 5 下审议主席的文件草稿。一些代表团发言，就主席的文件草稿发表意见。在 2023 年 5 月 30 日和 31 日第 11、12 和 13 次会议上，委员会继续进行讨论，并就主席的文件草稿和有关拟订附加议定书的相关问题与专家(在线)进一步探讨。这些广泛讨论的摘要载于本报告附件一。

C. 介绍和讨论《消除一切形式种族歧视国际公约》附加议定书的程序方面：以国际公法为背景

64. 在 2023 年 5 月 26 日举行的第 9 次会议上，特设委员会审议了议程项目 6。委员会听取波兰尼古拉·哥白尼大学法学院人权系教授米哈乌·巴尔采扎克以国际公法为背景介绍《消除一切形式种族歧视国际公约》附加议定书的程序方面，并与他进行了讨论。他的介绍和随后讨论的摘要载于本报告附件一。

65. 也在第 9 次会议上，俄罗斯联邦代表指出，俄罗斯联邦自特设委员会成立以来一直支持其工作，并对仇恨、煽动仇恨、仇恨言论和暴力以及在全球传播主宰和至上这种意识形态的极端主义运动仍在增加表示遗憾。她表示，目前的国际努力不足以解决这些问题。她回顾说，委员会的任务是确定《消除一切形式种族歧视国际公约》中没有涉及的问题，并制定补充标准填补现有空白。她感谢法律专

家和主席兼报告员为提供详细文件所做的工作，但表示需要对主席的文件草稿进行详细研究。她说，主席文件草稿中的一些内容初看似乎有损《消除一切形式种族歧视国际公约》的规定，因为这些内容涉及其他国际条约管辖的领域，包括涉及刑事司法程序和司法行政。因此，俄罗斯联邦不能同意如此处理不干涉他国内政原则的方式。她指出，主席的文件草稿讨论了单一的国际法范式。她表示俄罗斯联邦代表团此刻无法形成正式立场。她提议，今后的工作可以借鉴跨国公司和其他工商企业与人权的关系问题不限成员名额政府间工作组的经验，并要求今后在委员会届会之前数月向各代表团提供文件草稿，以便详细进行法律研究。她指出，俄罗斯联邦认为主席的文件草稿构成了主席兼报告员对委员会今后工作的设想。

66. 主席兼报告员澄清说，现阶段欢迎作出各种评论，并说特设委员会尚未准备好就附加议定书的具体条款进行详细讨论，她也不期望此刻得到详细评论和意见。她重申，主席的文件草稿是供委员会审议的初稿，其中根据现有的标准法律架构概述附加议定书的结构；该文件是根据第十二届会议成果文件中的具体问题和要求拟订的。她回顾说，第十二届会议的结论和建议概述了四个主要问题，并请她提供一份主席文件。她重申，委员会的工作尚处于初步阶段，正在注意听取所有评论意见，并会将这些意见反映在本届会议的报告中。她解释说，她的用意是获得委员会的实质性意见，以根据并遵循委员会的授权任务推进工作。

D. 就本届会议的结论和建议进行一般性讨论和交流意见

67. 在 2023 年 5 月 31 日举行的特设委员会第 13 次会议上，主席兼报告员介绍了两页篇幅的摘要文件，其中载有想法和建议汇编，并反映了会议期间就主席的文件草稿进行交流的实质内容。根据人权理事会第 51/32 号决议，报告载有法律专家可能就委员会所审议的主席文件草稿中提出的各个领域以及会议期间随后与法律专家讨论中提出的要点进一步提出的意见。

68. 主席兼报告员指出，她编写的文件草稿列出了需要进一步提出意见和进行审议的领域。她解释说，该文件将作为第十三届会议的成果文件或结论和建议的基础。文件已在会议室分发，并通过电子邮件发给区域协调员和所有代表团。她请与会者就案文草稿作一般性发言，或提出修改意见，案文同时在屏幕上投射供会议室与会者观看。她还表示 Bonafe 女士在线上出席，以回答特设委员会成员或许希望提出的问题，并讨论可能需要专家进一步阐述的术语。

69. 巴基斯坦代表以伊斯兰合作组织的名义建议，在关于附加议定书中可如何处理基于宗教或信仰的歧视问题的清单中，列入将基于宗教或信仰的歧视作为加重处罚的一个因素这一考虑。

70. 中国代表支持巴基斯坦代表以伊斯兰合作组织的名义提出的建议。

71. 伊朗伊斯兰共和国代表支持巴基斯坦代表以伊斯兰合作组织的名义提出的建议。关于可能构成犯罪行为的范围，他建议增加种族优越、煽动暴力、煽动种族歧视和基于种族主义的暴力行为这些问题。他指出，在阅读《消除一切形式种族歧视国际公约》第四条时，应适当考虑《公约》第五条明确规定的权利，因此有必要提及这一措辞。他要求澄清合理受害者这一概念。

72. 南非代表建议，应当指出，《公约》原本未列入的术语或概念清单并非详尽无遗，因此，一旦有需要，可以列入更多的术语和概念。

73. 伊朗伊斯兰共和国代表说，伊朗代表团在第十三届会议期间已多次提出必须将种族隔离行为作为种族主义的一种形式刑罪化，并表示对这一问题应予以应有的关注。

74. Bonafe 女士解释说，“合理受害者”概念背后的想法是，需要以客观而不是主观的方式界定受害者。她指出，受害者和伤害严格相关，因为在国际刑事法庭上，受害者是根据所受伤害界定的。因此，她解释说，必须首先界定伤害，这样才能界定受害者为直接或间接遭受伤害的人。她指出，主观界定伤害的一个问题是，这将使声称受害的人承担举证责任。

75. Bonafe 女士指出，种族隔离是与种族歧视密切相关的一个概念，并指出，1973 年《禁止并惩治种族隔离罪行国际公约》包括刑罪化和定义这两节。她解释说，刑罪化一节简明扼要，在通过和实施立法方面留给各国一定的酌处权，但对于什么该刑罪化则很明确。

76. 关于民事责任和刑事责任之间的联系，Bonafe 女士指出，在国际公约中，刑事和民事措施通常分别论述；刑法在国家一级处理，而民事补救则与受害者的权利相联系。她接着说，诸如预防措施等其他义务通常另行在条款中列出。她解释说，就民事和法律责任而言，集体义务与后果是分离的。

77. 欧洲联盟代表对主席的文件草稿表示感谢，并指出，在等待指示之际，她权且在讨论案文之前先予一般性保留。

78. 伊朗伊斯兰共和国代表提议将种族隔离列为一项核心罪行，并在文件中反映《禁止并惩治种族隔离罪行国际公约》，正如《德班宣言和行动纲领》和《维也纳宣言和行动纲领》也提到种族隔离问题一样。

79. 巴西代表要求澄清文件是否会成为本届会议的结论和建议的基础。墨西哥代表说，她在接到指示之前需保留意见。

80. 主席兼报告员确认，主席文件是一份草稿，因此仍在演变，并指出，一些代表团表示，他们在此阶段的意见是初步意见。她还指出，特设委员会的许多成员表示，他们认为这是一次过渡性质的届会，因为尚不可能充分进行实质性的谈判。她还解释说，会上分发的文件草稿罗列了提出和注意到的问题和要素清单，从而可使委员会在本届会议的剩余期限花时间完善，以便向法律专家作出今后继续开展工作所必要的任何澄清。

81. 南非代表认同特设委员会仍在收集列入主席文件草稿的措辞，目前尚无需要各国首都批准的内容。

82. 中国代表团要求有更多的时间获得详细指示，询问是否可允许各代表团有两周时间向秘书处作出答复，届时进一步澄清和详细说明立场。对此，主席兼报告员澄清说，与以往届会一样，第十三届会议的成果文件需要在届会最后一次会议之前完成。她理解一些代表团正在等待进一步指示，并回顾许多代表团认为本届会议属过渡性质，并认为这一专题将在即将举行的第十四届会议上审议。主席兼报告员还指出，在本届会议的此时此刻，特设委员会尚未开始谈判其概述今后工作领域的成果文件，代表团没有必要此刻同意这项工作的成果。

83. Bonafe 女士回顾之前关于序言和人权议定书的讨论，表示法律专家讨论了其他任择议定书，注意到其中大多数涉及程序事项。她解释说，例如上述这些将所涉委员会的管辖权扩大到个人来文或特别权限。她着重指出《儿童权利公约关于买卖儿童、儿童卖淫和儿童色情制品问题的任择议定书》，因为这是一项刑罪化议定书，与特设委员会授权制定的相仿。该议定书是一份简短文件，而序言部分相对较长，其中载有委员会不妨在其附加议定书中考虑的规定。

84. Bonafe 女士还讨论了解决争端的问题。她建议，供专家分析的后续清单可包括评估争端的程序内容，并表示这样做有可供选择的不同方案。

85. 在 2023 年 5 月 31 日第 14 次会议上，主席兼报告员澄清说，法律专家将继续分析第十二届会议成果文件中确定的四个主要问题，同时参考第十三届会议期间提出的其他议题和问题清单。她提醒特设委员会，向法律专家提供的信息越多，可得到的收获就越大，并重申这项工作将与现有的国际法律文书相一致。

86. 在分别于 2023 年 5 月 31 日和 2023 年 6 月 1 日举行的第 14 次和第 15 次会议上，特设委员会继续就届会成果文件进行讨论和交流意见。委员会继续在非正式磋商中和会议室里就拟议的议题清单开展工作，以便专家们继续致力于向主席兼报告员提供意见和咨询。委员会成员考虑了关于精简和调整成果文件草稿的提议，突出委员会现阶段工作的重点。主席兼报告员提醒委员会，经调整的文件应包括代表和专家在届会期间提出的所有实质性后续行动问题和专题。

87. 在 2023 年 6 月 1 日举行的第 16 次会议上，特设委员会继续进行讨论和交流意见，以期通过本届会议的结论和建议。

88. 主席兼报告员请特设委员会提供关于修订成果文件的最新进展情况。一些代表团作了几次发言，向主席兼报告员介绍最新进展情况，并对文件提出具体措辞。委员会还讨论了专家继续为拟定附加议定书这一授权工作提出意见的重要性，并指出届会成果文件中需要包含具体措辞，以确保今后通过所涉方案预算支持提供这一援助。关于届会结论和建议的订正文件副本已在会议室分发，并通过电子邮件发给所有区域协调员和代表团。

89. 主席兼报告员指出，对各代表团修订的成果文件内容已基本达成一致。她表示该文件为第十三届会议最后一次会议通过奠定了良好基础。

90. 在第 16 次会议结束时，主席兼报告员通知特设委员会，她不得不在届会最后一天离开日内瓦。她通知说，南非常驻联合国日内瓦办事处和瑞士其他国际组织代表团姆多利西·恩科西将在她缺席时主持会议，并告知她已向他介绍委员会本届会议期间的最新进展情况，表示已编写一份只需在格式上作最后修改的成果文件草案，供委员会审议通过。

四. 通过第十三届会议的结论和建议

91. 在 2023 年 6 月 2 日第 17 次会议上，恩科西先生在主席兼报告员缺席的情况下主持本届会议的最后一次会议。

92. 恩科西先生说，主席兼报告员告诉他，特设委员会已在之前两天审议并原则上商定了一份文件，其中按照人权理事会第 51/32 号决议的要求，列出了一些需要向主席提供指导和咨询意见的法律专家进一步阐述的问题。这基本上是工作方

案项目 8 下设想的第十三届会议的成果或结论和建议。恩科西先生说，之前一天委员会已在第 16 次会议上达成一份商定文件。在作了文体上的一些最后改动之后，该文件已在会议室内分发，并以电子方式发给区域协调员和各代表团。

93. 恩科西先生随后请与会者发表最后意见。由于无人发表意见或提出反对，特设委员会以协商一致方式通过了成果文件。他赞扬委员会为达成共识所作的努力，并请与会者最后发表一般性意见。

94. 南非代表对主席兼报告员在第十三届会议期间指导特设委员会的工作表示赞赏，并感谢法律专家应委员会第十二届会议的请求所作的准备。巴西代表附和南非代表的发言，并表示希望今后继续进行建设性合作。

95. 欧洲联盟代表对主席兼报告员、其他代表团和法律专家所做的工作表示赞赏。她指出，即便本届会议为过渡性质，但法律专家提供的意见和想法非常有用。

96. 伊朗伊斯兰共和国代表对第十三届会议期间完成的工作表示感谢，并指出，第十三届会议的成果为特设委员会今后的工作奠定了坚实的基础。

97. 中国代表说，中国代表团对主席兼报告员在第十三届会议期间所做的工作表示赞赏。她说，本届会议的成果为今后的讨论奠定了必要的基础，并表示中国将继续建设性地参与特设委员会的工作。

98. 恩科西先生转达了主席兼报告员对各代表团在第十三届会议期间的合作和参与的诚挚感谢，并鼓励各代表团继续建设性和积极主动地参与迎接第十四届会议。他回顾说，特设委员会必须继续加强对所有人的保护，使其免遭种族主义、种族歧视、仇外心理和有关不容忍行为之害。他表示真诚希望所有代表团将继续展现政治意愿，取得进展，执行人权理事会和大会交给特设委员会的任务。

五. 第十三届会议的结论和建议

99. 特设委员会审议了主席根据人权理事会第 51/32 号决议第 10 段拟定的关于将种族主义和仇外性质的行为刑罪化的《消除一切形式种族歧视国际公约》附加议定书草案的范围、结构、用语和要素的文件草稿，并注意到法律专家在届会期间提出的初步意见和咨询意见。

100. 为进一步履行授权任务，特设委员会建议，根据其授权任务，聘请一组代表不同区域和不同法律制度的法律专家，负责继续为主席兼报告员提供准确的指导和意见。

101. 在第十三届会议期间，代表团和特设委员会的与会者提出了下列问题和要素，并请予以进一步阐述，以便在即将举行的第十四届会议上协助主席和委员会：

(a) 刑法和民法在打击种族主义和仇外性质行为方面的关系和作用，包括在预防、预警、紧急和早期行动、教育、调解、和解和康复方面的关系和作用；

(b) 根据《公约》第四条，可刑罪化的行为范围，同时也探讨附加议定书中应如何处理参加种族主义组织、种族定性和仇外的问题；

(c) 交织性概念的适用以及是否列入加重处罚因素或其他可能的歧视理由的问题；

(d) 附加议定书中可如何处理仇外和种族定性问题，包括仇外和种族定性与当代形式种族主义之间的联系；

(e) 附加议定书中可如何处理基于宗教和信仰的歧视问题，包括各种歧视形式相互交织构成加重处罚因素的问题；

(f) 就种族主义和仇外性质的行为刑罪化方面的法律保障提出意见，包括罪刑法定原则、必要性和相称性原则、平等诉诸法律的机会和公平审判权；

(g) 就受害者的权利以及与平等诉诸法律的机会和补救权有关的问题提出意见；

(h) 就如何处理国家对网上的种族主义和仇外性质行为的域外义务提出意见，以期鼓励国家之间而且也与社交媒体提供者和相关企业/非国家行为体开展国际合作；

(i) 就是否界定《消除一切形式种族歧视国际公约》中未列入或界定的其他术语或概念提出意见，诸如“仇恨”、“仇恨言论”、“仇恨犯罪”、“伤害”、“交织性”、“族裔血统”、“民族血统”、“土著居民”、“土著人民”、“种族”、“种族主义”、“种族主义者”、“种族定性”，“宗教或信仰”、“结构性种族主义”、“系统性种族主义”和“仇外”。

Annex I

Summaries of the presentations and discussions

A. Presentations and discussion with the legal experts on paragraph 79 (a) to (d) of report A/HRC/51/57

1. At its 1st meeting, held on 22 May, the Ad Hoc Committee considered agenda item 4, discussion with the legal experts on A/HRC/51/57 paragraph 79 (a)-(d). The following legal experts: Rhonda Bain, former Supreme Court Justice and Associate Tutor at Eugene Dupuch Law School, Bahamas, Beatrice Bonafe, Professor of International Law, Sapienza University of Rome, Italy, Joanna Botha, Head of the Department of Public Law, Faculty of Law, Nelson Mandela University, South Africa, Mark Drumbl, Class of 1975 Alumni Professor of Law and Director of the Transnational Law Institute, Washington and Lee University, United States of America, and Li-Ann Thio, Provost Chair Professor, Faculty of Law, National University of Singapore, Singapore, engaged with the Committee on the document entitled "Preliminary inputs and advice by the experts to the four questions[1] in paragraph 79 (a)-(d) of report A/HRC/51/57." The experts addressed issues pertaining to structure, scope, elements and terms of a draft additional protocol criminalizing acts of a racist and xenophobic nature.

2. The document, "Preliminary inputs and advice by the experts to the four questions in paragraph 79 (a)-(d) of report A/HRC/51/57" was introduced by Mr. Drumbl on behalf of the experts. He explained that the document began with a broad statement of principles, and noted that the group of experts had been working to think thoroughly and creatively about how the ICERD could progressively develop to better address the scourges of racism and xenophobia. The experts found that there was a need to advance the Convention in light of contemporary developments, and that an additional protocol could consolidate, develop, clarify, and modernize the prohibitions in the Convention. He stated that the experts recognized that the most insidious forms of race-based violence fell within the settled norms of international law that prohibited crimes against humanity, genocide, and apartheid, and that it was critically important to address conduct that had not yet become invidious enough to constitute genocide or crimes against humanity, but that it could take the form of hate speech and hate crimes. The experts noted that there was an opportunity though the development of an additional protocol to the ICERD to criminalize racial hate speech, race-based hate crimes, and to contemplate how xenophobic acts may fit within this framework.

3. The experts noted that, in addition to criminalization of the most serious conduct, there was also a need for preventative, rehabilitative, and educational measures to address racism and xenophobia. It would be important to consider children and young people who may become socialized into communities of hate, and how an additional protocol to the ICERD could align with the broader international human rights framework, including the Convention on the Rights of the Child.

4. Mr. Drumbl explained that criminal law required and demanded great clarity, precision and exactitude regarding what was defined as a crime, how an individual who was accused of a crime could become linked to that crime, and the mental element required to convict such an individual. The experts had also contemplated elements that might constitute a crime of hate speech, an act of hateful violence, thoughts about the mental element, and linkages between perpetrators, context, and individual acts.

5. Mr. Drumbl stated that there was considerable settled international law addressing the criminalization of racial discrimination in terms of hate speech and hate crimes, but there

[1] The four questions are as follows: (a) What are the elements that need to be legally defined in order to criminalize acts of a racist and xenophobic nature, either at the national, regional or international level?; (b) What structure would a legal document aimed at criminalizing acts of a racist and xenophobic nature take?; (c) What should the scope of such a document be?; and, (d) Which terms should be defined at a minimum?

were gaps in the ICERD when related to the clarity, precision, and legitimacy in terms of predictability of those crimes. The experts were of the view that an additional protocol could serve that gap-filling function in relation to criminalizing racial hate speech and acts of racist violence.

6. The experts had noted there was less existing international law regarding xenophobia, however, they suggested that the additional protocol could serve a catalytic function in advancing existing thinking on the criminalization of xenophobia and advancing that in a legal framework. This would progressively develop international law.

7. The experts had discussed the place of religion within the existing framework of the ICERD as an independent prohibited ground, or intersectionally as an aggravating factor alongside race. He noted that the experts had individuated views on this issue.

8. At the 1st meeting, Ms. Bonafe presented the experts inputs regarding a proposed structure of the legal document criminalizing racial discrimination. She discussed the background research undertaken and considered and noted that the experts had selected primarily universal and binding treaties with the purpose of ensuring a coordinated prohibition of certain conduct under domestic law. The experts identified four main groups: core international crimes, serious breeches of human rights, transnational crimes, and terrorism. She relayed that the primary purpose was to ensure consistency with international law.

9. She explained that the experts had identified a number of key elements of a possible structure, from the preamble to the final clauses. Ms. Bonafe explained that there were two main categories of legal ingredients that were present in all conventions. The first category was necessary clauses, which were legally required on the basis of the principle of legality. She explained that a number of clauses must be present to define the crime, define duties to legislate, and to establish jurisdiction. The second category was additional clauses that may complement the criminalization obligations, such as civil remedies or preventive measures.

10. Ms. Bonafe stated that the structure of criminalization conventions is built around their subjects; those who would answer for the commission of the covered crime. The experts had identified three broad levels of responsibility and obligations. The first collected state obligations of criminalization, meaning the duty to provide the criminal responsibility of the authors of the crime under national law, where the relevant clauses addressed both the conduct of natural persons and legal entities. The second level of responsibility concerned states' obligations to adopt measures that offered a remedy for the victims, such as the duty to provide civil responsibility of the authors under national law. The third level of responsibility concerned states' obligations not to commit the crime, and a variety of accessory obligations concerning legislative and administrative measures, and additional aspects that would lead to the prevention of the crime, not only its punishment. These obligations would depend on the specific context of criminalization and could be adapted to the specific needs of the crime. The experts had emphasized the importance of preventive measures, especially in the context of racial discrimination crimes. Ms. Bonafe suggested that the Ad Hoc Committee may find it useful to consult the United Nations Convention Against Corruption, as it contained more than ten articles on such accessory provisions, and the United Nations Convention Against Transnational Organized Crime, as it contained eight articles outlining accessory obligations.

11. Also at the 1st meeting, Mr. Drumbl presented an overview of the experts inputs concerning the scope of the additional protocol. He noted that the experts had identified important elements of the scope of the additional protocol. The first element was that the additional protocol would be a legal document, which meant that it must satisfy the very exigent, demanding, and clear requirements of the criminal law, to offer justice without the potential of becoming either overused or useless. The experts noted the importance to consider defences, freedom of expression, and preventive, educational, rehabilitative, and reconciliatory mechanisms.

12. Mr. Drumbl explained that during their discussions, the experts constructed racism as both individual and collective and noted that it could be simultaneously idiosyncratic and structural or systemic. It would be advisable to consider how social media providers, media disseminators, non-state actors, and private parties would fall within the additional protocol's

framework. Mr. Drumbl noted that the ICERD focused primarily on state actors in the language of the treaty, but the experts believed that progressive developments in international law had created a space where it was possible to discuss the responsibility of private and non-state actors, recognizing the importance of social media networks and involving social media platforms in a conversation about responsibility.

13. He stated that the experts were aware of the importance in a contemporary framework of thinking about the intersectionalities of xenophobia, race, and religion or belief. They noted that there was more existing international law criminalizing race-based discrimination than there was existing international law addressing xenophobia, and advised that criminalizing race-based discriminatory speech and violence would be a first step to filling gaps. Mr. Drumbl highlighted the final paragraph of the experts' document which indicated an opportunity for the Ad Hoc Committee to develop and crystalize a definition of xenophobia for the first time in public international law, as well as a clear assessment and investigation of the relationship between discrimination based on religion or belief and racial discrimination.

14. The experts had emphasized the importance in a criminal law framework of exercising great prudence, care, exactness, and recognition that the criminal law could have functions ranging from condemnation and denunciation through to symbolic expressiveness, rehabilitation, restoration, and prevention. Their advice was that and additional protocol should contemplate more than criminal law remedies.

15. At the 1st meeting, Ms. Botha presented the experts' input on elements that need to be legally defined in order to criminalize acts of a racist and xenophobic nature at the national, regional, or international levels. She explained that the experts analyzed the original text of the ICERD, particularly articles 4 (a) and (b) to determine which offences the original text enumerated and translate that text into the language of current international human rights law and international criminal law treaties in order to provide the clarity and precision that the criminal law requires. In so doing, to fill in the gaps in the terminology of the International Convention on the Elimination of All Forms of Racial Discrimination. ((The experts discussed aligning and developing the Convention's listed obligations in accordance with the UN human rights treaty system for the prescription of hate speech and hate crimes, taking into account the right to equality and the principles reflected in the Durban Declaration and Programme of Action and subsequent resolutions and declarations; the many serious incidents of discrimination and group-based hatred that regularly occurred as the result of systemic racism and discrimination and which impacted most severely peoples who had been subjected to past human rights abuses; and took into account the inherent dignity of all people and the right to freedom of expression and opinion.))

16. She explained that the experts analyzed the text of International Convention on the Elimination of All Forms of Racial Discrimination article 4 (a) and (b) and found that it listed six activities or offences which should be highlighted for criminalization: a) the dissemination of ideas based on racial superiority or hatred; b) incitement to racial discrimination; c) acts of violence against any race or group of persons of another colour or ethnic origin; d) incitement to acts of violence against any race or group of persons of another colour or ethnic origin; e) the provision of any assistance to racist activities, including the financing of such racist activities; and f) participation in racist organizations. Those six offences could be collapsed into three more identifiable offences and one mode of liability. The three offences would be: hate speech (which encompassed a) and b)); hate crimes (which encompassed c) and d)); and criminalization of participation in racist organizations. The mode of criminal liability was to hold a secondary perpetrator accountable for a listed and recognized criminal offence committed by somebody else (the primary perpetrator), where the secondary perpetrator aided and abetted that person, and thus should also be held criminally liable. On that mode of liability, the experts were of the view that there already existed settled international law.

17. She explained that modern international human rights law and international criminal law provided the means to criminalize hate speech and hate crimes, and that the additional protocol could bring the International Convention on the Elimination of All Forms of Racial Discrimination in line with those existing principles. There was difficulty with criminalization of participation in racist organizations, because the term "participation" was

not a legally recognized term, and therefore required further deliberation as to what it should mean for criminal liability, bearing in mind the importance of insuring that the criminal law was applied with precision, certainty, and to give full effect to the rule of law, as people needed to know what was prohibited.

18. ((Finally, the experts used the term "race" in the elements portion of the document they had prepared to avoid conflating the elements of those crimes with the group targeted. They understood that the Ad Hoc Committee desired further clarification of whether race included xenophobia and religion or belief as either independent or intersectional grounds.))

19. The Chair-Rapporteur thanked the experts for their presentations and invited preliminary thoughts, comments, and questions from the Member States. She urged delegations to ensure that their questions triggered legal issues and technicalities that the experts could be asked to address.

20. The representative of Iran requested the experts to present briefly on elimination of contemporary forms of discrimination based on religion or belief. He asked them if they could suggest tangible actions or measures to address such discrimination.

21. The representative of Pakistan on behalf of the OIC recalled the history of the development and adoption of the International Convention on the Elimination of All Forms of Racial Discrimination, and noted that it did not specifically refer to religion or belief because there was a mandate for a separate convention that was to address discrimination based on religion or belief. The representative noted that the Committee on the Elimination of Racial Discrimination recognized the intersectionality of religion or belief and race in its General Recommendation 32. He recalled that the mandate given by the United Nations General Assembly regarding a separate convention on discrimination based on religion or belief was not achieved due to the difficulty of negotiations and differences in views amongst Member States, and proposed that this mandate should be renewed. He stated that there was a need to bridge this gap in international law, and requested the views of the experts on the issue.

22. Ms. Thio recalled the history of the International Convention on the Elimination of All Forms of Racial Discrimination and the separate mandate for a convention addressing discrimination based on religion or belief. She explained that there were three "waves" where race and religion had been considered since the end of the second World War. Ms. Thio noted that a two-track system emerged in the early 1960s to prevent delays in addressing racial discrimination. She recalled that this led to two trajectories where the International Convention on the Elimination of All Forms of Racial Discrimination developed along with a draft convention on religious intolerance in 1965, which was not adopted but became the soft law instrument the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief in 1981.

23. Ms. Thio stated that consideration of discrimination based on religion or belief must apply to all religions or beliefs, as human rights apply universally. She explained that, taking a strict originalist interpretation of the Convention, it was clear that religion was intended to be dealt with separately. She affirmed that in Committee on the Elimination of Racial Discrimination General Recommendations, there had been a shift toward considering intersectionality, because there were certain problems where it was difficult to distinguish between racial and religious discrimination.

24. Ms. Thio raised some concern about conflating race with religion even though sociologically it had occurred, as she considered that religious freedom was voluntary. She noted that any additional protocol must be consistent with existing human rights standards, and one of which is the right to have a religion, change religions, or not have a religion. She stated that the elaboration of an additional protocol to the International Convention on the Elimination of All Forms of Racial Discrimination presented an occasion to contemplate how religion might be accommodated. She explained that the experts discussed that it could be accommodated in two ways: the first of these would be to deal with it in a separate instrument, and the second to treat it as an aggravating factor. Incorporating religious intolerance into the International Convention on the Elimination of All Forms of Racial Discrimination could be problematic as it was not within Convention's mandate. However, Ms. Thio suggested that

treating religious intolerance as a facet of race could be useful at the level of prosecutorial discretion or as an aggravating factor in sentencing.

25. Regarding xenophobia, the experts discussed that there was no international legal consensus on xenophobia, and noted that it is possible to be xenophobic towards a person of the same race. Ms. Thio explained that xenophobia could encompass a broad spectrum of actions and circumstances, and suggested it may be useful for the additional protocol to formulate a definition of xenophobia.

26. Ms. Thio expressed some caution that criminal law could be very alienating and antithetical to societal harmony. She noted that it was necessary for the most egregious offences, but that other measures may be more beneficial where there was hope for reconciliation.

27. The representative of South Africa stated that his country had been attempting to criminalize hate speech while maintaining freedom of speech. He noted that feelings of offence did not constitute hate speech in South Africa, and that there needed to be serious intent to create harm. He requested the experts' opinions about where to find the balance between offence and intent.

28. The representative of Sierra Leone emphasized the need to be mindful about criminalization so as not to create problems within society instead of addressing them. He also recalled the need to clarify the meaning and scope of participation. He noted that public international law provided for conspiracy as an inchoate offence, but requested further clarity on how to address the issue of participation.

29. The representative of Saudi Arabia noted that, while the International Convention on the Elimination of All Forms of Racial Discrimination did not touch upon discrimination based on religion or belief, the International Covenant on Civil and Political Rights reaffirmed the right to freedom of expression and opinion, but that its article 20 stated that any advocacy of national, racial or religious hatred that constitutes incitement to hostility or violence shall be prohibited by law. She clarified that this was not about speech that would cause minor offence, but hate speech that would cause hostility or violence and should be prohibited by law, and be discussed within this universal framework.

30. The Chair-Rapporteur recalled that previous discussions the Ad Hoc Committee had held regarding articles 19 and 20 of the International Covenant on Civil and Political Rights. She noted circumstances whereby practitioners of different religions who wore visual signifiers of their religion could no longer do so out of fear that their human rights would be violated as a consequence, and requested input from the experts on how the law could assist governments in criminalizing both acts of incitement to violence and acts of violence themselves that may be perpetrated by different people: one person who committed the incitement, and another who committed the violent act.

31. Ms. Botha clarified that the offence identified in the International Convention on the Elimination of All Forms of Racial Discrimination was participation in an organization, which had to be compared to and distinguished from participation in an already existing criminal offence as a mode of liability, for example aiding and abetting. She noted that it was settled as a mode of liability in international criminal law when the underlying conduct was a recognized criminal offence in international criminal law. She noted that there was some concern about the wording "participation in a criminal organization" and its interpretation as a substantive criminal offence. This would require further definition on elements such as: at what level did the criminal liability attach? Did an individual or legal entity need to be actively involved in the organization, merely appear on the membership list, or post something on social media about that organization? She recalled the precision necessary within the criminal law, which was why that wording required greater clarification.

32. Responding to the question related to intention, Ms. Botha stated that when dealing with hate, offence, and insult it must be recalled that the criminal law must be reserved for the most serious cases, and that other types of law such as civil law, human rights law, and anti-discrimination laws could be used with a variety of remedies to address less serious cases. She explained that the criminalization of inter-group hatred, where one group was vilified, undermined, or dehumanized, rose to the criminal law level as the precursor to existing

crimes in international law, such as genocide, crimes against humanity, and persecution. The experts opined that there was a gap that must be filled in that regard, and the strict elements in articles 19 and 20 of the International Covenant on Civil and Political Rights provided the mechanism for doing so: advocating hatred against a group and inciting harm. Ms. Botha noted those were very intentional terms, and that phrasing a criminal offence using that language and those elements would capture the most egregious forms of hatred that should be dealt with by criminal law. The experts also discussed various aggravating factors, which pointed to the context in which the harm occurred.

33. Ms. Thio was of the view also that the discussion fell within the context of articles 19 and 20 of the International Covenant on Civil and Political Rights. She noted that within international law there were modes of conduct which were categorically outlawed; for example, incitement to genocide. Discussing articles 19 and 20 of the International Covenant on Civil and Political Rights, she noted the difficulty of achieving balance. She raised the idea of dignitary harm where a person is insulted because of their membership in a particular group. She noted that the Chair-Rapporteur's example of a person being threatened for wearing a visual signifier of their religion was already a crime, consequently the fact that it was motivated by race or religion was an aggravating factor. Ms. Thio stated that there was no need to criminalize it, because it had already been criminalized. To have a greater social impact, Ms. Thio suggested that a more onerous or stringent sentence could be imposed for perpetrators of such crimes.

34. Mr. Drumbl responded to the questions from the representatives of Iran and Pakistan on behalf of the OIC . He noted that it was legally difficult to include in an additional protocol criminal offences that were not in the original treaty. He explained that in the practice of law, when elaborating an additional protocol, one began with what was clearly covered by the initial convention or treaty. In the International Convention on the Elimination of All Forms of Racial Discrimination was racial discrimination. He underscored the importance of recalling that principle in all discussions about improving and modernizing the treaty framework. He recalled that the word xenophobia did not appear in the original Convention, which was dated. He recalled also that International Convention on the Elimination of All Forms of Racial Discrimination clearly distinguished between citizens and non-citizens in terms of its applicability. He stated that other documents and reports from the Committee on the Elimination of Racial Discrimination and other committees updated thinking and addressed the intersectionality of religion or xenophobia, and that including xenophobia and intersectionalities with religion in an additional protocol would progressively develop international law. He explained that this must be done with great care and prudence, particularly in the realm of criminal law. Alternatively, he proposed that another method for addressing discrimination based on religion or belief would be to elaborate a new international treaty on religious discrimination. He stated that, to maintain the integrity of law, it was important to proceed carefully.

35. Regarding the question on the criminalization of hate, Mr. Drumbl underscored the importance of recognizing the notion of racial distinctions and racially-motivated speech that promoted superiority, which was a term used in the International Convention on the Elimination of All Forms of Racial Discrimination. He noted that the experts had discussed the other side of superiority to be subordination and that the idea of subordination could be important for determining what may be permissible or impermissible under the law.

36. At its **2nd meeting, held on 22 May,** the Ad Hoc Committee continued consideration of agenda item 4, discussion with the legal experts on A/HRC/51/57 paragraph 79 (a)-(d). The group of legal experts, Rhonda Bain, former Supreme Court Justice and Associate Tutor at Eugene Dupuch Law School, Bahamas, Joanna Botha, Head of the Department of Public Law, Faculty of Law, Nelson Mandela University, South Africa, Mark Drumbl, Class of 1975 Alumni Professor of Law and Director of the Transnational Law Institute, Washington and Lee University, United States of America, and Li-Ann Thio, Provost Chair Professor, Faculty of Law, National University of Singapore, Singapore, gave presentations on, and held discussions with the Ad Hoc Committee about the document they prepared entitled "Preliminary inputs and advice by the experts to the four questions in paragraph 79 (a)-(d) of report A/HRC/51/57."

37. The representative of the Islamic Republic of Iran clarified that his intervention at the first meeting applied to all Abrahamic religions, not only Islamophobia. He suggested that there was a gap in representation of different legal systems among the legal experts, as Islam had a distinct legal system and manner of interpreting jurisprudence, and that a legal expert who understood Islamic views of discrimination may contribute to greater mutual understanding in the Ad Hoc Committee. He stated that Islam was under greater attack than other religions. The representative stated while religion might be considered a choice, but expressed that it was not a choice that could be altered without a significant impact in an individual's life. He noted that was why Iran considered that it was of the utmost importance to address contemporary forms of discrimination based on religion or belief. He hoped that the legal experts and the Ad Hoc Committee would concentrate on the issue of religion or belief and stated that, despite the experts' interpretation that there was no reference in the International Convention on the Elimination of All Forms of Racial Discrimination to religion, the word religion appeared twice: first in paragraph 1 of the preamble, and again in article 5(vii). He stated that religion was part of the mandate of the Ad Hoc Committee and that it was important to take up the issue of eliminating contemporary forms of discrimination based on religion or belief seriously in the additional protocol. He noted the reference to religion in article 20 of the International Covenant on Civil and Political Rights, underscored the need for serious consideration of this issue, and hoped for constructive development of the Ad Hoc Committee's mandate.

38. The representative of the European Union explained that the promotion and protection of the right to freedom of religion or belief was a key priority for the European Union, and that the European Union was very active on this topic, including at the Human Rights Council. She recalled the European Union's longstanding position that substantive discussion on the Rabat Plan of Action, the Istanbul Process, and anything related to the topic of religion or belief were not part of the Ad Hoc Committee's mandate. She expressed the European Union's position that mixing the two processes addressing racial discrimination and religious intolerance risked weakening protections for both. She recalled that in the 1st meeting of the thirteenth session, experts had suggested that the Committee take a holistic approach to the additional protocol where criminalization, was one of many options.

39. The Chair-Rapporteur asked the experts how the work of the Ad Hoc Committee could address the steps leading up to an actual crime being committed based on racial discrimination or the intersection of racial discrimination and discrimination based on religion or belief without unduly restricting freedom of expression.

40. The representative of South Africa noted that the text of the International Convention on the Elimination of All Forms of Racial Discrimination did include the term racial discrimination but not the word racism. He noted the difficulty of addressing racial discrimination in the context of modern technology, where a post online from one part of the world could incite an act of racial violence in another part of the world, and requested input from the experts on how criminalization would operate in that context. He sought clarification on how to ensure accountability of the person who made the original post, but who did not commit the act of racial discrimination itself. He stated that a difficulty with the Convention was that racial discrimination was an act, but racism itself was not. He noted that racism and racist systems caused contemporary harms and were not addressed by the Convention. He acknowledged that some countries and regions had attempted to fill gaps in their own legislation and make progress, but that the purpose of the Ad Hoc Committee was to create complementary standards that enabled all states to progress. He suggested that the best practices of countries and regions that had been progressive on these issues be applied at the international level through the elaboration of the additional protocol.

41. The Chair-Rapporteur called on Member States to bring existing best practices to the Ad Hoc Committee in order to foster a common understanding. She explained that, from her perspective, on the nuances between racism and racial discrimination there was a duty to combat racism, and the potential to eliminate racial discrimination. She noted that an individual could not be forced not to be racist, but that governments and states had the responsibility to ensure racism was not acted upon.

42. The representative of the European Union informed about a European Union-wide survey conducted by the Fundamental Rights that took place in 2018 entitled "Being Black

in the European Union," which would have an update published in the near future. She noted that the European Union monitored data because mapping the issues was the first step in policy development. The 2018 survey prompted the European Commission to launch its first anti-racism action plan 2020-2025. She explained that in addition to twenty years of legislation, the European Union also had a vast body of case law from the European Court of Human Rights and the Court of Justice of the European Union. She indicated that this body of case law emphasized the importance of context and why it was difficult to just criminalize a principle, incident or an event, as many elements contribute to the interpretation of each situation. The European Union held the view that an additional protocol that only criminalized hate speech and hate crime was the proper step forward. She briefed about other measures that could be taken to combat these issues, such as the European Union Code of conduct countering illegal hate speech online, which engaged major social media companies into a system where they were notified of content deemed hate speech, and the companies committed to withdraw that content in a certain timeframe. She explained that the European Union monitored and published this data annually. She underscored the need not only for political will, but also for a holistic approach that balanced freedom of opinion and expression and freedom of association.

43. The representative of Pakistan on behalf of the OIC noted the comments made by the European Union about separate mechanisms for freedom of religion or belief. He stated that there were several gaps in the International Convention on the Elimination of All Forms of Racial Discrimination and there was a need to examine and incorporate the intersectionality between acts of discrimination based on religion or belief and acts of racial discrimination. He stated that the framers of the International Convention on the Elimination of All Forms of Racial Discrimination had not envisaged issues such has hate speech and incitement to violence, particularly in an online context. The Ad Hoc Committee needed to discuss and incorporate the intersection of discrimination based on religion or belief and racial discrimination.

44. Mr. Drumbl agreed with the need for legal remedies to address the exclusion of discrimination based on religion or belief and xenophobia from existing international legal instruments, and noted that an additional protocol could enable some progression. In response to the Chair-Rapporteur's question, he recalled that particularly egregious violence based on race and religion or belief was already addressed as crime under international criminal law, such as genocide and crimes against humanity. He stated that to discourage xenophobia and dissuade hate across religious, xenophobic and racial lines in the precursor zones to these more serious international crimes, non-criminal remedies such as closer regulation of hate groups on social media and disbanding of those groups, education, rehabilitation, and presenting a vision of the world to young people that was inclusive instead of exclusionary could be employed. He explained that the criminal law did not accomplish those tasks and that, in his opinion, there may be greater flexibility and expansionary capacity within the International Convention on the Elimination of All Forms of Racial Discrimination to encompass xenophobia and intersectional discrimination based on race and religion or belief using preventive human rights measures instead of criminal law provisions. He stated that the criminal law was and always must be the most strictly regulated and narrow area of law because it was the greatest expression of power. Mr. Drumbl addressed the question from the South African delegate about how to align all countries to the same level of protection for victims of racial discrimination. He explained that the additional protocol could offer one mechanism that avoided the jurisdictional gaps that could occur when prosecutions were not coordinated or harms were geographically separated by utilizing mutual and reciprocal jurisdiction clauses, also known as extradite or punish clauses, where states would be under a duty to prosecute in their jurisdiction or to extradite. Mr. Drumbl discussed freedom of expression and opinion and recalled the international criminal jurisprudence from the International Criminal Tribunal for Rwanda, which addressed the involvement of media, including radio and newspaper articles and imagery, in fomenting ethnic hatred leading to genocide. He returned to the Chair-Rapporteur's question and explained that there was a strong body of research on early indicators of genocide that could be placed within a civil regulatory preventative framework, which could be a direction for the additional protocol to take. He noted this approach would not only remedy gaps related to criminalization and racial

discrimination, but also enable discussion of xenophobia and discrimination based on religion or belief.

45. Ms. Botha explained that the law provided a variety of remedies across a spectrum, the most severe of which was criminal sanction with a custodial sentence; below that was a suspended sentence, then a fine; following that was civil remedies which involved individuals rather than the state and were non-custodial; then human rights remedies that aimed to provide victims with justice and promoted reconciliation and behavioural redress. She noted that human rights law remedies were aimed at reconciliation and shifting attitudes, whereas criminal law was used to punish but could also risk alienating people and causing greater harm, and that she believed an inclusive approach could be more beneficial. She explained that public international lawyers thought that law should evolve and that its function was not only to name and punish crimes, but to signify to victims that they were worthy of protection and to acknowledge the harms they had experienced.

46. Ms. Botha then continued her presentation on the elements that need to be legally defined in order to criminalize acts of a racist and xenophobic nature, either at the national, regional or international level, as considered by the legal experts in their analysis and assessment work. She explained the view of the experts that the language of the International Convention on the Elimination of All Forms of Racial Discrimination, particularly in article 4 which obliges States Parties to criminalize certain acts, was somewhat outdated and should be updated to align with modern human rights and criminal law standards. She explained that article 4 was the criminal law measure in the Convention, and that other articles addressed different measures that States Parties should take in domestic laws and policies to end racial discrimination and promote a culture of non-racism. She recalled that the experts identified three main offences within article 4 of the Convention. She explained that article 4 recognized the history of racial superiority doctrines and repeated much of the preamble, and she noted that it must be read in conjunction with the entire text of the Convention, as this was one of the basic principles of legal interpretation. She explained that article 4(a) was regarded as an outlier among international legal instruments due to its wording: "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 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". She explained that the experts interpreted article 4(a) of the Convention as instructing States to introduce into domestic law the crime of hate speech when it uses the words "racial superiority or hatred" and "incitement to racial discrimination"; and to address acts of violence, which was the act committed on the basis of a racist motive, or a hate crime. She continued that article 4(a) also required States Parties to prohibit the financing of racist activities, and in 4(b) prohibited participation in organizations that promote hatred.

47. Ms. Botha explained that the crimes article 4 required States Parties to introduce into their legal systems were essentially the crime of hate speech and hate crimes. She explained that there were distinctions between hate speech and hate crimes: hate speech was a speech act, a message, communication, expressive act; whereas a hate crime was an existing criminal act such as rape, murder, or assault committed with a hateful motive or intent. She noted that most States that had hate crime laws added additional sanctions to the pre-existing crimes, and suggested that enacting hate crimes legislation was quite straightforward. Ms. Botha noted that a benefit to incorporating hate crime laws into domestic legislation was that it enabled states to map patterns of behaviour, which enabled them to more clearly identify which groups of persons were being targeted, how they were targeted, and put in place policies to address those issues. She explained that hate crimes were not merely crimes against an individual, but crimes that sent a message or threat to the entire group of persons to which that individual belonged. She stated that enacting hate crimes legislation indicated to the victim group that the state would protect them. She also noted that the presence of domestic hate crimes legislation enabled training of public employees such as prosecutors, police, and health care providers on how to address those types of incidents.

48. Ms. Botha discussed the crime of hate speech, which she stated was more difficult to address as freedom of expression was regarded as a fundamental right that promoted human beings' autonomy and dignity, and its protection was vital, especially for the purposes of

holding governments accountable and eradicating corruption. Ms. Botha relayed that some jurists had stated that restrictions on freedom of expression were among the most difficult balances to strike due to the value of expression versus the damage it could do to equality, dignity and the cohesion of society. She explained that international law had developed to require a very clear test when the criminal law was used to punish perpetrators of hate speech because speech on its own was not a crime. She explained that international human rights law criminalizing hate speech required very strict elements which were found in article 20 of the International Covenant on Civil and Political Rights, and had been used by many states in domestic legislation. She outlined those elements as the advocacy of hatred on a prohibited ground that incited serious harm, not just hurt feelings or offense. She explained that the harm could occur directly, such as physical harm or severe psychological harm, or indirectly, where the harm broke down the cohesion of society.

49. The Chair-Rapporteur thanked Ms. Botha for explaining the intricacies and difficulties of the language in the International Convention on the Elimination of All Forms of Racial Discrimination, and hoped that it would assist the Ad Hoc Committee to focus on the issue of terminology and elements that would constitute the additional protocol, and enable delegates to contribute best practices and relevant legislation from their national contexts. She recalled that the focus of the Ad Hoc Committee should be on its mandate to elaborate an additional protocol, or protocols, to the International Convention on the Elimination of All Forms of Racial Discrimination and that it should not lose sight of that focus.

50. Ms. Thio noted that discussions of discrimination based on religion or belief must encompass all religions, beliefs, and also the right not to have a religion or belief, as human rights needed to apply universally. She addressed the issue of precursors to genocide, and stated it was useful to conceive of a continuum where conduct suitable to criminal sanction was on one end, and conduct ill-suited to criminal sanction was on the other. She noted that law could bring about criminal sanctions, but it could also facilitate mediation, conciliation, and reconciliation. She suggested regarding the precursor zone, that it may be useful to think in terms of harmful speech, which caused physical, psychological, or dignitary harm, as well as hurtful speech, which could be more intangible. She recalled that article 29 of the Universal Declaration of Human Rights referenced duties to the community, and suggested that for the less egregious crimes the Ad Hoc Committee might consider discerning how to build through law civic virtues and duties that would create harmonious societies. She explained that the law could provide for dialogical processes whereby an ombudsperson or other intermediary could assess whether the relationship in a specific case could be salvaged before resorting to criminal prosecution. She noted that this would not always be possible, but that attempts at reconciliation could often be more effective than criminal law sanctions.

51. The representative of Iran noted that there was not international consensus on the issue of terrorism. He stated that Muslim countries viewed the 2018 attack in Christchurch, New Zealand as a terrorist attack, but that some media outlets did not use the word or concept of terrorism. He suggested that when attacks were committed by Muslims they were accused of terrorism, but this label was not applied to people of other backgrounds. He expressed the belief that there was a divergence in understanding the concept of religion. He recalled that Iran was among one of 48 countries that voted in favour of the Universal Declaration of Human Rights in 1948, but that today Iran would issue reservations on articles 16 and 18 of the Universal Declaration of Human Rights. He noted that there were no Muslims involved in drafting the Universal Declaration of Human Rights. He stated the experts interventions made clear the urgent need for the Ad Hoc Committee to move forward with its mandate to update the International Convention on the Elimination of All Forms of Racial Discrimination, as it was the only one among the nine human rights treaties that has not been updated with an optional protocol. He asked the experts if, in their opinion, the wording of article 4(a) of the International Convention on the Elimination of All Forms of Racial Discrimination could replace “offence” with “declared a crime.”

52. The representative of South Africa noted, in response to the delegate from Iran, that President Mandela was only removed from a terrorist list in 2008, and this was not related to religion. He stated that freedom fighters had been considered terrorists by the state they were opposing. He noted that some countries also used the term domestic terrorism, which did not

mean Islamic terrorism, and that the word terrorism in his view did not specifically target one region. He agreed that all articles of the International Convention on the Elimination of All Forms of Racial Discrimination must be read in conjunction with each other, and noted that the Convention raised issues that needed to be criminalized but did not dictate how to do so, and that it was within the ambit of each state and its specific legal system how to elaborate the offence. He explained that, in South Africa, all rights were justiciable but that regarding freedom of expression, one individual's rights were not allowed to deprive another individual of their rights. He recalled that South Africa and Rwanda were criticized for their truth and reconciliation commissions by other states which believed they should have used stricter penal sanctions, but that the process of reconciliation and forgiveness was very important. He hoped that the principle that an individual, could not claim for themselves a right that they would deny another individual could be expressed in the text of the additional protocol.

53. The Chair-Rapporteur hoped that the Ad Hoc Committee could catalogue behaviours that created an environment of impunity that could lead to egregious crimes and determine steps that would mitigate such an environment from being created.

54. Mr. Drumbl emphasized that criminal law alone did not promote societal, nation, and community building and expressed caution against the thinking that, because something had been criminalized the problem had been solved. He noted that other human rights treaties tended to have more than one protocol.

55. Ms. Botha stated that, given the difficult relationship between freedom of expression, its permissible limitation, its impact on other rights such as the right to equality and freedom of religion or belief, and international law informing how criminal law and other forms of law should intersect to address hate speech and hate crimes, the additional protocol could address those aspects at a minimum. She described the issues requiring further discussion as the prohibited grounds, as they discussed who was recognized as a victim of hate speech or hate crime. She recalled that international human rights law and international criminal law provided guides as to as to what the elements of specific crimes should be due to the need for precision. She noted that the experts' document outlined contextual facts to be taken into account to determine whether the crime had been proved, whether prosecution should take place, and what sanction should be imposed if the crime was proven. She stated these factors included the identity of the speaker, whether they were powerful or authoritative versus a young person or child who has been indoctrinated into a hate group; the audience hearing the message; and whether the victim was part of a group that had been subordinated in society. She noted that intersectionality occurs on various grounds.

56. The representative of Iran clarified that when he spoke about Islam and terrorism that he did not intend that terrorism was merely concentrated on Islam. He noted the need evidenced in every era to demonize others and create the enemy, sometimes under the name of religion and sometimes under race. He acknowledged the issue raised about an additional protocol or protocols, but suggested the Ad Hoc Committee concentrate on this additional protocol before considering other additional protocols.

57. The Chair-Rapporteur noted the extensive body of information the Ad Hoc Committee had received on the first day of the thirteenth session and encouraged delegations to continue engaging pragmatically with the technical legal expertise provided by the experts.

58. At its **3rd meeting, held on 23 May,** the Ad Hoc Committee continued its consideration of agenda item 4, discussion with the legal experts on A/HRC/51/57 paragraph 79 (a)-(d). The following legal experts, Rhonda Bain, former Supreme Court Justice and Associate Tutor at Eugene Dupuch Law School, Bahamas, Beatrice Bonafe, Professor of International Law, Sapienza University of Rome, Italy, Joanna Botha, Head of the Department of Public Law, Faculty of Law, Nelson Mandela University, South Africa, Mark Drumbl, Class of 1975 Alumni Professor of Law and Director of the Transnational Law Institute, Washington and Lee University, United States of America, and Li-Ann Thio, Provost Chair Professor, Faculty of Law, National University of Singapore, Singapore, presented and engaged with the Committee on the document they submitted entitled "Preliminary inputs and advice by the experts to the four questions in paragraph 79 (a)-(d) of report A/HRC/51/57."

59. The Chair-Rapporteur gave Ms. Botha the floor to continue elaboration on the issue of the elements that need to be legally defined in order to criminalize acts of a racist and xenophobic nature, either at the national, regional or international level she had commenced at the 2nd meeting.

60. Ms. Botha recalled that she had outlined elements that could be used to update the language of the International Convention on the Elimination of All Forms of Racial Discrimination to bring it into alignment with similar language used in other international instruments. She recalled her discussion of prohibited grounds, which were required elements of inter-group hatred prohibitions, and restated that hate speech and hate crimes were group-based offences rather than being individually-based. She further recalled that more discussion was required regarding whether the description of racial discrimination in the Convention could be either expanded intersectionally to include xenophobia and religion or belief, or whether religion or belief could be introduced as an independent ground of discrimination. She restated her interpretation that the hate speech offence under criminal law could be sufficiently captured as the advocacy of hatred that incites the most severe types of harm with an element of intention, as opposed to negligence or recklessness. She recalled that hate crime under the criminal law would encapsulate acts that were understood in international and domestic legal systems to be existing crimes, such as murder, assault, or arson that were committed with hateful intent and consequently given more severe sentences. She noted that the benefit of such laws in domestic systems was that they enabled the criminal law to work in relation to punishing, and possibly assisting in the rehabilitation of the offender; to provide a sense of justice to, and support for, the victim; to enable mapping of data that could lead to further policy developments and identify groups that were at risk of becoming targets of hate; and to enable training of public employees such as prosecutors, judges, police, and health care providers on how to interact with victims of group-based hatred.

61. Ms. Botha noted that the experts' document presented various models that could be used to criminalize acts of hatred as opposed to hate speech. She recalled difficulty concerning the crime in International Convention on the Elimination of All Forms of Racial Discrimination article 4(b) of participation in organizations that promote or incite racial discrimination. She emphasized that organizations that promote racial superiority should be banned. She clarified that the experts had concerns regarding the definition of participation in such organizations as a criminal offence. She highlighted the need to discuss whether it should be considered a crime simply to sign a membership with such a group, or to approach such a group for assistance under the belief that it was achieving a certain mandate and learn that it was not, or how to address the issue of young people who were indoctrinated into such groups. She recalled that participation in an organization was distinct from the secondary mode of criminal liability of aiding and abetting, which was already a recognized criminal offence.

62. She suggested that the context for both hate speech and hate crimes required further consideration, as context assisted in the decision about whether the elements of a hate crime or the offence of hate speech had been proven by the prosecution. She noted that this would also assist prosecutors in determining whether to prosecute a specific crime. She explained that, after the elements of the crime had been determined, the next stage would be to determine the punishment that should be imposed and whether there were factors that would aggravate punishment, and make it stricter, or mitigate it, and make it milder. She explained that at this stage in the inquiry the possibility of rehabilitation, vulnerable audiences, and vulnerable target groups would be taken into account. The Ad Hoc Committee might also consider defences to both a hate crime and the offence of hate speech.

63. Mr. Drumbl noted that the recognition of the collective aspect of the crime of hate speech and hate crimes was important to the experts in the consideration of criminalization. He explained that the simplest form of linking a perpetrator to the crime occurred when a person acted alone to commit a crime. However, he noted, the reality of the systemic and organized nature of racism, racial discrimination, and xenophobic acts was that they were generally group-based. He explained that there was often a direct perpetrator of these acts, but there could also be secondary perpetrators who aided and abetted or assisted the crime, were part of a collective enterprise that committed the crime, financed the crime, or educated another person into the crime. He stated that the experts believed it was vital for the proper

criminalization of hate speech offences and hate crimes to hold secondary perpetrators accountable as well as primary perpetrators. He noted that often the most powerful person was not the direct perpetrator, but rather the mastermind of the violence or speech.

64. The representative of Iran expressed that criminalizing hate speech and hate crimes was of the utmost importance, but that it was not sufficient and that remedies and redress for the victims must also be considered. He stated that the analysis of the perpetrators committing the offence should be concentrated on the root causes of the hate speech or hate crime, such as colonialism.

65. The representative of Pakistan on behalf of the OIC requested the experts' input on the online context of hate speech and hate crime. He noted that this context could not have been envisaged when the International Convention on the Elimination of All Forms of Racial Discrimination was negotiated and adopted and suggested the experts and Ad Hoc Committee should consider elements such as the originator, content developer, platform, and authenticity of the online content. He emphasized the need for clarity on the parameters used for defining hate speech and hate crimes online and offline and suggested that a different approach may be required for online content. He proposed evaluation of business models and the UN Guiding Principles on Business and Human Rights, and contemplation of the obligations of States Parties and business enterprises in relation to content available online. He also suggested that elements for the additional protocol could establish thresholds related to participation in organizations that promoted racial subordination or racial superiority, as well as guidance on where to use criminal law versus preventive measures.

66. Ms. Botha reiterated that the experts discussed that hate speech both online and offline should be dealt with by both the criminal law and other types of law. She noted that discussions regarding context factored in the magnitude, reach, and mode of communication. She noted the reality that in contemporary society hate speech that occurred online had the potential to spread and reach further, be more powerful, and cause more harm, and this should be reflected in the additional protocol in so far as non-state actors were concerned.

67. She recalled that the original text of the International Convention on the Elimination of All Forms of Racial Discrimination placed obligations on States Parties only to address instances of racial hate and racial superiority, and noted that States Parties were to introduce laws to address those phenomena, as well as to educate, put in place promotional measures, and respect, protect, and promote all rights recognized at domestic and international levels. She explained that public international law had recently begun to hold non-state actors accountable for human rights abuses and to insist they take steps to promote and protect various rights in international treaties. The Ad Hoc Committee may wish to consider how the additional protocol could extend the obligations of the Convention to non-state actors directly, as opposed to indirectly, by imposing the obligation on States Parties to hold non-state actors accountable for their actions or lack thereof.

68. She commented that the root causes of hate speech and hate crimes needed to be targeted and addressed as well.

69. Mr. Drumbl noted that the root causes of genocide could be traced to colonialism, international capitalist flows, failure of international organizations, pressures by commodities markets and international economic insecurity, and in the future likely migration patterns from climate change but stated that those harms were difficult to situate within the framework of criminal law, there was value in preventative and reparative measures. He noted that a primary catalyst of genocide in Rwanda was the radio, which could be viewed in parallel to the nature of online content today. He hypothesized, regarding preventive measures, that had the international community at the time utilized existing satellite technology to jam radio frequencies in Rwanda, the genocide may not have spread as quickly. He suggested that the Ad Hoc Committee might consider including preventive measures, such as shutting down internet grids in places where national authorities failed to effectively manage online content in order to prevent the spread of violence.

70. Ms. Thio reflected that root causes were important considerations, and underscored the importance of non-criminal sanctions. She stated that this showed the virtue of a comprehensive criminal, civil, and human rights approach to the root causes of racial discrimination. Regarding the issue of online hate speech, she noted that what was stated

online could lead to harm in the physical world and should, therefore, be subject to legal regulation. She stated that internet speech was another form of communications technology, where the difference was identified due to the virality, speed with which it could spread, its global reach, and longevity or permanence. She noted the difficulty in apportioning blame or harm, as there was a difference between posting something online in the first instance, and someone who forwarded it. She noted that the Rabat Plan of Action could be a good starting point for this. She added that that just because the internet had a broader reach did not mean that it caused more harm; the harm would depend on who was speaking and the audience it reached, and suggested this as an area where delegations might share best practices. She noted that, when dealing with racial hate speech online or offline, it would be important to utilize a mixture of hard law, or treaty law, and soft law, as well as domestic law, and codes of conduct. She stated that the prospect of imposing direct liability on non-state actors was unlikely, but a possible approach could be through a treaty obligation requiring states to adopt effective measures related to non-state actors, such as fining companies that did not comply with government take-down orders for hateful online content. She raised concern over censorship and freedom of expression in this context, and proposed an assessment process or monitoring body for government action once the immediate danger had been averted.

71. Ms. Bonafe responded to the question regarding online and offline hate speech, noting that there were different actors and different roles, which implied different obligations. It was difficult to place direct responsibility of internet providers at the international level, as they were not the ones that would express the hate speech, rather they acted as gatekeepers. Their role was to ensure that the threshold of what was acceptable was not crossed. She explained that what was generally accepted from a legal standpoint was to impose obligations under domestic law to adopt a due diligence policy. She noted that the Human Rights Committee was facing this problem as it was currently negotiating a treaty on human rights and business enterprises. She noted there were two situations to be distinguished: the first where business enterprises directly acted as speakers; and second where the were performing their ordinary functions and should monitor language that was used and messages that were conveyed. She noted that, in this case, domestic legislation and obligations were placed on internet providers and social media platforms to adopt due diligence policies.

72. Ms. Bonafe noted that the Committee had at its disposal several elements that combined together should be used in to find a balance between freedom of opinion and expression and racial discrimination. She explained that criminal law was built on several blocks. First was a material act. Ms. Bonafe specified that offensive speech was generally not considered enough to attract criminal responsibility, but that the offensive speech must advocate hatred or other elements. Secondly, she specified the need for the element of intention, or mens rea, to incite violence or harm. Third, she noted the contextual element and grounds for discrimination such as incitement to violence against a certain racial group or religion or belief. Ms. Bonafe stated that, according to this combination of factors, there may be established criminal liability with factors that would aggravate responsibility or higher penalties, or mitigating factors leading to milder penalties. She explained that, taken together, these elements should be defined and they were at the Ad Hoc Committee's disposal to find the balance.

73. Ms. Botha added that it was important to ensure understanding of the meaning of the term "measures," as it was used throughout the treaty in relation to preventive measures, executive measures, and legal measures. She clarified that measures did not only indicate laws, but also policy decisions, reaching agreements with moderators of online content on how that content should be dealt with. She noted that the International Convention on the Elimination of All Forms of Racial Discrimination did not directly hold non-state actors responsible, but it did place a duty on States Parties to enter into a wide range of agreements or measures with such parties. She stated that the issue of censorship would become important because moderation would need to occur in a way that did not censor merely different views.

74. The representative of Pakistan on behalf of the OIC noted the extraterritorial obligations related to most social media platforms because the companies were based in one place and the geographic spread of their activities was vast. He noted that the Ad Hoc Committee should consider that some of those companies had influence and financial

resources which exceeded that of many states, and it could be difficult for states to control these actors' activities through national laws and jurisdictions. He also requested the experts' views on the inclusion of elements such as racial profiling in the additional protocol.

75. The representative of South Africa raised examples of censorship leading to book banning and political tools to silence individuals from their right to expression. He noted the danger that states may enact legislation against opposition groups. Consequently, he stated that the criteria should be very high before categorizing something as hate speech, and that offensive speech should not be criminalized, as it would not reach the level of hate speech. He suggested that the experts be requested to provide text and words that could be used to formulate the additional protocol that the Committee could debate.

76. The Chair-Rapporteur clarified that the development of concrete language would not be part of the Ad Hoc Committee's work this session, but that delegations' questions and inputs were important to progress the Committee's mandate. She noted that the experts were undertaking the exercise of providing the Chair-Rapporteur with some specific language in terms of definitions and legal concepts that she could then present to the Ad Hoc Committee. She noted that with concrete language it may be possible to better focus and structure discussions on specific elements that could constitute the additional protocol.

77. The representative of Iran stated that the draft additional protocol should reflect the views of all Member States. He suggested that the situation of countries that had political intervention, were under coercive measures, or in a coup d'état, as they may be incapable of regulating private actors in respect of hate speech in the online sphere. Consequently, he emphasized the need to provide international legally-binding instruments for monitoring behaviour of social media platforms and internet providers. He encouraged the legal experts to take into account cultural and regional diversity.

78. The representative of Iran also noted that there did not appear to be representatives of non-governmental organizations present in the meeting, and asked if they had been invited to the session. The Secretariat confirmed that non-governmental organizations had been invited to the session, as they had been for all previous sessions of this Ad Hoc Committee.

79. The representative of the European Union stated that the definition of the concepts of hate speech and hate crime was at the core of the matter and that the European Union was also working on this conceptualization. She noted one manner of doing so was to define the different grounds of discrimination and the elements required, but relayed that within its own process the European Union had yet to apply one definition across the entire system, which made matters complicated. She expressed the belief that it was crucial to spend enough time on this specific element. She explained that the European Union was on track to include hate speech and hate crime in what they referred to as a list of European Union crimes, which was a limited list of major crimes such as trafficking in persons and terrorism. She explained that it was at the stage where a preparatory study had been conducted and the European Commission had issued a communication, and the next step would be that the twenty-seven European Union Member States approve it for further development. She stated that she was working to obtain instruction from the European Union's legal departments to ascertain their views, but noted her understanding that when the European Union took the step to include hate speech and hate crime on that list, that it should have a broad definition of the grounds, such as race, colour, religion, descent, national or ethnic origin, but also disability, age, sex and sexual orientation. She noted that women's rights was a situation where the European Union was experiencing an increase in hate speech and hate crimes. She asked requested the perspectives on how to define the concepts in a manner that could future-proof the issue.

80. The Chair-Rapporteur noted on the issue of root causes that colonialism was not the only relevant consideration, but also slavery and the consequences of slavery and the slave trade She also noted that those who did not have a colonial past because they were colonizers sometimes had also been colonized themselves and had to deal with those legacies.

81. The representative of Saudi Arabia stated that it would be very difficult to incorporate online hate speech and hate crimes into national legislation due to the extraterritorial nature of large technology companies. She noted that previous attempts by states at protecting human rights, such as privacy rights, were unsuccessful. She stated that progress regarding large technology companies and online crimes, regardless of the crime, required international

action to be successful. She stated that states must work together to find solutions for protecting human rights, as most cases were extraterritorial where the victim was in one state and the perpetrator was in another.

82. The Chair-Rapporteur suggested that the experts be requested to assist the Ad Hoc Committee in structuring its comments in legal language.

83. Ms. Botha stated that the matter of communications surveillance and privacy fell beyond the scope of this particular treaty, but noted that it was a pressing global issue requiring attention. Regarding questions about hate speech and hate crime, she reminded the Ad Hoc Committee that there was a difference between hate speech and hate crimes: while they used hate as a common denominator, hate crimes included a pre-existing criminal offence that was aggravated by hateful intent. She noted that when dealing with a hate crime it was acceptable in state practices to see a spectrum of hate, because the base crime was occurring at the criminal level and hateful intent was evaluated at a later stage. She recalled that hate speech differed because speech was not a crime in its own right, which was why it was important to attach the elements noted earlier by Ms. Bonafe. She noted that this was the reason some states addressed hate speech at the human rights level.

84. Ms. Botha addressed the question about future proofing by explaining that law needed to grow, evolve and develop alongside society. She noted that many states accomplished this goal by identifying in legislation specific grounds that were protected and then added the word ‘including’ or phrase ‘on any other ground that was comparable’ or ‘analogous grounds’, which allowed the law to evolve and account for intersectionality. She noted that the International Convention on the Elimination of All Forms of Racial Discrimination did not use that language and was very specific, but she recommended the inclusion of analogous grounds at the domestic or regional level.

85. Mr. Drumbl noted that an advantage of the additional protocol was that it would have a common definition of a crime and a provision that would require the state where an accused was physically located to prosecute for conduct, even if committed elsewhere, or to be extradited to the state where the conduct was committed. He explained that extradition law without a treaty resulted in the problem that different jurisdictions may criminalize things under different requirements, which was the problem of dual criminality. He noted that most countries had a wide array of human rights legislation that did not have criminal sanctions but that dealt with discrimination, such as employment and labour law that addressed situations of discrimination or harassment in the workplace. He explained there was also a broad area of law that addressed discrimination and contracts or applying for jobs, as well as legislation that addressed individuals who felt uncomfortable or discriminated against by others in other areas of life. He emphasized the importance of recognizing that there was more going on to combat racial discrimination than only hate speech and hate crimes laws. He noted that thousands of individuals were assisted by labour legislation and employment standards on a daily basis. He noted that these forms of legal redress were not spectacular or newsworthy, but suggested that this was why the precursors that the Ad Hoc Committee had been discussing and preventative obligations that could be included in the additional protocol may render the International Convention on the Elimination of All Forms of Racial Discrimination more robust. He stated that preventive measures may be a more amenable space to discuss and define xenophobia and discrimination based on religion or belief, as those measures were less rigid than the criminal law.

86. Ms. Botha stated that article 5 of the International Convention on the Elimination of All Forms of Racial Discrimination contained a list from (a) through (f) that outlined state obligations to introduce laws in relation to economic, social and cultural rights, including the rights to work, housing, health, and education. She recalled that at the criminal level, law needed to be very precise and clear, should be used as a last resort, and that it did not always create ideal societies due to its penalizing nature.

87. In response to the interventions of the delegates from Iran and Saudi Arabia related to the monitoring systems that could be provided by the criminalization instruments, Ms. Bonafe explained that it was normal in criminalization protocols to include provisions that were not strictly criminal, such as cooperation obligations or institutional control and monitoring systems. She noted that in regard to cooperation there were sometimes succinct

and precise provisions that indicated states must cooperate, but there may also be more complicated systems of cooperation. She noted this was one tool at the Ad Hoc Committee's disposal. She recalled the possibility of establishing a monitoring system, where a body could be created to monitor states' actions or interventions in cases of transnational crimes. She noted that the International Convention on the Elimination of All Forms of Racial Discrimination had already created a committee for monitoring compliance by states which could be empowered with a monitoring function over the future additional protocol -the Committee on the Elimination of Racial Discrimination, but that other systems could be created for monitoring purposes as well.

88. The Chair-Rapporteur noted that one of the experts who would be joining the 9th meeting of the session was a member of the Committee on the Elimination of Racial Discrimination and would be able to speak to the monitoring work that Committee was already undertaking.

89. The representative of Iran stated that there was not one common understanding on the definition of religion and suggested that the experts provide inputs on developing a definition of discrimination based on religion or belief that would allow for forward progress on the additional protocol.

90. The representative of the European Union expressed concern regarding an intervention where reference was made to extraterritorial jurisdiction for hate speech and hate crime, as it implied that states could punish actions taking place outside their borders should they determine other states were not acting upon them. She stated the need to establish a system of cross-border cooperation between countries on an equal footing, but noted the difficulty of so doing due to the requirement for agreement on what would be punishable. She stated the need to discuss proportionality, and noted as an example that the European Union did not apply the death penalty. She also clarified that those were her own questions to the experts, and not a European Union position.

91. The Chair-Rapporteur encouraged delegations to continue to seek guidance from the experts to assist with determining the next steps the Ad Hoc Committee could take in the exercise of its mandate.

92. The representative of Saudi Arabia clarified that her intention in raising extraterritorial jurisdiction was that, within the scope of the Ad Hoc Committee's work on hate crimes, states should cooperate with each other. She explained that she had used the example of privacy rights to highlight a failure of national legislation to adequately regulate large technology companies. She noted that the reason protection of privacy rights had not succeeded was due to a lack of international cooperation.

93. Mr. Drumbl responded to the question raised about extradition and noted that transnational criminal law conventions, which were similar to the form the additional protocol would take, avoided the concern about externalities because the crimes addressed were defined commonly for all parties. He explained that these treaties defined the crimes, established extradition or prosecution requirements, set mutual legal assistance, outlined appropriate punishments, and often even contemplated specific defences. He noted that states that signed and ratified the additional protocol would create a common legal landscape and shared commitments. He explained that the absence of transnational conventions was what could bring about the concerns raised, and noted that, consequently, one of the reasons to elaborate an additional protocol on hate speech and hate crimes would be to avoid those issues.

94. Mr. Drumbl responded to the delegate from Iran and suggested that a natural first step for the Ad Hoc Committee would be to use the work that the experts had compiled on racial hate speech and racial hate crimes to establish a structure where criminal responsibility was one of many remedies. He suggested that once there was agreement on the definition or meaning of race that could be criminalized, that could assist the Committee in defining gaps for xenophobia and incendiary violence based on religion or belief. He noted that there were many soft law provisions emerging on xenophobia in human rights law, and that it may be best dealt with through non-criminal measures. On the elaboration of definitions, he recalled that it was more straightforward to provide definitions for preventive measure than criminal law.

95. The Chair-Rapporteur recalled that the experts had raised the issue of subordination in their interventions and requested further elaboration of that concept and how the experts thought it could operate in the context of the additional protocol.

96. Mr. Drumbl explained that the idea of subordination was the other side of superiority. He elaborated that superiority was conditioned upon another person or group's inferiority, which created a dynamic of subordination. He noted that the International Convention on the Elimination of All Forms of Racial Discrimination criminalized distinctions made on the basis or race, and that in certain contexts this could risk policies and actions such as affirmative action programs being declared problematic. He suggested this was where the concept of subordination could be useful, as whatever was criminalized, prohibited, or precluded as an act of racial discrimination must have come from historical, colonial, or continued subordination. He expressed the importance that subordination be placed in the systemic context of structural racism, and noted that the concept of subordination was universal as there had been elements of subordination along racial, xenophobic, and religious lines in the history of all societies regardless of colonial experiences.

97. Ms. Botha explained that subordination related to an imbalance in power relations because of the phenomena referenced in the International Convention on the Elimination of All Forms of Racial Discrimination, and that this subordination was ongoing. She added that this was why hate crimes were usually committed as a demonstration of power and to perpetuate an imbalanced power relationship. She stated that the acting out of an imbalance of power was a helpful way to understand how a hate crime or hate speech would fit into the framework of the additional protocol. She noted the word hate typically recalled an emotion that expressed fear of an individual who was different or other, and was often a group-based emotion.

98. Ms. Bonafe recalled that, regarding jurisdiction, in a treaty such as the additional protocol the Ad Hoc Committee would be required to define the offences to make them crimes, and this would include a clause on state duties to adopt criminal law legislation and the need to establish jurisdiction. She explained that criminal jurisdiction was generally territorial, but there were other jurisdictional grounds that could be explored such as the author or the victim of the crime. She added that when the jurisdictional grounds were decided, priorities could be established regarding the order in which states would have the opportunity to prosecute. She assured the Ad Hoc Committee that they had the opportunity to define who had the power to prosecute and how to coordinate prosecutions within the additional protocol.

99. The representative of Pakistan on behalf of the OIC stated the need to define expressions such as xenophobia and racial profiling. He noted that there were other conventions that did not contain specific definitions, even though there would have been an opportunity to do so during their drafting. He expressed that it was difficult to define some of these terms due to differences in views among the Ad Hoc Committee members. The representative expressed the need to identify which elements were important to define and where the Committee could move forward without definition. He asked if definitions were truly important.

100. Mr. Drumbl responded that criminal law required strict definition, so if the additional protocol would criminalize certain acts, those acts must be clearly and precisely defined. He noted that there was less need to define terms when considering remedial or restorative measures. He explained that an international treaty required states to criminalize without definition had the potential to enable several negative consequences and create a false sense of accomplishment. He explained that racial profiling was generally considered an act of racial discrimination instead of a crime and that there were best practices available to address it, such as training for police forces. He explained that there had not been an effective, highly-regarded international criminal law development in which there was not some level of definition, as definitions granted legitimacy and credibility.

101. At its **4th meeting, held on 23 May,** the Ad Hoc Committee continued consideration of agenda item 4, discussion with the legal experts on A/HRC/51/57 paragraph 79 (a)-(d). The Committee heard a presentation from Ms. Li-Ann Thio, Provost Chair Professor, Faculty of Law, National University of Singapore, Singapore about which terms should be defined at

a minimum in respect of the additional protocol (paragraph 79(d)) of the document entitled "Preliminary inputs and advice by the experts to the four questions in paragraph 79 (a)-(d) of report A/HRC/51/57" and held discussion on this topic and the document prepared by the experts. Ms. Thio and other experts Rhonda Bain, former Supreme Court Justice and Associate Tutor at Eugene Dupuch Law School, Bahamas, and Joanna Botha, Head of the Department of Public Law, Faculty of Law, Nelson Mandela University, South Africa engaged with the Committee during this meeting.

102. Ms. Thio reiterated that an additional protocol was a legal instrument designed to update existing law. She recalled that the terms xenophobia and religious discrimination did not appear in the International Convention on the Elimination of All Forms of Racial Discrimination, thus the experts questioned whether there was latitude for the inclusion in the additional protocol. She reminded the Ad Hoc Committee that the original intention in the 1960s had been to split the development of legal instruments addressing racial discrimination and religious intolerance. She noted that the International Convention on the Elimination of All Forms of Racial Discrimination resulted from this, but that a convention to address religious intolerance was never completed. She noted that under international law, article 18 of the International Covenant on Civil and Political Rights addressed freedom of religion, but the only other document to do so was a soft law instrument, the 1981 Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief. She noted that discrimination based on religion or belief was a global phenomenon not confined to any particular religion. She emphasized that the right being protected was not only the right to religion, but the right to religion or belief, which also included atheistic or agnostic belief systems.

103. Ms. Thio noted that speech could be directed at individuals or groups. She stated that it was simple to view the communal element of religious groupings and racial groupings, but could be more difficult to envisage circumstances involving non-belief. She explained that the issue of religious intolerance was often focused on the fear and hatred of specific religious groups, but that it was also important to address protection of religious minorities.

104. Ms. Thio stated she was not amenable to the idea of defining religion, and suggested contemplating the meaning of religion aside from identifiable traits, noting that freedom of religion or belief was a human right that included both internal and external aspects. She explained that everyone had the right to freedom of conscience, and the right to unique opinions on God. She recalled that the law could only regulate external manifestations of internal beliefs, which included profession, practice, and propagation of those beliefs. She explained that the idea of practice involved diets and religious clothing. She suggested that public evangelizing of faith could also be seen as an external manifestation. She noted that, where religious freedom was concerned, there was a need to balance articles 19 and 20 of the International Covenant on Civil and Political Rights. She noted that for some people the criticism of religion or a religious figure caused great upset, however she clarified that there was a difference between insult or wounded feelings and incitement to hatred. She raised the importance of respect and restraint, even in the absence of agreement. She noted that an option aside from criminalization may be for governments to call out acts of religious intolerance, such as the burning of holy books, when they were committed by individuals and using it as an opportunity to educate and bring about conciliation using non-criminal law remedies and approaches. She expressed that, in worst case scenarios, if there was a need to resort to the law, it should be for the protection of public order so as not to create situations incompatible with freedom of expression.

105. Ms. Thio suggested that a preventive measure in the precursor stage would be to build up and promote mutual respect. She noted a measure in place in Singapore where the government created a harmony fund for youth with initiatives to promote inter-faith and inter-religious harmony. She suggested preventive measures such as these may be a way to address religion or belief in the additional protocol, as she could not read religion or belief into the International Convention on the Elimination of All Forms of Racial Discrimination as a lawyer. She also suggested that religious intolerance could be treated as an aggravating factor in tandem with racial discrimination. Ms. Thio stated that the virtue of the additional protocol was that it could provide clarity regarding intersectional approaches, such as those elaborated

in general recommendations of the Committee on the Elimination of Racial Discrimination, and establish a trajectory for legal developments.

106. Ms. Thio recalled that there was ongoing examination of the relationship between xenophobia and racial discrimination, because there had been cases of xenophobia occurring between individuals of the same race or religion. She suggested that one interpretation of xenophobia would be to see it in the context of citizen versus non-citizen, but she noted this interpretation would be complicated by article 1, paragraph 2 of the International Convention on the Elimination of All Forms of Racial Discrimination, which stipulated that "this Convention shall not apply to distinctions, exclusions, restrictions or preferences made by a State Party to this Convention between citizens and non-citizens", and provisions in the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights which gave states the ability to treat nationals and non-nationals differently in relation to voting rights, and social benefits, for example. She noted another complication for using the distinction of citizen versus non-citizen as a definition of xenophobia was that some new citizens did not look the same as old citizens and could still be subjected to discrimination as a result. She stated that, as far as xenophobia was concerned, a common understanding of the meaning of xenophobia would be important, and it would also have to ensure consistency of that that meaning in relation to all other pre-existing legal instruments including those addressing migrants, refugees, and asylum seekers as well as human rights instruments. She noted that this would not be an easy task, but that it would not be impossible, as the law allowed for the possibility of first addressing the most urgent matters where consensus had existed.

107. The representative of Djibouti requested more information about intolerance and targeting religious groups. He asked if there could be a difference between individual acts that were not embedded in ideologies or had ideals underlying them and supremacist or other ideologies on the other hand which transmitted a message above and beyond an affront to religious feelings. He asked about hate apologies in comparison to apologies for terrorism and whether there was a distinction to be drawn between individual isolated acts which were deliberately based on ideology and could fuel the idea of moving from action to ideology. He noted regarding the dissemination of these messages, that the world was increasingly interconnected but that there were nationalist and fascist movements and reactions. He gave an example of an individual who might share information to a social media page but did not have as much impact as another individual with more followers, and asked if this could be considered an aggravating factor to be considered and criminalized.

108. The representative of Iran stated that there were three tendencies related to anti-Islam or Islamophobia: "Islamophobia, Islamoromia, and Islamovertica." He stated his country's view that most interpretation from the religion of Islam and Islamophobia was concentrated on Islamoromia, and was not concentrated on Islamovertica, which meant the real visage or face of the Islams. He expressed Iran's belief that Islamophobia was rooted directly in xenophobia, otherization, and racism. He stated that for those reasons, Iran believed Islamophobia should be divided into those concepts and that discussions of Islamophobia should take under consideration which kind of Islamophobia was being spoken about. He noted that for his delegation it was highly important that the issue of contemporary forms of discrimination based on religion or belief be taken under serious consideration by the Ad Hoc Committee.

109. The representative of Brazil asked the experts about criminalization for some minor acts concerning discrimination. She noted that the International Convention on the Elimination of All Forms of Racial Discrimination was not on freedom of speech or freedom of religion, but was focused on racial discrimination. There were issues eroding society from within that should be taken into consideration, such as the right to work and right to participation, and the right to development. She explained that these were the issues addressed in Brazilian law, and that Brazilian law only employed criminal law for the most serious cases and otherwise used preventive measures and education to communicate that racial discrimination was not allowed. She acknowledged that the discussion of hate speech and hate crimes was the main focus of the Ad Hoc Committee's work, but requested greater insights about how education and other measures could apply.

110. The representative of South Africa stated that in relation to religious freedom that South Africa was a secular state and that its bill of rights contained provisions protecting religious freedom and prohibiting discrimination on various grounds, including religion or belief. He noted that the right to freedom of expression did not extend to hate speech, as was also indicated in the Convention. He explained that South Africa did not have a hierarchy of rights, that religious rights were not absolute, and where they were in conflict with constitutional guarantees or legitimate government purposes that the conflict was evaluated carefully. He noted that the Durban Declaration and Programme of Action addressed the issue of discrimination based on religion or belief and stated that the Ad Hoc Committee should not undertake again that work while elaborating a complementary standard, as it already existed. He noted that the Durban Declaration and Programme of Action was not a convention, but stated that it had been elaborated and had been incorporated into national action plans. He emphasized that a convention could not be exclusionary of any religions, faiths or beliefs, and that if religion was incorporated it must be in a general sense that was inclusive of all religions or beliefs and people who were not religious or did not believe. He stated that the ICERD was a general convention on racial discrimination and that the Ad Hoc Committee should be ensure balance in developing the additional protocol.

111. The representative of Pakistan on behalf of the OIC agreed that interfaith harmony, intercultural dialogue and human rights education were very important to promote a culture of tolerance and coexistence but noted that not every state would be willing to take those steps. He noted that over the decades many Human Rights Council and General Assembly resolutions had called on states to take steps to promote and create cultural harmony, but that many states had avoided taking specific measures to prohibit and prevent incidents of violence and discrimination based on grounds such as religion and race. He stated that some states which opposed taking measures to criminalize incitement to religious intolerance had laws preventing anti-Semitism but would not extend this protection more broadly. He stated that the status quo was not an option, as the world was moving at a rapid pace and that via social media a message could travel thousands of miles or kilometers within seconds. He agreed that preventive measures were important, but that multiple tools were necessary. He acknowledged that there were different interpretations of articles 19 and 20 of the International Covenant on Civil and Political Rights, and noted the perspective that there must be balance between them, but recalled that freedom of expression in article 19 was not absolute. He noted that the Rabat Plan of Action gave six steps that could assist in informing the Ad Hoc Committee's work. He emphasized the need to identify and address gaps in the additional protocol.

112. The representative of the European Union requested the experts' views on documents that already existed and may assist with further development of the Committee's thinking. The first of these was the United Nations Strategy and Plan of Action launched in 2019 by the Secretary General to address hate speech. She stated that it was a useful document that touched upon the Ad Hoc Committee's work, that it indicated that the way to address hate speech was by promoting more positive speech instead of limiting negative speech. The second document she highlighted was the Rabat Plan of Action, which suggested a high threshold for defining restrictions on freedom of expression, incitement to hatred, and the application of article 20 of the International Covenant on Civil and Political Rights. It contained a six-part threshold test for criminalization, such as the elements that should be taken into account when deciding whether hate speech should be criminalized. She noted that the elements in the Rabat Plan of Action were similar to what the Ad Hoc Committee had been hearing from the experts: social and political context; status of the speaker; intent to incite the audience against a target group; the form of speech; extent of dissemination; likelihood of harm including its imminence. She noted that the European Court of Human Rights had referred to the Rabat Plan of Action in decisions and that the Organization for Security and Co-operation in Europe had been working with it as well. She expressed the need to elaborate concrete text, which could be aided by the existing text of the Rabat Plan of Action. She noted that the European Union did not use the term Islamophobia, but used anti-Muslim hatred, and invited the members of the Committee to visit the website of the European Commission to consult the trainings and guidelines they had in place for prosecutors, fair policing, racial profiling, and many other elements.

113. The Chair-Rapporteur welcomed the interventions and invited the delegations to report on national and regional practices, policies, and instruments that would assist the Ad Hoc Committee in the elaboration of the additional protocol and thanked the delegations who had already contributed such information.

114. Ms. Thio stated that the answer to hate speech was more good speech rather than restricted speech. She recounted, in relation to religion, that religious people had a variety of responses to criticism of religion, and it was a challenge to find the proper balance because some people were more sensitive than others to this topic. She suggested that the only perhaps a manner to subsume these differences may be addressed if religion or belief were to be considered as contextual factors.

115. Ms. Thio continued that there was general agreement that freedom of expression was not unlimited, and the differences in opinion stemmed from where to strike the balance between them. She expressed that, in law, the suggestion was that speech should be regulated if it created a clear and present danger or a real and substantial risk, or reasonable likelihood of a risk. She explained that with the word balance, what was being discussed was the gravity and likelihood of harm. She suggested that the Rabat Plan of Action could be useful to commence discussions on this topic.

116. The representative of Djibouti reiterated his question concerning intolerance targeting religious groups, and asked if a distinction could be drawn between isolated acts carried out by individuals from the actions carried out based on ideology with an underlying set of thoughts. He recalled that he had made an analogy with apologies for terrorism and asked if there could be a discussion about apologies for hatred in this case. He also asked if these messages had more impact and a further reach when they were disseminated online, such as when an idea placed online in one part of the world inspired an act in a different part of the world, such as the Christ Church attack. He asked if it was possible to separate a situation wherein a whole ideology was drawn up and disseminated online from a situation wherein an isolated individual posted something which may be an affront to the religious sensitivity or feelings of another individual. He asked if there should be incrimination in both cases.

117. Ms. Thio responded that she had rarely come across situations where an individual decided to post something hateful in complete isolation. She explained that Singapore created religious rehabilitation groups where young people radicalized online and at risk of committing serious crimes would be preventatively detained and could learn more about the religion and how they may have misunderstood some of the tenets of faith. She noted that the measure of success for that program was if the participants would be assessed as no longer a threat and released, and it was found that 62 of 64 participants were released.

118. Ms. Thio stated in response to the question from the representative of Djibouti that she was unfamiliar with apologies related to terrorist activities and acts, but stated that apologies did not work if they were coerced instead of heartfelt. She stated that apology as a civil remedy could be very useful when it was non-coercive. She noted there were options available for non-serious cases such as remediation, reconciliation, and rehabilitation as opposed to prosecution.

119. Ms. Thio also addressed the question regarding whether a post online might have a stronger impact. She explained that just because something appeared online did not mean it would get traction, rather it was contextual. She expressed that it was worth considering pre-emptive powers that could be utilized before something spread too far, such as a community group that could intervene, although she noted that this assumed there was a community instead of isolated individuals.

120. Ms. Botha addressed a comment in relation to the criminalization of acts of discrimination committed by State representatives. She explained that the accepted test for limiting rights under international law was a three-pronged test that involved the elements of legality, necessity, and proportionality. She noted that it was important to understand what the term discrimination meant in the law. She recalled that article 1(1) of the International Convention on the Elimination of All Forms of Racial Discrimination defined racial discrimination as “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". She explained that this definition contained two elements: the first was that there had to be some form of differential treatment, which was also known as the "difference requirement"; the second was that it must have caused a harm or a harmful impact. She noted that, for this reason, the law requires an analysis of impact as opposed to the intention to discriminate. She also explained that not all acts of discrimination constituted legally unjustified discrimination. She noted article 2(2) of the Convention, which included a remedial equality measure and permitted differences in treatment in order to achieve a goal of equality for everyone, while recognizing that some people may have been treated differently in the past and measures were required to be put in place to rectify that treatment, thus in certain circumstances differential treatment was permissible.

121. Ms. Botha noted that, the document prepared by experts had introduced the language of the Rabat Plan of Action in its assessment of ICERD so that the additional protocol would be aligned with other instruments, and noted that the elements provided in the Rabat Plan of Action were reflected in the factors outlined.

122. The representative of the European Union asked whether the experts had been making this distinction between private relations between individuals and state obligations towards individuals in their analyses and assessments.

123. The representative of Iran stated that his country requested a reservation to the references made to gay, bisexual, intersex, and LGBTI issues by delegations and experts during the thirteenth session.

124. The representative of Brazil noted that education, training, administrative and civil measures could accomplish some objectives, but registered concern about the social data that had been collected in Brazil and other states that indicated marginalization was still occurring due to racial discrimination. She recalled that there had been many previous initiatives regarding preventive and positive measures, but questioned whether these measures were eliciting the results necessary to overcome discrimination. She questioned if the criminal law could accomplish this.

125. Ms. Thio noted that progress through legal framework could appear very gradual, she explained that law, imprisonment and fines tended to be put at one end of a spectrum, and education and public awareness at the other, and conceded that sometimes the latter was used as an excuse for inaction. She suggested that an intermediate space may be along the lines of a code of conduct or a declaration by all parties. She suggested there could be a third space of moral pressure, but was uncertain that this would be satisfactory.

126. Ms. Thio recalled, regarding remedies, that there was no right not to be insulted, but that insulting individuals or groups could elicit a hostile or violent response. She noted that legal sanction and criminal prosecution was one avenue for remedies, but that civil remedies were also possible. She noted that civil remedies did not have any educative effect and were less likely to act as deterrents due to their private nature, unless they were publicly reported. She suggested one new way forward may be to provide a remedy that was both public and private: private in the sense that it was in the hands of the person who felt wronged, and public in the sense that it could go to an ombudsperson or commission to do a public investigation so that there was acknowledgment in society that the act had been unacceptable.

127. Ms. Botha explained that in a participatory democracy, the idea was that every citizen had a voice and every person in the country should be able to voice their opinions to create the society they wanted. She noted that these were not the only reasons, but the main ones. Ms. Botha also noted that the reality was that freedom of expression also caused severe harm, and that the harm it caused was dependent on the context in which it took place. She suggested this may be a reason there were so many different views on how to balance it.

128. Ms. Botha expressed that, in her view, hate speech as it appeared in article 4(a) of the International Convention on the Elimination of All Forms of Racial Discrimination did not advance the truth or advance democratic self-governance, as to express hatred toward another group would undermine participatory democracy because it suppressed all voices from being heard. She suggested that the Ad Hoc Committee should build from the different contexts and viewpoints to arrive at legal terminology for what criminalization of hate speech and hate

crimes entailed in relation to race, and agree on principles that would best balance the right to freedom of expression and all other universal rights in a way that was proportional and necessary using the law.

129. The Chair-Rapporteur welcomed the discussion about balancing, as that was how she hoped to anchor the work of the Ad Hoc Committee. She noted that the terms freedom or expression and freedom of speech had both been used frequently. She recalled that freedom of expression referred to article 19 of the International Covenant on Civil and Political Rights, but noted that there was no explicit reference to freedom of speech in that article. She asked the legal experts if they could define freedom of speech. She stated that, in addition to balance, universality was also important to her as the Chair-Rapporteur, and she asked if freedom of speech was universal in the same way as freedom of expression. She suggested that understanding those terms may assist in bridging differences and building consensus.

130. Ms. Botha responded that the first amendment of the Constitution of the United States of America used the term speech, whereas article 19 of the International Covenant on Civil and Political Rights protected the right to hold opinions and the right to freedom of expression, which included the freedom to seek, receive, and impart information and ideas of all kinds regardless of frontiers, orally, in writing, in print, in the form of art, or through other media of his or her choice. American jurists on this issue was prominent, insightful, and used across the world. She explained the right to freedom of expression was cast more broadly than just verbal speech and included all forms of expression including speech, signs, pictures, images, symbols, gestures, and the manner in which people dressed. She noted that freedom of expression also included the right to receive and impart information and ideas, because it was not only about speaking, but also listening, taking in information, and responding. The correct terminology was freedom of expression, and in international human rights law this right to freedom of expression was not without boundaries, but that limitations must be drawn in accordance with the principles of legality, proportionality, and necessity.

131. The Chair-Rapporteur clarified that when she referred to universality she had been inquiring about the use of the right of freedom of speech versus the right of freedom of expression.

132. Ms. Thio noted that Singapore's Constitution used both words speech and expression, but treated them as synonyms. She stated that freedom of speech was not universal and suggested that the way the right to freedom of speech or expression was framed may affect the balancing process. She explained that for any balancing act it must first be decided what goes onto the scale, and then decide how to weight it. She noted that this would not be the same for all states and suggested that the way the right to freedom of expression was framed would affect the balancing process. She recalled that the United States of America's first amendment and jurisprudence signalled that freedom of speech was the priority law, whereas the European Convention of Human Rights had a dignitarian formulation, which meant that there was recognition between the general norm and the limitations. She noted a further model that was used in Singapore, where the law began with "subject to these limits…", and thus freedom of speech and expression was seen as a subsidiary right for a long time until jurisprudence indicated otherwise. She summarized that in the United States of America, freedom of speech was a primary right, in Europe it was a preferential right, and in Singapore it began as a subsidiary right, but that had changed with jurisprudence over time. She explained that legal tests such as clear and present danger, imminent risk, and reasonability attached weights to the interest. She stated that she had not seen a universal approach, and noted for example that Europe took a proportionality approach, whereas Singapore took a reasonableness approach; and that the Inter-American Convention of Human Rights promoted a strong right to reputation in defamation law, whereas this was weighted very weakly in the United States of America. Thus, different states varied in the weighing of those interests, and she noted that nearly every constitution in the world protected the right to freedom of expression, but hypothesized that the balance was different in each.

133. The representative of Iran asked the legal experts how the Ad Hoc Committee could link the elimination of discrimination with the right to development and the elements reflected in article 5 of the International Convention on the Elimination of All Forms of Racial Discrimination, such as the rights to work, education, and participation in cultural life.

134. Ms. Botha stated that the United Nations had done a vast amount of work through its sustainable development goals to recognize how states may achieve sustainable development and noted that one of the difficult parts of development law and sustainable development was that it was contextual, as development varied across the world. She noted that only the African Charter had entrenched the right to development and that it recognized people's rights, which was a community-based approach to rights that recognized that development entailed development in relation to other people as well as the individual. She relayed that freedom of expression contributed to the right to development, as did the rights to equality, human dignity and all other rights that were protected in every human rights instrument in the treaty system.

135. Ms. Thio stated that she was uncertain about the link between the right to development and the work of the Ad Hoc Committee. She noted that the right to development was very important in Asia and did appear on the ASEAN Charter of Rights as a collective right. She explained that in Asia it was primarily viewed as the foundation of economic rights. She stated that the right to development primarily related to fair participation in the political process and fair distribution of economic goods, consequently the only link she could draw was to where the Ad Hoc Committee's work touched upon participation in the political process, but that even this link was weak.

136. The Chair-Rapporteur noted there was a working group on the right to development at the Human Rights Council, thus the Ad Hoc Committee did not need to address this particular issue, as it was being addressed elsewhere and she did not wish to infringe on the work being done by that working group. She expressed hope that over the coming days the Ad Hoc Committee could build upon the complex issues they had been discussing with the experts, in order to establish common understandings of the terms and issues. She invited all delegations to review the documents referenced by delegations and the legal experts and to contribute substantively to upcoming conversations about the elements and terms that could also be considered for inclusion.

137. **At its 10th meeting, held on 26 May,** the Ad Hoc Committee continued considered Item 5, discussion on the Chairperson's draft document concerning the possible scope, terms, elements and structure of the "draft additional protocol criminalizing acts of a racist and xenophobic nature" pursuant to resolution A/HRC/51/32.

138. The Chair-Rapporteur recommenced discussions of the Chairperson's draft document in particular a consideration on the definitions of the words racism, xenophobia and racial profiling in the context of the additional protocol.

139. She opened the floor to interventions by the Committee on the term racism.

140. The representative of South Africa stated that several documents made inferences to racism, including the Durban Declaration and Programme of action and Human Rights Council resolution 51/32. She noted that the notions of systemic, structural, and institutional racism were largely absent from existing definitions of racial discrimination and suggested the Ad Hoc Committee incorporate these terms into its definition of racism. She defined systemic racism as a system in which patterns, policies, and processes and cultural representation worked to perpetuate inequalities and patterns of discrimination against one or more racial or ethnic group. Structural racism was defined as the set of norms, rules, routines, patterns, attitudes, and standards of behaviour, both de jure and de facto, that gave rise to situations of inferiority and exclusion against a group of persons in a general sense, with these traits perpetuated over time and even generations. Institutional racism was defined as the policies and practices in institutions that had the effect of producing outcomes that consciously disadvantaged or favoured a particular racial group, and could also relate to pervasive beliefs and accepted ways of doing things within an institution.

141. The representative of Pakistan on behalf of the OIC drew the Ad Hoc Committee's attention to reports of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance which specifically referred to systemic and structural racism. He noted that the Special Rapporteur had highlighted several factors at play, including the colonial past and environmental issues. He stated that racism was based in hate, discrimination, and violence towards others and that racial profiling was a manifestation of racism. He explained that racial profiling could not be separated from racism

because it was the stigmatization and targeting of individuals based on colour, profession, national or ethnic identity, religion or belief and several other factors.

142. The representative of South Africa shared that the 1978 UNESCO Declaration on Race and Racial Prejudice built upon the terms in the International Convention on the Elimination of All Forms of Racial Discrimination and may be of use to the Ad Hoc Committee in its work.

143. The Chair-Rapporteur requested input from delegations on their understandings and proposed definitions of the term xenophobia.

144. The representative of South Africa noted that the Durban Declaration and Programme of Action would be a relevant document to consider, not only as it related to xenophobia, but also to other issues the Committee was considering, such as discrimination based on religion or belief. She proposed using the Durban Declaration and Programme of Action as a starting point, and also evaluating the relationship between xenophobia as a fear or hatred of foreigners or anything perceived as foreign or different. She also suggested including issues regarding related intolerance and stated that those were a fundamental part of racism, racial discrimination, and xenophobia that could not be separated.

145. The Chair-Rapporteur requested comments from the Ad Hoc Committee on the definition of racial profiling.

146. The representative of South Africa noted that articles 2 and 5 of the International Convention on the Elimination of All Forms of Racial Discrimination read together could be interpreted to prohibit an action undertaken for reasons of security, public safety, and law enforcement that relied on stereotypes about race, ethnicity, national origin, or religion or belief rather than reasonable suspicion to identify individuals who may pose a threat to society. She recalled that article 5 of the Convention discussed guarantees, without distinction, of rights such as security of the person, and protection by the state against violence or bodily harm, whether inflicted by government officials, individuals, groups, or institutions. She stated that the definition of racial profiling was already implicit in this article, and that it spoke to the issue of racial profiling within the context of race and other factors, possibly religion or belief. She suggested that the Ad Hoc Committee may propose examples of racial profiling, such as airport immigration checks, to reinforce the definition of racial profiling.

147. The Chair-Rapporteur noted that the discussion of articles 2 and 5 of the International Convention on the Elimination of All Forms of Racial Discrimination reminded her of the discussion with Mr. Balcerzak during the Ad Hoc Committee's 9th meeting regarding the Committee on the Elimination of Racial Discrimination's approach of progressive interpretation of the Convention.

148. The representative of Pakistan on behalf of the OIC shared information from the April 2015 report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance presented to the Human Rights Council that provided a detailed explanation of the act of racial profiling. In it, racial and ethnic profiling was defined as 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 check, and investigation or for determining whether an individual was engaged in criminal activity; that it had been a persistent and pervasive issue in law enforcement and issues arising in connection with policies on national security; that it exacerbated discrimination already suffered due to ethnic or religious minority status, and remained a serious challenge to the realization of rights among various racial, religious, and ethnic groups globally. He recalled that, in 2021, the Special Rapporteur presented a report that discussed the use of artificial intelligence and other techniques utilized in racial profiling.

149. The Chair-Rapporteur recalled the Committee on the Elimination of Racial Discrimination's General Recommendation Number 36 regarding racial profiling. She noted that in that General Recommendation, racial profiling was defined as the practice of law enforcement relying to any degree on race, colour, descent, or national or ethnic origin as the basis for subjecting persons to investigatory activities or to determining whether an individual was engaged in crimination activity. The Committee on the Elimination of Racial Discrimination also recognized that racial profiling could be conscious or unconscious;

individual or institutional or structural. As there were no further reflections on racial profiling, the Chair-Rapporteur opened the discussion to comments regarding other terms requiring additional thought or definition by the Ad Hoc Committee, such as hate crime, participation, and religion or belief.

150. The representative of South Africa recalled that much of the Ad Hoc Committee's discussions at the 7th and 8th meetings related to hate speech and hate crimes.

151. The representative of Pakistan on behalf of the OIC agreed with the representative of South Africa, and noted that it would be difficult to provide an exhaustive list of elements that could be included in hate speech and hate crimes, as would providing a legal definition of the term "participation." He stated that the Ad Hoc Committee may have agreed with the objective of the legal experts' question regarding the term participation, but that the original negotiators of the International Convention on the Elimination of All Forms of Racial Discrimination would have considered the meaning of participation. He noted that there would be a threshold and that participation ranged from actively participating, to extending moral support, to collecting funding, among other levels, but that providing a precise definition of participation would be very difficult.

152. The Chair-Rapporteur explained that the Ad Hoc Committee's consideration of participation was not only regarding a definition, but also considering what it meant in regard to other rights, such as the right of association.

153. The representative of Pakistan on behalf of the OIC suggested that the issue of discrimination based on religion or belief could be addressed within the issue of structural and systemic racism and discrimination. He stated that the manifestations of discrimination based on religion or belief were visible in numerous forms that included personal attacks, hateful rhetoric, incitement to violence, racial profiling, negative stereotyping, denigration of revered personalities, and desecration of holy books. He noted that these acts were often intentional, and some were undertaken in the public domain to incite violence and humiliate others. He proposed that the elements he had listed could be considered within the Ad Hoc Committee's discussions in relation to all religions or beliefs.

154. The representative of the European Union recalled that the Ad Hoc Committee had discussed many of these terms during its 12th session. She stated in regard to discussion of discrimination based on religion or belief that it was difficult to discuss that terminology as it recalled old discussions regarding defamation of religions, and it had been difficult at the Human Rights Council to define ways in which international law protected symbols, buildings, and other items related to established religions. She noted that the right to freedom of religion and belief was interpreted differently among Member States and that the European Union considered one element of that freedom to be the right to not hold a belief or to change beliefs. She stated that work carried out to define this terminology needed to be carefully considered because the existing international instruments that guaranteed freedom of religion or belief did not define those elements. She recalled that the Human Rights Committee's General Comment on article 18 of the International Covenant on Civil and Political Rights stated that the terms religion and belief were to be broadly construed and that the article protected theistic, non-theistic, and atheistic beliefs, as well as the right not to profess any religion or belief. She stated that it was also important to the European Union that any definition used would align with the European Court of Human Rights and regional mechanisms and documents.

155. The Chair-Rapporteur asked if the representative of the European Union could provide further information regarding these documents and definitions.

156. The representative of the European Union responded that the main document was the Charter of Fundamental Rights of the European Union, which was the human rights charter that was binding for all European Union member states, article 10 of which addressed the right to freedom of thought, conscience and religion. She explained that there were European Union guidelines on how to promote and protect the right to freedom of religion or belief, and there were individual directives regarding the topic. She noted that European Union legislation always included definitions and that most of the definitions had been interpreted by courts as well to provide more specific meanings dependent upon context.

157. The representative of Pakistan on behalf of the OIC noted that in the context of the additional protocol to the International Convention on the Elimination of All Forms of Racial Discrimination the Ad Hoc Committee's task was not to define the rights, as the International Covenant on Civil and Political Rights had already done so. He recalled that the right to freedom of religion or belief was a fundamental human right, but stated that there was no human right to insult other individuals based on their religion or belief. He noted that Human Rights Council resolution 16/18 affirmed that there was also a right not to have a religion. He stated that there needed to be differentiation between freedom of religion or belief and discrimination based on religion or belief. He explained that the objective of the additional protocol to the International Convention on the Elimination of All Forms of Racial Discrimination was not to redefine the right to freedom of religion or belief and the multiple manifestations of exercising that right, but rather to evaluate discrimination and violence against individuals based on religion or belief.

158. The representative of the European Union suggested that the Ad Hoc Committee needed to decide how it would approach the additional protocol. She recalled that it could begin with criminalization of hate speech and hate crime based on race, which was the core principle of the International Convention on the Elimination of All Forms of Racial Discrimination and build on aggravating elements that could broaden the scope of hate speech and hate crime. Another option that she recalled from discussions at the 9th meeting was that the Committee could address this through the principle of intersectionality of other grounds of discrimination with racist hate speech or racially motivated hate crime, which could include grounds such as religion or belief, ethnicity, and gender. In that case, she explained that the legislation would begin with racial discrimination, and the intersectional elements would be added on.

159. The Chair-Rapporteur asked how racism was defined by the European Union and if there was any legislation or documentation defining racism, xenophobia or racial profiling.

160. The representative of the European Union replied that the European Union had definitions of the term racial discrimination and that the 2008 Framework Decision specifically addressed offences concerning racism and xenophobia in its article 1, and noted that the Council of Europe had a significant body of material on these issues as well.

161. The Chair-Rapporteur noted that there was an attempt to define systemic racism in the High Commissioner's report A/HRC/47/53, paragraph 15.

162. The representative of the European Union noted that another soft law document that may be of consulted by the legal experts was the online glossary of the European Commission against racism and intolerance of the Council of Europe contained entries on race, racialization, racial profiling, racism, and racist offences.

163. The representative of Brazil drew the Ad Hoc Committee's attention to the Inter-American Convention on Racial Discrimination, chapter 1, article 1 which included definitions of racial discrimination, multiple discrimination, and aggravated racism, as well as intolerance. She relayed that Brazil's national legislation did not always include strong definitions, but listed some elements such as acts of impediment, embarrassment, humiliation, stereotype, and stigmatization. She emphasized the importance that the Ad Hoc Committee be focused on acts of discrimination and the key elements required for defining them.

B. Discussion on the Chairperson's draft document[2]

164. **At its 7th meeting, held 25 May,** the Ad Hoc Committee continued its consideration of the Chairperson's draft document under item 5. The Chair-Rapporteur welcomed inputs, feedback and general statements from delegations on the Chairperson's draft document to facilitate the ongoing work of the Ad Hoc Committee.

165. The representative of Iran relayed that he was awaiting instruction, but recalled that paragraph 199 of the Durban Declaration and Programme of Action recommended that the

[2] The Chairperson's draft document can be consulted at: https://www.ohchr.org/en/hrc-subsidiaries/adhoc-committee-on-complementary-standards-to-icerd.

Commission on Human Rights prepare complementary standards to strengthen and update international instruments against racism, racial discrimination, xenophobia and related intolerance. He stated that, for this reason, it was imperative that the Chairperson's draft document highlight the role of relevant international instruments, such as the Durban Declaration and Programme of Action and the Vienna Declaration and Programme of Action, as well as respect for cultural diversity and recognition of regional and national particularities. He stated that there were issues recognized in the Durban Declaration and Programme of Action, such as discrimination based on religion or belief, incitement to religious hatred, contemporary and existing forms of apartheid, the negative legacy of colonialism or imperialism, and new forms of enslavement that Iran believed should be reflected independently and criminalized in the additional protocol.

166. The representative of Brazil noted that she was also awaiting further instruction, but stated that the Chairperson's draft document provided strong guidance for the continuing work of the Ad Hoc Committee. She noted that it contained substantive elements on which the Committee had been working with inputs from the experts on hate speech and hate crimes, and outlined a structure of the additional protocol that would propel the work of the Committee. She reflected on the important international dimension provided by the document concerning discrimination, hate speech, and hate crimes, and indicated it was of great interest to her delegation.

167. The Chair-Rapporteur welcomed the feedback, noting that the Chairperson's draft document was the first document that had been compiled based on the specific questions posed to the legal experts by the Ad Hoc Committee at the end of the session. She recalled that it was intended as a first draft, and it was reliant on further contributions from the Committee to reflect perspectives based on various national and regional experiences.

168. The representative of Mexico relayed that the Chairperson's draft document had been shared with her capital and that it required meticulous examination and in-depth analysis, consequently she would reserve comments until receiving instruction.

169. The representative of South Africa relayed that the Chairperson's draft document was timely, as South Africa was in the final stages of adopting domestic legislation on combatting and preventing hate speech and hate crimes, which gave expression domestically to the work the Ad Hoc Committee was doing internationally. She thanked the Chair-Rapporteur for the solid basis that the document provided, and noted that it captured the requested legal advice and issues raised in discussions with the legal experts.

170. The Chair-Rapporteur expressed understanding that the Chairperson's draft document needed to be reviewed by delegations' capitals and legal experts so that they could receive instructions and guidelines. She suggested that delegates could use the thirteenth session to express initial reactions and responses to the document and make recommendations about additional documents and issues for consideration by the legal experts. She recalled that during the 6th meeting, she had highlighted areas within the document requiring the Committee's further consideration, noting the importance of receiving further feedback in order to exchange with the legal experts when they rejoined the Committee for the 11th-14th meetings of the session.

171. The representative of Pakistan agreed with South Africa that the Chairperson's draft document formed a strong basis for future work of the Ad Hoc Committee. He agreed that Member States had to take leadership on some of the issues and provide guidance on how the document should evolve. He stated that this was the first consolidated paper in the form of a Chairperson's document that encompassed multiple elements that had been produced since the establishment of the Ad Hoc Committee. He noted that Pakistan had already shared some views, but would be able to provide further ideas over the course of the Committee's deliberations.

172. The Chair-Rapporteur explained that, for the benefit of delegations that had not been present at the 6th meeting, she had indicated the portions of the Chairperson's draft document where she had requested further input from the Committee members, based on their knowledge and expertise as human rights experts. She recalled sections number 4 on use of terms, number 5 on definition of the main conduct to be criminalized, number 7 on consistency clauses, number 11 on duty to exercise criminal jurisdiction, number 12 on

extradition number, 13 on the duty of mutual assistance, number 15 on fair trial rights, number 17 on state responsibility, number 18 on preventive or promotional measures, number 19 on additional state obligations, number 20 on institutional arrangements, and number 23 on final clauses. She also drew the Committee's attention to paragraph 34 regarding participation in racist organizations, and paragraph 37 regarding references to specific treaty commitments. She requested that the Committee members provide input on these areas to assist the legal experts with their work moving forward.

173. The representative of South Africa suggested that the Ad Hoc Committee work through the Chairperson's draft document one section at a time, to address the substance of the document.

174. The representative of the European Union stated that she was awaiting instruction from her headquarters and European Union member states, but commented that the Chairperson's draft document was the most comprehensive document discussed by the Ad Hoc Committee thus far and that it reflected much of what had been discussed at previous sessions and in the opening days of the 13th session. It was a good idea to hold further discussions to provide guidance to the legal experts for the subsequent work they would undertake, but that it was too early to make final decisions regarding content. She stated that the European Union considered that much of the content in the Chairperson's draft document was already present in the existing international legal framework. She highlighted that the document called for addressing hate speech and hate crime in a holistic manner, whereby criminalization was one measure to be implemented among many others, and noted paragraph 22 of the document, which recalled that the criminalization of hate speech was to be reserved for serious cases and that other cases could be remedied by means other than criminal law. She recalled that paragraphs 53 and 54 a referred to diverse remedies that could be provided in respect to racial discrimination crimes, particularly those committed by young people. She highlighted further references in the document that stated the importance of non-punitive, conciliatory, rehabilitative, restorative, educative, and preventive approaches. She suggested that the experts could be asked to provide a full overview of these non-criminal law approaches in the future. She also suggested that the experts focus on the principles of legality, necessity, and proportionality as guiding principles. the legal experts had emphasized the necessity to linking the content of the additional protocol with existing international legal standards, specifically the International Convention on the Elimination of All Forms of Racial Discrimination and the International Covenant on Civil and Political Rights. She appreciated the objective approach to examining the potential content of the additional protocol.

175. She shared documents that reflected the European Union's best practices, including the European Union framework decision on combating certain forms and expressions of racism and xenophobia by means of criminal law (2008), which obliged European Union member states to criminalized certain forms and expressions of racism and xenophobia; the Audiovisual media services directive (2018) and Digital Services Act (2022) that addressed online situations; and the European Union code of conduct on countering illegal hate speech online, which invited large companies to volunteer to establish and enforce rules and standards that prohibited hate speech and rapidly reviewed and removed content that had been reported in violation of those standards. She noted that the majority of the major technology platforms had signed on, which included having their performance monitored by the European Union. She also highlighted the Victims' Rights Directive, which addressed victims of all varieties of crime including hate crimes and evaluated the support given to them to assist with mitigating their traumas.

176. The Chair-Rapporteur thanked the representative of the European Union for sharing those best practices, and requested that other Ad Hoc Committee members provide examples from their own national or regional contexts as well. She encouraged constructive discussions and deliberations that focused on the legal elements of the additional protocol to ensure that the work of the Committee would contribute positively to combating racism and eliminating racial discrimination. She highlighted the need to attain common understanding of the issues being considered by the Committee and to focus on concrete issues that the Committee could determine together.

177. The representative of Venezuela stated that the Chairperson's draft document provided a strong foundation for further work on the elaboration of complementary standards to the International Convention on the Elimination of All Forms of Racial Discrimination, which was necessary given contemporary forms of racism, racial discrimination, xenophobia and related intolerance and the proliferation of hate speech and incitement to hatred, which had been increasing. He noted that the document had been shared with his capital, and highlighted the necessity of developing complementary standards to fill gaps in the Convention in accordance with General Assembly resolution 71/181 and Human Rights Council resolution 34/36.

178. The representative of Pakistan on behalf of the OIC emphasized the need to move forward with collective efforts, and agreed with the representative of the European Union that the tools for addressing racism, racial discrimination, xenophobia, and related intolerance needed to include affirmative action and preventive measures in addition to criminalizing acts that led to serious forms of violence and discrimination on the basis of their race, colour, ethnicity, and religion. He recalled his previous proposal that the preamble of the additional protocol should contextualize the document's contents and explain the necessity for the additional protocol to address challenges that had not been addressed in the International Convention on the Elimination of All Forms of Racial Discrimination. He suggested that the expression "serious forms of conduct" be used in lieu of "egregious forms of conduct" where it had been stated that the criminal law should be reserved for the most egregious forms of conduct. He agreed that the preamble needed to recall fundamental principles of international human rights, but recommended that it be more inclusive of freedom of religion and belief and freedom of assembly and association in addition to freedom of expression and opinion. He proposed an intersectional approach to the discussion of article 4(a) and (b) of the Convention that addressed ethnicity, colour, and religion to align with the Committee on the Elimination of Racial Discrimination's General Recommendation Number 32. He agreed that working through the Chairperson's draft document paragraph by paragraph would be a useful exercise when delegations were ready to do so.

179. The Chair-Rapporteur recalled the European Union code of conduct that had been raised as a best practice by the representative of the European Union, where technology platforms voluntarily signed on, and asked what incentivized them to do so. She also requested information on how the right to freedom of expression had been balanced in this example.

180. The representative of Iran stated that it was imperative that the additional protocol criminalize contemporary forms of discrimination, hate speech, and hate crimes that were initiated by social media platforms. He noted that this was debated during discussions with the legal experts, and that it was necessary that this be reflected in the Chairperson's draft document.

181. The Chair-Rapporteur noted that as there were no further requests to issue general statements on the Chairperson's draft document. She suggested that the Ad Hoc Committee proceed with the proposal to work through the document paragraph by paragraph, beginning with the introduction.

182. The representative of South Africa proposed that the Ad Hoc Committee needed to have a strategic discussion on what was referenced within the preamble of the additional protocol. She asked what the Committee wished to achieve through this process and how it could ensure that the majority of states signed on. She suggested that the Committee evaluate which soft law and existing international legal instruments it would refer to in the context of the preamble and noted the Durban Declaration and Programme of Action, the Vienna Declaration and Programme of Action, and the Universal Declaration of Human Rights had already been mentioned by delegations. She also expressed the need to account for limitations that hate crimes did not entail, such as issues related to freedom of expression and artistic creativity. She noted the necessity not to undermine special measures such as affirmative action policies in the text of the additional protocol.

183. The representative of Iran recommended that the preamble reference Human Rights Council resolution 16/18, the Durban Declaration and Programme of Action, the Vienna

Declaration and Programme of Action, and the 1981 Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief.

184. The representative of the European Union noted that most existing optional protocols contained very short preambles that focused on the principles and did not reference Human Rights Council or General Assembly resolutions. She suggested, given this was an additional protocol to an existing treaty, that the preamble remain limited.

185. The Chair-Rapporteur welcomed the discussions that were taking place and reminded the Ad Hoc Committee that this was not the stage for negotiations on the document, but rather the time to identify missing elements or additional input related to the Chairperson's draft document to provide further instructions to give the legal experts.

186. The representative of South Africa noted the need to highlight the severity of the crime and that hate speech and hate crimes impacted not only individuals but the communities and societies to which they belonged. She noted that this need not be incorporated into the preamble, but that it should be a component of the text.

187. The Chair-Rapporteur recalled that the legal experts had also highlighted the impact that hate speech and hate crimes had on the community, and that they may be able to elaborate further on where in the additional protocol that could be incorporated. She suggested that if there were no further comments on the introduction and preamble, that the Committee next consider section number 2 on the relation with the main convention.

188. The representative of Iran recalled a previous intervention where he stated it was imperative that the preamble refer to relevant resolutions that established this Ad Hoc Committee.

189. The Chair-Rapporteur asked the representative of Iran to share the resolutions he had in mind for inclusion in the preamble.

190. The representative of Iran responded that he was referring to United Nations General Assembly resolutions 6/21 and 71/181 and Human Rights Council resolutions 10/30 and 34/36.

191. The representative of the European Union noted that all the resolutions mentioned by the representative of Iran were voted upon and not consensual. She also recalled that there was not reference to Human Rights Council or General Assembly resolutions in the preambles of any other optional protocols, and advised they not be inserted into this additional protocol either if the goal was to have it widely adopted.

192. The Chair-Rapporteur recalled that the Chairperson's draft document outlined a standard structure that should be followed for criminalization conventions, and that the additional protocol should remain structurally similar to other optional protocols. She noted that delegations who wished to have input into the additional protocol were present in the room, and that agreement was not necessary at this stage, but rather it was important to reflect on the ideas put forward by all. She guided the Committee to section number 2 of the document and requested comment on the relation with the main convention.

193. The representative of South Africa suggested that, in addition to article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination, the additional protocol also make explicit reference to article 2(2) of the Convention regarding special measures.

194. The representative of Iran stated that reference to only articles 4(a) and (b) of the International Convention on the Elimination of All Forms of Racial Discrimination was insufficient, and that the additional protocol should reflect other articles in the Convention and broader issues.

195. The Chair-Rapporteur noted no further input on section number 2. The Ad Hoc Committee then proceeded to discuss section number 3 on purposes.

196. The representative of South Africa stated that her comments were preliminary and based on South Africa's domestic hate crimes legislation. She proposed that the Ad Hoc Committee consider a reference to gathering and recording data on hate crimes in the purpose of the additional protocol. She recalled that this issue was raised in Annex 2 of the

Chairperson's draft document and its importance had been raised previously by Special Rapporteurs.

197. The Ad Hoc Committee then discussed section number 4 on the use of terms. There were no requests for the floor on that topic, so she moved on to section number 5 regarding the main conduct to be criminalized.

198. The representative of Iran stated that it was necessary to criminalize all contemporary forms of discrimination and manifestations based on religion and belief and religious hatred, apartheid, foreign occupation, and the extraterritorial effect of social media providers.

199. The Chair-Rapporteur recalled that discussion with the legal experts on this section primarily concerned the importance of defining the main conduct to be criminalized based on the main convention, which was the International Convention on the Elimination of All Forms of Racial Discrimination. She recalled the legal experts' advice to focus primarily on article 4(a) and (b) of the Convention, as those were the existing criminal provisions. She asked the representative of Iran if his intention was to expand the list that was included in the document.

200. The representative of Iran expressed respect for the views of the legal experts but that was only one part of the process and Iran did not accept all points and comments that had been raised by the legal experts. He recalled that article 4(a) and (b) of the International Convention on the Elimination of All Forms of Racial Discrimination did not address issues such as internet providers and social media platforms, thus the Ad Hoc Committee should not only concentrate on the text of the Convention, but on how to address to address gaps that existed within it.

201. The Chair-Rapporteur noted that the legal experts had raised a similar concern when they noted that the language in article 4(a) and (b) of the International Convention on the Elimination of All Forms of Racial Discrimination was outdated and needed to be translated into current terminology using the two clear offences of hate speech and hate crimes. She indicated that the opinion of the legal experts was important, as they were intended to advise her on the text of her document, but noted that the text was amenable to change based on input from the Committee. She recalled the importance of working by consensus in the Ad Hoc Committee, but that no comment would be rejected.

202. The representative of the European Union stated that the definition of the main conduct, that hate crime was more straightforward to address than hate speech. She relayed that this was because hate crimes arose from conduct that was already criminal, such as murder or torture, that had been committed with a racist motive. Consequently, it was easier to define hate crimes. She explained that hate speech had been more complicated to define, but noted that the six-step test in the Rabat Plan of Action had been useful to the European Union for evaluating specific cases. It would be beneficial to use the test in the Rabat Plan of Action as it was an already agreed upon and could be a good starting point.

203. She relayed that the definition used by the European Union was "the following intentional conduct is punishable: (a) publicly inciting to violence or hatred directed against a group of persons or a member of such a group, defined by reference to race, colour, religion, descent or national or ethnic origin; (b) the commission of such an act by public dissemination or distribution of tracts, pictures, or other material; (c) publicly condoning, denying, or grossly trivializing crimes of genocide, crimes against humanity and war crimes as defined in the articles of the statute of the International Criminal Court directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or ethnic origin when the conduct is carried out in a manner likely to incite to violence or hatred against such a group or member of such a group." She noted that aiding and abetting was also considered a criminal offence. She emphasized again the importance of applying the principles of legality, necessity, and proportionality, and precise definition of terminology. In relation to precision, she stated that any formulation of a concept that began with "all forms of" was incompatible with the requirement for precision, as it could lead to censorship rather than a balanced limitation on freedom of expression. She stated that discrimination based on religion or belief, could be included as an aggravating factor, as suggested by the legal experts. She clarified that discrimination based on religion or belief was a problem in many countries

where there was persecution of religious minorities, but that it should be addressed separately from the International Convention on the Elimination of All Forms of Racial Discrimination.

204. The Chair-Rapporteur asked the European Union representative about. The reference for the definition of hate speech provided, to which she cited the European Union directive of 2008.

205. The representative of South Africa proposed that there were two methods by which the Ad Hoc Committee could address this issue: first, to limit, and second to list the categories. She relayed that South African legislation listed the categories, but noted several of them would not likely be agreed to by all delegations. She asked how the Ad Hoc Committee would address this in a manner that accommodated concern regarding related intolerances and the contemporary evolution of racism. She explained that in the South African legislation (which was pending adoption) that a hate crime was defined as "an offence recognized under an law, the commission of which by a person is motivated by that person's prejudice or intolerance towards the victim of the crime in question because of one or more of the following characteristics or perceived characteristics of this victim, or his or her family members, or the victim's association with or support for a group of persons who share the said characteristics: age, albinism, birth, culture, disability, ethnic or social origin…etc.". Regarding hate speech, she relayed that the domestic offence was defined as "any person who intentionally publishes, propagates or advocates anything, or communicates to one or more persons in a manner that could reasonably by construed to demonstrate a clear intention to be harmful or to incite or promote or propagate hatred based on one or more of the following grounds…; any person who intentionally distributes or makes available an electronic communication which that person knows constitutes hate speech as contemplated above through electronic communication systems which is accessible by any member of the public, accessible by or directed at a specific person who can be considered to be a victim of hate speech is guilty of an offence; any person who intentionally in any manner whatsoever displays any material or makes available any material which is capable of being communicated and which that person knows constitutes hate speech as contemplated above which is accessible by, or directed at a specific person who can be considered to be a victim of hate speech is guilty of an offence." She suggested that it may be advisable that in the terms of the additional protocol's preamble it be stated that the provisions did not apply in specific instances, for example any bona fide artistic performance or other form of expression, any academic or scientific inquiry, fair and accurate reporting or commentary in the public interest.

206. The Chair-Rapporteur requested that Committee members refrain from bringing issues that are not consensual or divisive to the work of the Ad Hoc Committee in order ¨that a common understanding of key issues be created, and she thanked the delegations for their strategic engagement.

207. The Chair-Rapporteur then opened the floor to input on section number 7. There were not interventions, so she opened discussion on section number 8. She noted that there had been discussion with the experts about different models—the discriminatory selection model, animus model, and hybrid model.

208. The representative of South Africa stated that different countries would have different approaches in their domestic legislation, and questioned the usefulness of the Ad Hoc Committee being too prescriptive.

209. The Chair-Rapporteur opened the floor to discussion of participation in racist organizations, and where the level of participation would amount to criminal responsibility. As there were no interventions, she reflected that this was an issue to address at a later stage when delegations had received instructions from their respective capitals.

210. **At its 8th meeting, held on 25 May,** the Ad Hoc Committee also considered Item 5, discussing the Chairperson's draft document concerning the possible scope, terms, elements and structure of the "draft additional protocol criminalizing acts of a racist and xenophobic nature" pursuant to resolution A/HRC/51/32.

211. The Chair-Rapporteur recalled that as discussions had been taking place, she had been collecting both general and specific comments from the Ad Hoc Committee on the

Chairperson's draft document, and that the Committee had left off on the topic of participation in racist organizations and definitions of accessory conduct to be criminalized at the end of the 7th meeting.

212. The representative of Cote d'Ivoire made a preliminary general comment on behalf of the African Group. He noted that the members of the African group were reviewing the Chairperson's draft document to provide further substantive input and comments. He wished to place on record that the African Group had taken careful note of the document, appreciated it, and hoped it would serve as a useful framework for further progress and discussions moving forward. He stated that he would share comments from members of the African Group, particularly on substantive issues, once they had been received.

213. The Chair-Rapporteur noting no further comments on section number 6, opened the floor to input on section number 7 of the Chairperson's draft document regarding consistency clauses.

214. The representative of South Africa aligned with the representative of Cote d'Ivoire's statement on behalf of the African Group. She emphasized the importance of the issues raised in the Chairperson's draft document regarding consistency clauses, as they were necessary to situate the additional protocol in relation to other human rights treaties and broader international legal obligations.

215. The Chair-Rapporteur indicated there was no further input on section 7 and opened the floor to comments regarding inter-state obligations in section number 8 of the document.

216. The representative of Pakistan on behalf of the OIC emphasized the extraterritorial obligations of social media platforms, as a company could be based in one state, but its activities could spread globally. He noted that domestic legislation would be challenged to ensure compliance, and that this issue should be taken under consideration.

217. The representative of Iran supported the point raised by Pakistan on behalf of the OIC.

218. The representative of South Africa supported the importance of inter-state obligations as they spoke to the motivation for elaborating an additional protocol.

219. The Chair-Rapporteur saw no further requests for the floor on this issue and opened the discussion to section number 9 on the duty to criminalize.

220. The representative of Pakistan on behalf of the OIC emphasized the importance of this section and noted it was a point of divergence among the Ad Hoc Committee members. He stated that the tools in the additional protocol should be broad enough to include all levels of action, including affirmative actions in addition to criminalization. He stated the need to highlight criminalizing acts of incitement to violence that had an intersectional relationship to racism, such as discrimination based on religion or belief, colour, or ethnicity, and that this should be reflected in the document.

221. The Chair-Rapporteur opened the floor to discussion of section 10 on the duty to establish criminal jurisdiction.

222. The representative of South Africa suggested the Ad Hoc Committee request further input from the legal experts about how other protocols had addressed this issue. She suggested this may be useful, as this issue required a great deal of capacity from the states concerned.

223. The Chair-Rapporteur opened discussion on section number 11 regarding the duty to exercise criminal jurisdiction.

224. The representative of South Africa noted that in certain legal contexts there were specific responsibilities related to a duty of care, and gave the example of police officers or teachers. She asked whether the Ad Hoc Committee would be evaluating this in the additional protocol. She clarified that, as an example, police officers were under a duty to behave a particular way and held to a higher standard of behaviour than civilians, and posited that this may be a question for the legal experts.

225. The representative of Iran stated that this regulation in the additional protocol should not prejudge or impact national jurisdictions and should not breech or violate customary international law.

226. The representative of Pakistan on behalf of the OIC proposed adding two additional factors to paragraph 43 of the Chairperson's draft document: first, intention of the speaker who was engaged in hate speech; and second, the speed at which the information could be disseminated.

227. The Chair-Rapporteur opened discussion on sections number 12 on extradition, number 13 regarding the duty of mutual assistance, and number 14 about cooperation, but there was no input from the Committee. She opened discussion on section number 15 regarding fair trial rights and noted that this section also considered the scope of the additional protocol, the importance that it was consistent with international human rights on permissible and legitimate restrictions related to freedom of expression and opinion, and the importance of commitment to legality and proportionality under criminal law. There were no comments from the Committee, and she opened discussion on section number 16 on victims' rights.

228. The representative of South Africa explained that her national legislation incorporated victim impact statements to ensure that victims played a key role in the proceedings. She suggested the Ad Hoc Committee may consider including a similar provision in the additional protocol.

229. The representative of Iran proposed that the concept of remedy and redress be incorporated into the section on victims' rights.

230. The Chair-Rapporteur opened discussion of section number 17 on state responsibility, but there were no comments, so she opened section number 18 on preventive and promotional measures.

231. The representative of Pakistan on behalf of the OIC requested that the legal experts be asked to provide inputs on criminal liability and civil liability. He noted the necessity for clarity and specificity in the additional protocol, and was uncertain about how to frame issues such as affirmative action, education, and intercultural dialogue in the context of the additional protocol. He requested clarification on the threshold to invoke criminal law, and jurisdiction regarding specific instances of hate speech, hate crime, and xenophobic acts of discrimination based on race, colour, religion, language, and ethnicity.

232. The representative of Iran stated that national and regional particularities should be taken into account regarding processes of rehabilitation and social integration when it came to preventive and promotional measures.

233. The Chair-Rapporteur opened discussion on section number 19 regarding additional state obligations.

234. The representative of South Africa recalled that article 7 of the International Convention on the Elimination of All Forms of Racial Discrimination spoke to issues regarding education and awareness. She agreed that the additional protocol could make concrete the issues raised by the representative of Pakistan on behalf of the OIC regarding clarity of criminal liability and the liability for other forms of actions. She noted that South African legislation required the state to promote awareness of the prohibition against hate crimes and hate speech aimed at prevention and combating those offences, and proposed that a similar consideration could be incorporated into the additional protocol. She explained that the legislation required the state to conduct education and information campaigns, ensure that all public officials that were involved in the investigation of such crimes were aware of those issues, and provide assistance to anyone wishing to lodge a complaint.

235. The Chair-Rapporteur opened discussion on section number 20 about institutional arrangements, and noted that at the next meeting of the Ad Hoc Committee Mr. Michal Balcerzak would be presenting on this topic. Noting no comments on that section, she opened discussion on section number 21 regarding empowerment of existing bodies, which she noted would also be addressed in Mr. Balcerzak's presentation. As there were no comments, she opened discussion of section number 22 on dispute settlement, where there was also no input

from the Committee. She opened discussion on section number 23 regarding final clauses and noted that this section highlighted terms requiring further definition from the Ad Hoc Committee including race, racism, religion or belief, xenophobia, hate speech, hate crime, participation, and racial profiling. She recalled the experts' advice that every term that was to be a criminal provision of the additional protocol required precise definition. She noted that further guidance from the Committee would be of assistance to the legal experts in their work moving forward.

236. The representative of Iran noted that the International Convention on the Elimination of All Forms of Racial Discrimination used the word religion twice: once in the preamble and again in article 5. He also noted the presence of religion in the 1981 Declaration on the Elimination of All Forms of Intolerance and of Discrimination based on Religion or Belief, article 20 of the International Covenant on Civil and Political Rights. He asked for clarification regarding why the issue of religion was put in a secondary category in the discussions of the Ad Hoc Committee but issues such as freedom of expression were frequently discussed. He restated Iran's belief that discrimination based on religion or belief was rooted in xenophobia. He requested clarification from the Chair-Rapporteur about why discrimination based on religion or belief was a secondary priority in the Ad Hoc Committee compared to criminalization on other grounds of discrimination.

237. The Chair-Rapporteur requested further clarification on the question from the representative of Iran, who clarified that he wished to understand the rationale of the experts for placing discrimination based on religion or belief in a different category than other grounds of discrimination.

238. The Chair-Rapporteur shared that she understood from the exchanges with the legal experts that the legal experts recognized that discrimination based on religion or belief did occur and they did not dispute that, nor had any of the delegations present at the Ad Hoc Committee. She explained that the experts had difficulty incorporating discrimination based on religion or belief as a main element for criminalization, as it was not listed as a ground of discrimination in the International Convention on the Elimination of All Forms of Racial Discrimination, and an additional protocol was meant to reflect the content of the main Convention from which it was built. She recalled that the experts recognized that there could be intersectional discrimination that included religion or belief, and they left open the possibility that the Ad Hoc Committee could address discrimination based on religion or belief through that lens. Regarding the context of 1965, the Chair-Rapporteur theorized that perhaps the issue of discrimination based on religion or belief was not as prominent at the time, but that she understood from the inputs and exchanges with the legal experts was that there had been plans for a separate convention on discrimination based on religion or belief that was never adopted. She suggested that religion or belief was not reflected as a ground of discrimination in the International Convention on the Elimination of All Forms of Racial Discrimination because the intention had been to have a parallel convention that addressed discrimination based on religion or belief. She noted that there was no intention to downplay that religion or belief could be a ground of discrimination, but that there was some difficulty deriving it from this Convention and incorporating into an additional protocol as it was not a ground of discrimination that was listed in the main Convention.

239. The representative of Iran reiterated that the word religion was used twice in the International Convention on the Elimination of All Forms of Racial Discrimination in the preamble and in article 5.

240. The Chair-Rapporteur acknowledged that the word religion appeared, clarifying that it was not listed as one of the grounds of discrimination in the International Convention on All Forms of Racial Discrimination.

241. **At its 10th meeting, held on 26 May,** the Ad Hoc Committee recommenced discussions of the Chairperson's draft document, in particular a consideration on the definitions of the terms racism, xenophobia and racial profiling in the context of the additional protocol. The Chair-Rapporteur opened the floor to interventions by the Committee on the term racism.

242. The representative of South Africa stated that several documents made inferences to racism, including the Durban Declaration and Programme of action and Human Rights

Council resolution 51/32. She noted that the notions of systemic, structural, and institutional racism were largely absent from existing definitions of racial discrimination and suggested the Ad Hoc Committee incorporate these terms into its definition of racism. She defined systemic racism as a system in which patterns, policies, and processes and cultural representation worked to perpetuate inequalities and patterns of discrimination against one or more racial or ethnic group. Structural racism was defined as the set of norms, rules, routines, patterns, attitudes, and standards of behaviour, both de jure and de facto, that gave rise to situations of inferiority and exclusion against a group of persons in a general sense, with these traits perpetuated over time and even generations. Institutional racism was defined as the policies and practices in institutions that had the effect of producing outcomes that consciously disadvantaged or favoured a particular racial group, and could also relate to pervasive beliefs and accepted ways of doing things within an institution.

243. The representative of Pakistan on behalf of the OIC drew the Ad Hoc Committee's attention to reports of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance which specifically referred to systemic and structural racism. He noted that the Special Rapporteur had highlighted several factors at play, including the colonial past and environmental issues. He stated that racism was based in hate, discrimination, and violence towards others and that racial profiling was a manifestation of racism. He explained that racial profiling could not be separated from racism because it was the stigmatization and targeting of individuals based on colour, profession, national or ethnic identity, religion or belief and several other factors.

244. The representative of South Africa shared that the 1978 UNESCO Declaration on Race and Racial Prejudice built upon the terms in the International Convention on the Elimination of All Forms of Racial Discrimination and may be of use to the Ad Hoc Committee in its work.

245. The Chair-Rapporteur requested input from delegations on their understandings and proposed definitions of the term xenophobia.

246. The representative of South Africa noted that the Durban Declaration and Programme of Action would be a relevant document to consider, not only as it related to xenophobia, but also to other issues the Committee was considering, such as discrimination based on religion or belief. She proposed using the Durban Declaration and Programme of Action as a starting point, and also evaluating the relationship between xenophobia as a fear or hatred of foreigners or anything perceived as foreign or different. She also suggested including issues regarding related intolerance and stated that those were a fundamental part of racism, racial discrimination, and xenophobia that could not be separated.

247. The Chair-Rapporteur requested comments from the Ad Hoc Committee on the definition of racial profiling.

248. The representative of South Africa noted that articles 2 and 5 of the International Convention on the Elimination of All Forms of Racial Discrimination read together could be interpreted to prohibit an action undertaken for reasons of security, public safety, and law enforcement that relied on stereotypes about race, ethnicity, national origin, or religion or belief rather than reasonable suspicion to identify individuals who may pose a threat to society. She recalled that article 5 of the Convention discussed guarantees, without distinction, of rights such as security of the person, and protection by the state against violence or bodily harm, whether inflicted by government officials, individuals, groups, or institutions. She stated that the definition of racial profiling was already implicit in this article, and that it spoke to the issue of racial profiling within the context of race and other factors, possibly religion or belief. She suggested that the Ad Hoc Committee may propose examples of racial profiling, such as airport immigration checks, to reinforce the definition of racial profiling.

249. The Chair-Rapporteur noted that the discussion of articles 2 and 5 of the International Convention on the Elimination of All Forms of Racial Discrimination recalled the discussion with Mr. Balcerzak during the Ad Hoc Committee's 9th meeting regarding the Committee on the Elimination of Racial Discrimination's approach of progressive interpretation of the Convention.

250. The representative of Pakistan on behalf of the OIC shared information from the April 2015 report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance presented to the Human Rights Council that provided a detailed explanation of the act of racial profiling. In it, racial and ethnic profiling was defined as 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 check, and investigation or for determining whether an individual was engaged in criminal activity; that it had been a persistent and pervasive issue in law enforcement and issues arising in connection with policies on national security; that it exacerbated discrimination already suffered due to ethnic or religious minority status, and remained a serious challenge to the realization of rights among various racial, religious, and ethnic groups globally. He recalled that, in 2021, the Special Rapporteur presented a report that discussed the use of artificial intelligence and other techniques utilized in racial profiling.

251. The Chair-Rapporteur recalled the Committee on the Elimination of Racial Discrimination's General Recommendation Number 36 regarding racial profiling. She noted that in that General Recommendation, racial profiling was defined as the practice of law enforcement relying to any degree on race, colour, descent, or national or ethnic origin as the basis for subjecting persons to investigatory activities or to determining whether an individual was engaged in crimination activity. The Committee on the Elimination of Racial Discrimination also recognized that racial profiling could be conscious or unconscious; individual or institutional or structural. As there were no further reflections on racial profiling, the Chair-Rapporteur opened the discussion to comments regarding other terms requiring additional thought or definition by the Ad Hoc Committee, such as hate crime, participation, and religion or belief.

252. The representative of South Africa recalled that much of the Ad Hoc Committee's discussions during its 7th and 8th meetings related to hate speech and hate crimes.

253. The representative of Pakistan on behalf of the OIC agreed with the representative of South Africa, and noted that it would be difficult to provide an exhaustive list of elements that could be included in hate speech and hate crimes, as would providing a legal definition of the term "participation." He stated that the Ad Hoc Committee may have agreed with the objective of the legal experts' question regarding the term participation, but that the original negotiators of the International Convention on the Elimination of All Forms of Racial Discrimination would have considered the meaning of participation. He noted that there would be a threshold and that participation ranged from actively participating, to extending moral support, to collecting funding, among other levels, but that providing a precise definition of participation would be very difficult.

254. The Chair-Rapporteur explained that the Ad Hoc Committee's consideration of participation was not only with regard to a definition, but also considering what it meant in regard to other rights, such as the right of association.

255. The representative of Pakistan on behalf of the OIC suggested that the issue of discrimination based on religion or belief could be addressed within the issue of structural and systemic racism and discrimination. He stated that the manifestations of discrimination based on religion or belief were visible in numerous forms that included personal attacks, hateful rhetoric, incitement to violence, racial profiling, negative stereotyping, denigration of revered personalities, and desecration of holy books. He noted that these acts were often intentional, and some were undertaken in the public domain to incite violence and humiliate others. He proposed that the elements he had listed could be considered within the Ad Hoc Committee's discussions in relation to all religions or beliefs.

256. The representative of the European Union recalled that the Ad Hoc Committee had discussed many of these terms during its 12th session. She stated in regard to discussion of discrimination based on religion or belief that it was difficult to discuss that terminology as it recalled old discussions regarding defamation of religions, and it had been difficult at the Human Rights Council to define ways in which international law protected symbols, buildings, and other items related to established religions. She noted that the right to freedom of religion and belief was interpreted differently among Member States and that the European Union considered one element of that freedom to be the right to not hold a belief or to change

beliefs. She stated that work carried out to define this terminology needed to be carefully considered because the existing international instruments that guaranteed freedom of religion or belief did not define those elements. She recalled that the Human Rights Committee's General Comment on article 18 of the International Covenant on Civil and Political Rights stated that the terms religion and belief were to be broadly construed and that the article protected theistic, non-theistic, and atheistic beliefs, as well as the right not to profess any religion or belief. She stated that it was also important to the European Union that any definition used would align with the European Court of Human Rights and regional mechanisms and documents.

257. The Chair-Rapporteur asked if the representative of the European Union could provide further information regarding these documents and definitions. The representative of the European Union responded that the main document was the Charter of Fundamental Rights of the European Union, which was the human rights charter that was binding for all European Union member states, article 10 of which addressed the right to freedom of thought, conscience and religion. She explained that there were European Union guidelines on how to promote and protect the right to freedom of religion or belief, and there were individual directives regarding the topic. She noted that European Union legislation always included definitions and that most of the definitions had been interpreted by courts as well to provide more specific meanings dependent upon context.

258. The representative of Pakistan on behalf of the OIC noted that in the context of the additional protocol to the International Convention on the Elimination of All Forms of Racial Discrimination the task of the Ad Hoc Committee was not to define the rights, as the International Covenant on Civil and Political Rights had already done so. He recalled that the right to freedom of religion or belief was a fundamental human right, but stated that there was no human right to insult other individuals based on their religion or belief. He noted that Human Rights Council resolution 16/18 affirmed that there was also a right not to have a religion. He stated that there needed to be differentiation between freedom of religion or belief and discrimination based on religion or belief. He explained that the objective of the additional protocol to the International Convention on the Elimination of All Forms of Racial Discrimination was not to redefine the right to freedom of religion or belief and the multiple manifestations of exercising that right, but rather to evaluate discrimination and violence against individuals based on religion or belief.

259. The representative of the European Union suggested that the Ad Hoc Committee needed to decide how it would approach the additional protocol. She recalled that it could begin with criminalization of hate speech and hate crime based on race, which was the core principle of the International Convention on the Elimination of All Forms of Racial Discrimination and build on aggravating elements that could broaden the scope of hate speech and hate crime. Another option that she recalled from discussions at the 9th meeting was that the Committee could address this through the principle of intersectionality of other grounds of discrimination with racist hate speech or racially motivated hate crime, which could include grounds such as religion or belief, ethnicity, and gender. In that case, she explained that the legislation would begin with racial discrimination, and the intersectional elements would be added on.

260. The Chair-Rapporteur asked how racism was defined by the European Union and if there was any legislation or documentation defining racism, xenophobia or racial profiling.

261. The representative of the European Union replied that the European Union had definitions of the term racial discrimination and that the 2008 Framework Decision specifically addressed offences concerning racism and xenophobia in its article 1, and noted that the Council of Europe had a significant body of material on these issues as well.

262. The Chair-Rapporteur noted that there was the High Commissioner's report A/HRC/47/53, paragraph 15, contained a definition of systemic racism which could be useful.

263. The representative of the European Union noted that another soft law document that may be of consulted by the legal experts was the online glossary of the European Commission against racism and intolerance of the Council of Europe contained entries on race, racialization, racial profiling, racism, and racist offences.

264. The representative of Brazil drew the Ad Hoc Committee's attention to the Inter-American Convention on Racial Discrimination, chapter 1, article 1 which included definitions of racial discrimination, multiple discrimination, and aggravated racism, as well as intolerance. She relayed that Brazil's national legislation did not always include strong definitions, but listed some elements such as acts of impediment, embarrassment, humiliation, stereotype, and stigmatization. She emphasized the importance that the Ad Hoc Committee be focused on acts of discrimination and the key elements required for defining them.

265. At its 11th meeting, held on 30 May, the legal experts, Beatrice Bonafe, Professor of International Law, Sapienza University of Rome, Italy, Joanna Botha, Head of the Department of Public Law, Faculty of Law, Nelson Mandela University, South Africa, and Li-Ann Thio, Provost Chair Professor, Faculty of Law, National University of Singapore, Singapore, (online) had a further engagement online with the Ad Hoc Committee about the document.

266. Ms. Thio noted that accountability of social media and internet providers was important to the additional protocol, as well extraterritorial obligations prompted by those platforms. She recalled that extraterritorial obligations were one of the primary reasons to elaborate an additional protocol to address the increased threat caused by online racist speech. She explained that one of the difficulties with clauses on extraterritorial obligations related to enforcement and recalled that other criminal treaties included extradite or prosecute clauses. She suggested that another approach could be mutual information-sharing and facilitating investigations. She informed the Ad Hoc Committee that there would be practical difficulties with any extraterritorial obligations clauses, as they were difficult to enforce, but stressed their important symbolic function to illustrate the desires of the international community for a society based on harmonious racial pluralism. She stated that, because social media and internet providers were private parties, it would be difficult to enforce obligations directly related to them, as international law rarely imposed direct obligations on private parties. She suggested that a more viable approach might be to impose obligations on states to enact legislative and soft law measures that directly addressed social media companies and internet providers, for example, substantial fines if the companies did not comply with orders to rapidly remove comments containing hate speech. She stated that there were other measures the Committee could contemplate, such as statutory duties of care that imposed duties directly upon social media companies and internet providers to do things such as ensuring the safety of users and addressing online harm. She explained that some jurisdictions in Asia utilized a model contract clause between private persons using private social media platforms whereby social media companies committed to monitoring online content and could request removal of hateful speech, and failure on behalf of the private person to do so resulted in suspension of user access or outright cancellation of the contract for use of the platform. She emphasized the importance of enacting legislative and soft law measures to proactively engage with social media companies.

267. Ms. Thio emphasized the need for a multifaceted approach that included criminal law as well as civil law measures. She recalled that enforcement responsibility for criminal law measures rested on the state to initiate prosecution, whereas civil law placed the onus of initiation on the individual or representative of the targeted group to file a complaint. She noted that individuals may have access to justice issues with a civil law approach, as they may not have the financial resources to file a suit. To alleviate this burden, she suggested that states had a duty to provide and facilitate access to legal advice. She emphasized the need for a range of remedies, and noted that criminal law and civil law approaches provided a variety of options. She stated that hate speech and hate crimes damaged the relationships within communities, consequently it was important that the law not only convict those guilty of the most serious offences but, to the extent possible, provide mechanisms that promoted reconciliation and healing of the damaged relationships. She suggested potential remedies such as injunction for those at serious risk of committing violent acts, and compensation for victims. She stated that there should be clear guidelines in the additional protocol regarding the type of acts that invoked different legal approaches, from those that would invoke criminal sanction to those that would be best addressed through educational initiatives or reconciliatory efforts.

268. Ms. Bonafe spoke about possible ways to address the preamble to the additional protocol. She suggested two approaches. The first was to outline an exhaustive list of legal and soft law standards that the Ad Hoc Committee deemed important to the content of the additional protocol. The second was to make general reference to human rights instruments and recommendations of human rights monitoring bodies. Regarding the rationale for the additional protocol, she emphasized that the Committee consider a comprehensive approach that included criminal consequences in addition to broader legal and preventive measures.

269. Ms. Bonafe discussed victims' rights, and noted that a focus on the victims reflected the need for a holistic approach. She suggested that remedies for victims could include ensuring access to justice with the possibility to obtain a judicial decision and damages or other non-monetary forms of redress, and collective reparations at the societal or community level.

270. Ms. Bonafe stated that the provisions in criminal conventions tended to be very technical and to establish jurisdiction they listed situations where the state was obligated to prosecute based on territorial or other criteria. She explained that those provisions typically outlined prosecutorial discretion and connections between different legal orders. She noted that those provisions were not intended to reflect the elements of the crime, but rather established jurisdiction over the offences and the order in which states would have opportunities to prosecute the crimes.

271. Ms. Bonafe inquired whether the Committee's intention was to broaden the definition of crimes in the additional protocol to include grounds of discrimination other than racial discrimination, as she recalled references to religion, apartheid, and foreign occupation in the discussions held by the Ad Hoc Committee, and whether this would be considered in the work moving forward.

272. The Chair-Rapporteur clarified that the references were given by different delegations during discussions, but that there was no specific mandate to expand the work of the legal experts at that time.

273. Ms. Botha discussed the relationship between the additional protocol and the International Convention on the Elimination of All Forms of Racial Discrimination. She explained that the additional protocol would not replace the Convention, but would be read in conjunction with the Convention. She noted that the Convention already contained numerous articles and various preventive measures that States Parties were required to implement in their domestic systems to ensure that the Convention's objectives were met. She stated that there was no reason those could not be reiterated in the additional protocol to provide further clarity.

274. Regarding social media and internet providers, Ms. Botha drew the Ad Hoc Committee's attention to Human Rights Council resolution 17/4 on the Guiding Principles on Business and Human Rights, which contained 31 principles that clarified governments' and duties and obligations in the context of business operations. She noted that the European Union Code of conduct on countering illegal hate speech online was widely regarded as a document that illustrated best practices, but not all states possessed the same implementation and monitoring capacities as European Union member states, and consequently the same policies may not be viable to implement globally. Ms. Botha noted that much online hate speech was generated by bots and artificial intelligence, and explained that there was ongoing debate about whether those could be considered legal persons. She stated that this could create prosecutorial complications.

275. Ms. Botha recalled that experts inputs regarding the use of criminal law to regulate instances of inter-group hate based on the International Convention on the Elimination of All Forms of Racial Discrimination, and that their view that those were limited to the grounds expressed in the Convention. She reiterated that the additional protocol needed to be read in the context of the Convention and all other existing international human rights and criminal legal instruments. She noted that the Chairperson's draft document already considered existing soft law addressing hate speech, hate crimes, and existing duties of states concerning the intersection between criminal law, human rights law, and positive measures.

276. Ms. Botha noted, in relation to the specific mention of freedom of expression in the preamble, that while the Convention was aimed at protecting the rights to equality and human dignity, it did limit the right to freedom of expression in accordance with international human rights standards, because it called on States Parties to regulate instances of hate speech. The specific mention of freedom of expression did not place it above any other rights, but rather acknowledged that the Convention limited that right in accordance with the legality, necessity, and proportionality principles of international human rights law.

277. The representative of the European Union recalled that the legal experts had indicated that the International Convention on the Elimination of All Forms of Racial Discrimination contained three primary offences: hate speech, hate crime, and participation in racist organizations. She recounted that hate crimes were the most straightforward to address, that there was ongoing discussion regarding hate speech, but that the issue of participation in racist organizations was very challenging to address. She questioned whether the Ad Hoc Committee needed to consider the issue of participation at this stage, or whether it could first address hate crimes and hate speech.

278. The Chair-Rapporteur requested further input from other delegations about the question posed by the European Union.

279. The representative of Iran recalled that the Ad Hoc Committee was established to elaborate elements for complementary standards to the International Convention on the Elimination of All Forms of Racial Discrimination, which meant that there were legal, procedural, and conceptual gaps in the Convention. He stated that it was imperative to cover all contemporary forms of discrimination in the additional protocol, including apartheid, foreign occupation, and discrimination based on religion or belief, racial profiling, and xenophobia, not only hate speech and hate crimes.

280. The representative of Pakistan on behalf of the OIC recalled that the Human Rights Council Guiding Principles on Business and Human Rights did not cover extraterritorial obligations of business entities. He suggested that while these principles would be useful for the Ad Hoc Committee to evaluate in their work, consideration should also be made about whether there were gaps that could be filled in those Guiding Principles. He suggested that future legal work should identify those gaps and propose solutions to them. He also highlighted that the International Convention on the Elimination of All Forms of Racial Discrimination discussed multiple manifestations of racial discrimination, and stated that intersectional discrimination was an important consideration on issues such as xenophobia, ethnic and national origin, and religion or belief. He asked the legal experts what the threshold for those intersections would be so that they could be incorporated into the additional protocol.

281. Ms. Botha responded to the question about religion or belief being regarded as an intersectional ground or as a separate ground and the threshold for criminalization. She noted that the threshold would be the same as it was for racial discrimination, because the elements of the crime would be the same, but contextual factors would include the historical, sociological, political, and religious position at the time when the speech was uttered or published or committed.

282. Concerning the United Nations guiding principles on business and human rights, she noted that States Parties were obliged to ensure that their legal systems and policy frameworks correctly addressed the ways in which non-States Parties, businesses, juristic persons, and other persons interacted with other people and infringed their rights. She noted that the additional protocol would have to align with what was already in place at the international level.

283. Ms. Bonafe explained that the issue of participation in a racist organization was a difficult legal notion at the international level. She recalled that it was first introduced in the charter of the Nuremburg Tribunal, and that it was meant as a legal tool that could facilitate punishment for collective crimes. She explained that the Nuremburg Tribunal intended to adopt a declaration of criminality, convict Nazi organizations such as the SS and SA, after which the mere participation in those organizations entailed criminal responsibility of the members. She noted that this tool was not successful at the Nuremburg Tribunal because when criminal justices investigated and established individual liability, they could not only

rely on a declaration of criminality of the organization, as criminal law required establishment of the personal contribution of the individual and intention to commit a crime. She stated that convicting an individual based on membership to an organization went against all the basic principles of criminal law. She explained that the Nuremburg Tribunal declared some organizations criminal, but that national courts refused to attach criminal responsibility based only on membership. She noted that even the Nuremburg Tribunal ultimately required at least membership in the organization and intention, or mens rea, to commit a crime to establish criminal liability. She explained that if the Ad Hoc Committee decided to criminalize participation in a racist organization, what amounted to participation and the required the intention to perpetrate a crime had to be very precisely defined. She stated that it would be very important that the Committee employed caution both in defining participation and the threshold required for intention.

284. Ms. Bonafe agreed that the definition of the crime would remain the same even if the grounds of discrimination were extended. She expressed two possibilities: the first, that the complementary standard could include several different discriminatory offences; the second would begin with racial discrimination as articulated in article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination and then provide for aggravating factors when there is an overlap with other grounds of discrimination, and this could provide for a higher penalty or more serious sentence.

285. Regarding the corporate social responsibility and the obligations held by corporations, Ms. Bonafe noted that even where obligations are outlined at the international level, the legislation must be elaborated domestically. She explained that the most basic notion of extraterritoriality was sovereignty, and that one state could adopt measures, but if a company was registered in a different state those measures would not apply to the company because it would be bound only by measures adopted by the state in which it was registered. She stated that the only method to overcome state sovereignty was an international mechanism that would supervise the activities of states that would have to implement the obligations of the protocol and ensure a dialogue or intervene when there was a need for cooperation and intervention by actors under different jurisdictions.

286. Ms. Thio highlighted the need to distinguish between prescriptive jurisdiction and enforcement jurisdiction. Under prescriptive jurisdiction, she noted that any state could propose to regulate acts occurring in other countries, but it was nearly impossible to enforce. She recalled that current international practice when dealing with serious offences was the principle of prosecution or extradition whereby a state would prosecute the crime themselves or extradite the accused to another country that was willing to prosecute. She explained that if the harm occurred in a different state than the company was registered in, that state would already have jurisdiction because the harm occurred on its territory (territorial jurisdiction), and the state where the company was registered could have nationality-based jurisdiction.

287. Regarding the expansion of discriminatory grounds, Ms. Thio indicated that the additional protocol had to be based in the provisions of the International Convention on the Elimination of All Forms of Racial Discrimination, and consequently there needed to be a connection to racial discrimination. She explained that part of what determined the necessary threshold would be the definition of harm, and that harm could be defined using the objective conception, which considered how speech would generally affect individuals, or the subjective conception that focused on the impact on the victim, targeted individual, or targeted group. She noted that the objective conception of harm relied upon consideration of the reasonable person and the reasonable victim.

288. Ms. Thio emphasized caution regarding the inclusion insult-based crimes in the content of the crimes. She stated that physical violence was already encapsulated in the crimes, but that it was challenging to properly define crimes about hurt or wounded feelings, as there was a strong likelihood that it would be disproportionate when balanced with freedom of expression.

289. The representative of Iran reiterated that the Ad Hoc Committee did not have inputs and representations of every legal system, and suggested that expertise and representation of the legal systems of the states belonging to the Organization of Islamic Cooperation would be useful.

290. The Chair-Rapporteur explained efforts were made to ensure the perspectives of all regions and legal backgrounds, but that it was also important for the Member States to come to consensus about how they desired to undertake the work of the Committee. She noted that the membership of the Committee represented the different regions and legal backgrounds and that it was important that they undertake elaboration of the additional protocol together so that it would reflect an international instrument that could be implemented by a large group of states.

291. The representative of Iran suggested that the term "authors" of the criminal conduct be replaced by "perpetrators" and that it refer to accomplices as well as perpetrators. Regarding extradition in section number 12, he suggested adding "the obligation to persecute or extradite".

292. The representative of the European Union stated that it was her understanding that the Chairperson's draft document was not a text that the Ad Hoc Committee was negotiating or endorsing as states, but rather a discussion document for the session. She sought clarification as there were elements the European Union would comment on if it was being negotiated or endorsed. She noted another document that may be of interest to the Ad Hoc Committee, which was a Council of Europe recommendation on combating hate speech from 2022 discussing legal frameworks, including criminal, civil, and administrative law and non-legal measures, and a chapter with recommendations addressed to key actors such as public officials, political parties, internet intermediaries, media, civil society organizations. She also explained that there were chapters on awareness-raising, education, training, hate speech, support for victims, and monitoring and analysis. She recalled that discrimination based on race and discrimination based on religion or belief ought to be addressed through separate conventions to give both the attention they deserved.

293. The Chair-Rapporteur clarified that the Chairperson's draft document was a first draft intended to promote discussion of the structure and elements for the additional protocol and that it was not a document to be adopted. She stated it reflected areas requiring further input from the Ad Hoc Committee or work to be undertaken by the legal experts, including on the structure, elements, scope, and terms. She explained that she would inform the Committee when it was time to negotiate a document and then the document would capture all the linguistic and substantive changes suggested. She recalled that the Committee required a common understanding of the issues and elements before it could proceed with negotiation.

294. Ms. Botha noted on the issue of grounds of discrimination that the International Convention on the Elimination of All Forms of discrimination included racial discrimination, which was based on race, colour, descent, national or ethnic origin, and that from her perspective it would be possible to extend that definition to include xenophobia where xenophobia was defined as fear of a person from another state or area. She stated that it was difficult to read the International Convention on the Elimination of All Forms of Discrimination in a manner that could include religion or belief as an independent ground of discrimination, given the history where there was an intention to elaborate a separate convention addressing discrimination based on religion or belief. She suggested that discrimination based on religion or belief could be included as an intersectional addition to the existing harm caused by racial discrimination if there were also religious aspects of that discrimination.

295. Ms. Botha discussed the intersection between criminal law and civil law, and explained that the latter included human rights law, which required states to respect, protect, and promote the human rights of all people. This included taking promotional measures, which she indicated could include addressing social media platforms, and could be accomplished in the additional protocol.

296. Ms. Botha stated that criminalizing mere participation was a significant problem due to the difficulty of precisely defining what was criminalized. She noted that obligations could be placed on States Parties to address racist organizations through other measures that were less invasive.

297. Ms. Thio emphasized that it would be very helpful to the process if the Ad Hoc Committee provided instruction about what further legal expertise and information was required.

298. Ms. Bonafe explained that criminal law identified a "good" to be protected and that sometimes that "good", such as physical integrity, personal life, or the right to privacy, could be adequately protected with administrative law, civil law, or other measures, with criminal law available as a last resort. This was why the additional protocol could incorporate measures other than criminal law as well. She stated that it was important to provide clarity on the interest or "good" to be protected and the ways in which it could be protected, and the different remedies that certain conduct entailed. She noted that the additional protocol needed to be consistent with the International Convention on the Elimination of All Forms of Racial Discrimination and other existing instruments, but there was room for a degree of latitude where the Ad Hoc Committee could exercise its discretion.

299. Ms. Bonafe responded regarding the proposal that the word authors be replaced by perpetrators. She noted that perpetrators was a more technical word, that it was a broad notion that could include accomplices, and that there was no legal issue with substituting those terms. Regarding the proposal to include the obligation to prosecute or extradite, she clarified that this was a stringent obligation because if there was no prosecution the individual would have to be extradited to a country willing to do so. She explained that other possibilities included obligations to prosecute or obligations to extradite, but that the obligation to prosecute or extradite was common in criminal conventions.

300. At its **12th meeting, held on 30 May,** the legal experts: Rhonda Bain, former Supreme Court Justice and Associate Tutor at Eugene Dupuch Law School, Bahamas, Joanna Botha, Head of the Department of Public Law, Faculty of Law, Nelson Mandela University, South Africa, and Mark Drumbl, Class of 1975 Alumni Professor of Law and Director of the Transnational Law Institute, Washington and Lee University, United States of America, engaged with the Ad Hoc Committee.

301. Mr. Drumbl suggested that in elaborating definitions of hate speech and hate crimes, elements from the Rabat Plan of Action could be useful. He also recommended using the areas of preventative, early warning, and educational measures to develop definitions of xenophobia and possibilities on intersectional approaches to discrimination based on religion or belief. He recalled that those issues would be simpler to define under preventive and promotional measures, as they would not require the level of precision necessary for the elaboration of criminal law measures. He reiterated the importance of acknowledging national and regional particularities with respect to rehabilitation and social reintegration, and noted that alternate fora of restoration and rehabilitation could be customized to suit local contexts in less severe cases.

302. The Chair-Rapporteur recalled from the presentations and exchanges during the session areas that required further thinking and consideration, including the scope of criminal measures compared to civil or administrative law measures, and the possibility of new grounds of discrimination or a new focus on dealing with criminal conduct as outlined in article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination. She opened discussion of those issues.

303. The representative of Iran asked how to make a linkage between the enhancement of international cooperation or the role of relevant international agencies with the elements, scope, definition or structure of the additional protocol to the ICERD.

304. The Chair-Rapporteur raised several issues requiring further input from the Ad Hoc Committee with guidance from the legal experts, including: the possibility of broadening the scope of crimes; what threshold or factors could be considered regarding the inclusion of xenophobia and discrimination based on religion or belief; how criminal and civil law could intersect in the context of the additional protocol; how the Committee might address the possible criminal offence of participation in racist organizations; what specific non-criminal remedies could be considered in the additional protocol, the sharing of best practices by Committee members; the issue of extraterritoriality of internet providers and social media platforms, how social corporate responsibility could be taken into account; how to address victims' rights; and codification of the Committee on the Elimination of Racial Discrimination's early warning and urgent action mechanism.

305. The representative of South Africa noted that the issues raised by the Chair-Rapporteur were important, and raised additional issues to consider including language on

racism and systemic racism along with other terminology that was not present in the International Convention of the Elimination of All Forms of Racial Discrimination. He recommended that the Ad Hoc Committee incorporate documents that addressed those issues, such as the Durban Declaration and Programme of Action, in its drafting of the additional protocol. He requested that the legal experts evaluate important terminologies and definitions that should have been included in the International Convention on the Elimination of All Forms of Racial Discrimination and that have subsequently been elaborated upon in more recent documents such as the Durban Declaration and Programme of Action.

306. The representative of Iran suggested including elements related to colonialism and neocolonialism that were raised in the Durban Declaration and Programme of Action, and that elements of the Vienna Declaration and Programme of Action be reflected in the additional protocol.

307. Mr. Drumbl noted, regarding the issues of participation, modes of liability, and the nexus between the perpetrator, collectivity, and harm, that this could be further clarified by experts, and that a clearer list of modes of liability and ways in which people could be connected to the crime could be prepared. In addition, experts could suggest some possible definitions of participation.

308. Regarding the comment from the representative of Iran, a consideration of what other United Nations treaty bodies were undertaking could come into conversation with the Committee on the Elimination of Racial Discrimination regarding criminalization of hate speech and hate crimes, and he also suggested linkages with the Committee on the Rights of the Child.

309. Mr. Drumbl noted that it would be difficult to establish a criminal definition of xenophobia in relation to the International Convention on the Elimination of All Forms of Discrimination, but that it was possible to define the term for the purposes of preventive frameworks. He also suggested that the experts could contemplate intersectionality with religion or belief as an aggravating factor in evaluating the gravity of hate speech.

310. Mr. Drumbl recalled that it would be useful to hear examples of cultural and local particularities from the Committee members in terms of dispute resolution methods. He noted that it would be interesting for the additional protocol to reference concepts such as mediation, conciliation, and truth and reconciliation commissions as dispute settlement mechanisms, in addition to criminalization.

311. Mr. Drumbl stated that a report that evaluated all recommendations, communications, output, and soft law documents of the Committee on the Elimination of Racial Discrimination that references xenophobia or discrimination based on religion or belief would be very beneficial in order to support the further development of definitions of xenophobia and discrimination based on religion or belief.

312. Ms. Botha recalled that the term “participation in racist organizations” in relation to criminalization was problematic, but that there may be means of incorporating that concept under civil law, human rights remedies, or preventive measures. She also noted that, in relation to criminal measures and human rights measures, it was very important to take into account discrimination or hate speech that occurred on intersectional grounds. She explained that racial discrimination would act as the gateway for consideration of multiple forms of discrimination, and that the intersecting forms of discrimination were important.

313. Ms. Botha stated ed that race and xenophobia overlapped, but that there were also distinctions between race and xenophobia, and suggested that further thought was required about the connections between race and xenophobia, because in her view, xenophobia was not dependent on racial difference. She recalled that article 1(2) of the International Convention on the Elimination of All Forms of Racial Discrimination stated 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”. Consequently, she stated, a thorough consideration of the definition of xenophobia and clarification about what the Convention meant in its non-applicability in those contexts. […] She suggested that it be interpreted in such a way that could capture within its scope real instances of xenophobia

under the ground of racial discrimination and align it with the exclusion in article 1(2), as it was not possible to ignore that article 1(2) was part of the Convention.

314. The representative of Iran asked, regarding national and regional particularities, cultural diversity, and different legal systems, if using restorative measures such as mediation and conciliation would be proportionate with crimes such as continued instances of burning holy books. He also asked if these types of measures could guarantee those types of crimes were not committed in the future. He further questioned whether these measures could be implemented in disputes regarding foreign occupation and settlements.

315. Mr. Drumbl responded that in his view it would be an excellent idea for the additional protocol to grant the Committee on the Elimination of Racial Discrimination powers of early intervention in situations where there were trigger warnings emerging, and that this proposal fit well with suggestions that the additional protocol address the precursor stage to more serious crimes such as genocide and crimes against humanity. He explained that powers of early warning could have a broader scope of coverage than penal sanction, and would thus be able to incorporate issues such as xenophobia and violence or discrimination based on religion or belief with greater ease.

316. Mr. Drumbl replied to the representative of Iran that states may pass domestic criminal laws in accordance with its national values, so long as those laws remained respectful of international human rights standards. However, adding such content to an additional protocol to the International Convention on the Elimination of All Forms of Racism was a different matter, as it would then become part of customary international law. Regarding whether mediation and conciliation would be an appropriate first remedy in a case where holy books were desecrated, this would depend on contextual factors such as the age of the person who committed the act. He noted that mediation, education, and truth were important first steps, but that scale, amplitude, and repeated nature could indicate a need for a more serious sanction. He recalled that there was difficulty establishing a connection in so far as the International Convention on the Elimination of All Forms of Racial Discrimination contemplated criminalization of destruction of religious texts in its existing language, but that the Convention may allow for contemplation of preventive measures on that issue.

317. Mr. Drumbl stated that a key linkage that the additional protocol could contemplate was explicitly linking with international instruments that related to access to information and regulation of social media and internet providers to ensure a level of accountability and prevent the spread of video or recordings of acts that were intended to incite hatred.

318. The Chair-Rapporteur recalled the importance of reconciling different perspectives within the Ad Hoc Committee and the need to make strategic considerations to ensure the effectiveness of the additional protocol.

C. Presentation and discussion on procedural aspects of an additional protocol to the ICERD Convention: the context of public international law

319. **At its 9th meeting, held on 26 May,** the Ad Hoc Committee considered Item 6. The Committee heard a presentation by, and held a discussion with Michal Balcerzak, Professor, Faculty of Law, Department of Human Rights, Nicolaus Copernicus University, Poland on "procedural aspects of an additional protocol to the International Convention on the Elimination of All Forms of Racial Discrimination: the context of public international law."

320. The Chair-Rapporteur welcomed and introduced Mr. Michal Balcerzak who was presenting to the Ad Hoc Committee in his independent capacity as Professor at the Faculty of Law, Department of Human Rights at Nicolaus Copernicus University. Mr. Balcerzak noted at the beginning of his presentation that he was appearing before the Ad Hoc Committee in his capacity as an expert and scholar and was not representing the Committee on the Elimination of Racial Discrimination at this meeting. He explained that he would offer remarks concerning the procedural elements of the additional protocol based on his academic experience and his experience as a member of the Committee on the Elimination of Racial Discrimination.

321. Mr. Balcerzak stated that procedure followed the merits and that while content, merits, and material obligations were a priority, so too was a well-designed procedural framework because properly drafted procedural arrangements improved the effectiveness of the human rights obligations. He stated that there should be certain provisions explaining the links between the principal treaty (the International Convention on the Elimination of All Forms of Racial Discrimination) and the additional protocol. He noted that those links should be made both in relation to procedure and interpretation. He recalled the reference to 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) in the Chairperson's draft document and explained that it was a strong example as it referred to interpretation—that the protocol should be interpreted together with the convention—and he advised establishing a similar link in the additional protocol to the International Convention on the Elimination of All Forms of Racial Discrimination. He expressed that principal treaties created a specific legal environment and that it would be of great value to ensure that any additional protocols would be interpreted in harmony with the principal convention.

322. Regarding procedural elements, Mr. Balcerzak indicated that a general clause could be foreseen that would link the additional protocol to the International Convention on the Elimination of All Forms of Racial Discrimination by stating that the provisions of the Convention would apply to the additional protocol mutatis mutandis unless otherwise provided.

323. Mr. Balcerzak explained that for the past 50 years the Committee on the Elimination of Racial Discrimination had exercised the functions provided under the International Convention on the Elimination of All Forms of Racial Discrimination, and that he believed there was no intention of establishing a separate body, but that the additional protocol would supplement the list of obligations already enshrined in the Convention and it would be sensible to use the Committee on the Elimination of Racial Discrimination as the monitoring body for compliance with the additional protocol. He elaborated that the competence that should be procedurally accommodated was the competence to receive and review state reports. He explained that the general mutatis mutandis clause was not sufficient to invoke that competency and that more precision would be required to enshrine those reporting obligations. He provided examples from two of the optional protocols to the Convention on the Rights of the Child: the optional protocol on the involvement of children in armed conflict and the optional protocol on the sale of children, child prostitution and child pornography, as they added new complementary obligations that considered harmonization with the principal convention and procedural arrangements. He explained that they did so using a specific common provision that stated: "1. Each State Party shall, within two years following the entry into force of the present Protocol for that State Party, submit a report to the Committee on the Rights of the Child providing comprehensive information on the measures it has taken to implement the provisions of the Protocol, including the measures taken to implement the provisions on participation and recruitment. 2. Following the submission of the comprehensive report, each State Party shall include in the reports it submits to the Committee on the Rights of the Child, in accordance with article 44 of the Convention, any further information with respect to the implementation of the Protocol. Other States Parties to the Protocol shall submit a report every 5 years. 3. The Committee on the Rights of the Child may request from States Parties further information relevant to the implementation of the present Protocol."[3] He highlighted that States Parties were obliged to file comprehensive information on the measures taken to implement the provisions of the protocol itself in one initial report and then to file regular reports in accordance with their regular obligations under the convention. He expressed that it was sensible that States Parties provide initial comprehensive information, and that reporting obligations for the content of the protocol be included as part of the regular reporting procedure of the primary convention. He also recommended that the Ad Hoc Committee consider a provision similar to subparagraph 3 of

[3] Article 8, Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, 25 May 200, General Assembly resolution A/RES/54/263.

the article he referenced, as it would provide States Parties with both an obligation and an incentive to reflect and compile the information required.

324. Mr. Balcerzak noted that, when it came to reporting obligations, there were concerns about backlog and ongoing discussions on the need for reform. He encouraged the Ad Hoc Committee to consider that there may be some changes upcoming, such as a predictable calendar, concerning procedural arrangements and reporting. He explained that the Committee on the Elimination of Racial Discrimination currently considered periodic reports and that it did have some backlog, and that it was discussing the further extension of simplified reporting procedures. He stated that it was important that any potential new functions of the Committee on the Elimination of Racial Discrimination be known in advance and be accommodated within the future predictable calendar project.

325. Mr. Balcerzak stated that the reporting obligations and procedural obligations of states could mirror the provisions from the optional protocols of the Convention on the Rights of the Child. He noted that there were not many optional protocols that included new material obligations, and that optional protocols to the United Nations core human rights treaties tended to add competencies to the treaty bodies, and at least three such optional protocols concerned communications and communications procedure. He noted that the Ad Hoc Committee's mandate was different and more substantial, as it would consider new material obligations that may correspond with procedural obligations as well.

326. Mr. Balcerzak explained that the Committee on the Elimination of Racial Discrimination's mandate was broader than the consideration and monitoring of state reports and included complaint procedures. He relayed that there was an optional action of the Committee on the Elimination of Racial Discrimination to examine individual communications, but that article 14 of the International Convention on the Elimination of All Forms of Racial Discrimination indicated that the Committee could only serve this function where the State Party accepted its jurisdiction. He noted that approximately one third of States Parties to the International Convention on the Elimination of All Forms of Racial Discrimination consented, which led to this part of the Committee's mandate being underdeveloped. He suggested that the Ad Hoc Committee may wish to consider whether the jurisdiction of the Committee on the Elimination of Racial Discrimination should also cover obligations in the additional protocol regarding the competence to examine individual communications. He recalled that a general mutatis mutandis link between the additional protocol and the International Convention on the Elimination of All Forms of Racial Discrimination would not confer competency on the Committee on the Elimination of Racial Discrimination regarding individual communications. He explained that if the Ad Hoc Committee considered that the Committee on the Elimination of Racial Discrimination should have the competency to receive individual communications the obligations from the additional protocol, then specific provisions should be drafted in this regard.

327. Mr. Balcerzak also noted that there was a competency of the Committee on the Elimination of Racial Discrimination in article 11 of the International Convention on the Elimination of All Forms of Racial Discrimination that concerned inter-state communications. He did not foresee any need for specific provisions concerning inter-state procedures in the additional protocol, as the general linking clause that stated the provisions of the Convention would apply mutatis mutandis to the protocol would cover articles 11-13 of the Convention, which dealt with inter-state communications. He noted that the inter-state communications procedure was one that could lead to conciliation, and that it could also be made available to State Parties of the additional protocol.

328. Mr. Balcerzak noted that there was a procedure used by the Committee on the Elimination of Racial Discrimination that was not directly rooted in or foreseen by the International Convention on the Elimination of All Forms of Racial Discrimination, but was a matter of certain procedural developments. This was the early warning and urgent action procedure. He relayed that this procedure began in the 1990s and was developed through the Committee's guidelines, and that its essence was to act in advance of situations arising that could lead to violations of the Convention as opposed to reacting after those violations had already occurred. He explained that the Committee had a working group on early action and that it worked intersessionally. He noted that, as a result, the Committee was able to respond efficiently to disturbing information. He stated that he raised this issue because, thus far, there

had been no opportunity to discuss that procedure as a matter of treaty law because it was based on the Committee's guidelines, but that the Ad Hoc Committee could consider a preventive procedure or competence that would enable the Committee on the Elimination of Racial Discrimination to respond to urgent situations. He explained that empowering the Committee on the Elimination of Racial Discrimination to act in this preventive manner through a treaty provision would have great significance. He noted that not every material obligation would give rise to the need for urgent action, but that acts with the potential to escalate and lead to serious consequences could allow for urgent action.

329. The representative of Pakistan on behalf of the OIC noted that advice from the legal experts had been that the additional protocol could include new elements and that the obligations related to those elements should be linked with provisions in the International Convention on the Elimination of All Forms of Racial Discrimination. He asked if the addition of new substantive elements in the additional protocol would need to be linked to the primary Convention.

330. Mr. Balcerzak responded that the interpretation of the International Convention on the Elimination of All Forms of Racial Discrimination was a matter of the Committee on the Elimination of Racial Discrimination's constant attention, as there was often disagreement within that Committee on interpretation of some of the basic notions within the Convention as it worked to clarify approaches to the elements through General Recommendations. He noted that, whereas the principal treaty may and should influence the interpretation of the additional protocol, the question arose as to whether the additional protocol may influence the interpretation of the main treaty. He stated that he was in favour of providing precision and clarity to the notions used in the additional protocol, and that it would be beneficial for the interpretation of the main Convention if the additional protocol clarified definitions of some of the existing terminology and principal notions. He stated, however, that he was not convinced that elements elaborated in the additional protocol could impose on or influence the interpretation of the primary Convention and this would depend somewhat upon the number of States Parties that were bound by the additional protocol. He noted that the Committee on the Elimination of Racial Discrimination intended to hold discussions on terminology as well, and recalled that the International Convention on the Elimination of All Forms of Racial Discrimination was a living instrument that constantly evolved to serve changing realities.

331. The representative of the European Union noted that the Committee on the Elimination of Racial Discrimination had extensive practice in combating racist hate speech and had issued several important General Recommendations, including one from 2013 on combating racist hate speech that should inform the work of the Ad Hoc Committee. She stated that, reviewing the practices of and topics addressed by the Committee on the Elimination of Racial Discrimination, it appeared that the International Convention on the Elimination of All Forms of Racial Discrimination already allowed for a very broad approach. She questioned whether an additional protocol would add to that, as her understanding was that an additional protocol was intended to put into practice or further refine agreements that were already in place in the main convention. She noted that the Committee on the Elimination of Racial Discrimination had been employing the principle of intersectionality in its work for many years, which indicated that such an interpretation was already possible. She requested Mr. Balcerzak's opinion on this.

332. The representative of Iran asked how the Ad Hoc Committee could establish a link or develop inter-state procedures in the additional protocol.

333. The representative of South Africa asked Mr. Balcerzak if the ratifications of the additional protocol and the International Convention on the Elimination of All Forms of Racial Discrimination would remain the same, or if they would be lessened in the additional protocol, and how the Ad Hoc Committee could provide for that in the context of the additional protocol. She noted the example of the Convention on Nuclear Weapons Test Ban Treaty, which had not come into force because there had not been enough ratifications. She also asked if the Ad Hoc Committee would provide for amendments within the context of the additional protocol, or would it only refer to the primary convention. She raised the issue of funding, and noted that the monitoring, review, and implementation of treaties was a cost-intensive exercise, and she requested Mr. Balcerzak's insights on whether there was a way to

ensure that the monitoring and implementation was adequately resourced in terms of funding and capacity. She also asked whether there were any enforcement powers that Mr. Balcerzak had not already discussed that ought to be strengthened within the context of the additional protocol.

334. Mr. Balcerzak responded to the inquiry from the representative of the European Union on evaluation of the practices of the Committee on the Elimination of Racial Discrimination, its reports and recommendations. He agreed that the Committee interpreted article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination progressively, but he did not believe that this was an argument against an additional protocol or any argument that would weaken the need for an additional protocol. He clarified that this was because the experts of the Committee on the Elimination of Racial Discrimination came from various regions and professional backgrounds, but they were not lawmakers or authorized to elaborate international law, whereas the Ad Hoc Committee was empowered to do so. He noted that in international law there was a distinction between codification and progressive development and expressed his belief that part of the Ad Hoc Committee's task involved codification of what had already been proposed and interpreted, and the other part related to progressive development.

335. Regarding the question from the representative of Iran, Mr. Balcerzak noted that the inter-state procedure enshrined in the International Convention on the Elimination of All Forms of Racial Discrimination was also enshrined in other United Nations treaties, with one difference: the Convention provided for compulsory inter-state communications procedures that was not optional. He explained that if the Ad Hoc Committee utilized a general linking clause in the additional protocol, that would entitle State Parties to the additional protocol to the use of inter-state procedures outlined in articles 11-13 of the main Convention, but this would require that both the applicant and respondent states were parties to the additional protocol. He emphasized that this was a conciliation procedure and that the Committee on the Elimination of Racial Discrimination was not a court and did not possess judicial powers.

336. Mr. Balcerzak stated that he would endorse linking the early warning and urgent action procedure of the Committee on the Elimination of Racial Discrimination as an opportunity to strengthen both protection of human rights and procedures. He suggested that doing so would strengthen the additional protocol.

337. Mr. Balcerzak responded to the inquiry from the representative of South Africa that it was important that the threshold for ratification not be very high. He noted that there were standards and practices related to the threshold for ratifications and entry into force, and that states that had not ratified the primary convention would be unable to ratify the additional protocol. He noted that the Committee on the Elimination of Racial Discrimination was working to encourage States that had not yet ratified the International Convention on the Elimination of All Forms of Racial Discrimination to do so.

338. Regarding the funding and capacity of the Committee on the Elimination of Racial Discrimination, he noted that he could not answer on behalf of the Committee, as he was appearing outside of that capacity, but indicated that there were strong concerns about human and other resources and adequate supports for the Committee. He recalled that the process of elaborating the additional protocol provided a window of opportunity to consider how to make the International Convention on the Elimination of All Forms of Racial Discrimination more effective.

339. Mr. Balcerzak noted that, in terms of competencies, the Committee on the Elimination of Racial Discrimination did not currently possess any inquiry competencies, which may have the potential to increase the effectiveness of the Committee. He noted that this would depend on the correct tier of obligation, and noted that there were examples of this in other treaty bodies.

340. The Chair-Rapporteur inquired whether Mr. Balcerzak could provide insight on notions that he believed required more clarification.

341. Mr. Balcerzak responded that the definition of racial discrimination in article 1 of the International Convention on the Elimination of All Forms of Racial Discrimination did not solve every issue, for example ethnic origin and national origin had been differently

interpreted by the Committee on the Elimination of Racial Discrimination and the International Court of Justice. He noted there were also conversations regarding various interpretations of the term ethnicity, and notions that were not present in the Convention, but also needed to be accounted for, such as intersectionality.

342. The Chair-Rapporteur noted that the Ad Hoc Committee was discussing definitions of racism, xenophobia, hate speech, hate crime, religion or belief, and racial profiling, and requested Mr. Balcerzak's input on those notions.

343. Mr. Balcerzak responded that discussion of the notions was often very difficult, and that precision was fundamental. He noted that the Committee on the Elimination of Racial Discrimination did not have competence to pronounce on discrimination based on religion or belief, but that any exploration of that topic would benefit from consideration of the 1981 Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief.

344. The Chair-Rapporteur thanked Mr. Balcerzak for his presentation and opened the floor for other interventions or comments from the Ad Hoc Committee.

Annex II

Programme of work – 13th Ad Hoc Committee on the Elaboration of Complementary Standards, 22 May–2 June 2023

(as adopted 22.05.23)

1st week					
	Monday 22.05	Tuesday 23.05	Wednesday 24.05	Thursday 25.05	Friday 26.05
10:00 – 13:00	Item 1 Opening of the Session Abdoul THIOYE, Chief a.i. Rule of Law, Equality & Non-Discrimination Branch, OHCHR Item 2 Election of the Chairperson Item 3 Adoption of the Programme of Work General statements Item 4 Discussion with the legal experts A/HRC/51/57 para. 79 (b) (c) Rhonda BAIN, former Supreme Court Justice and Associate Tutor, Eugene Dupuch Law School, Bahamas; Joanna BOTHA, Head, Department of Public Law, Faculty of Law, Nelson Mandela University; Mark DRUMBL, Class of 1975 Alumni Professor of Law and Director of the Transnational Law Institute, Washington and Lee University School of Law; Li-Ann THIO, Provost Chair Professor, Faculty of Law, National University of Singapore	Item 4 continued Discussion with the legal experts A/HRC/51/57 para. 79 (a) Rhonda BAIN, former Supreme Court Justice and Associate Tutor, Eugene Dupuch Law School, Bahamas; Joanna BOTHA, Head, Department of Public Law, Faculty of Law, Nelson Mandela University; Mark DRUMBL, Class of 1975 Alumni Professor of Law and Director of the Transnational Law Institute, Washington and Lee University School of Law; Li-Ann THIO, Provost Chair Professor, Faculty of Law, National University of Singapore	Item 5 Discussion on the Chairperson's draft document	Item 5 continued Discussion	Item 6 Presentation and discussion "Procedural aspects of an additional protocol to the ICERD Convention: the context of public international law" Michal BALCERZAK, Professor, Faculty of Law, Department of Human Rights, Nicolaus Copernicus University, Poland

15:00 – 18:00	Item 4 continued Discussion with the legal experts A/HRC/51/57 para. 79 (a) Rhonda BAIN, former Supreme Court Justice and Associate Tutor, Eugene Dupuch Law School, Bahamas; Joanna BOTHA, Head, Department of Public Law, Faculty of Law, Nelson Mandela University; Mark DRUMBL, Class of 1975 Alumni Professor of Law and Director of the Transnational Law Institute, Washington and Lee University School of Law; Li-Ann THIO, Provost Chair Professor, Faculty of Law, National University of Singapore	Item 4 continued Discussion with the legal experts A/HRc/51/57 para. 79 (d) Rhonda BAIN, former Supreme Court Justice and Associate Tutor, Eugene Dupuch Law School, Bahamas; Joanna BOTHA, Head, Department of Public Law, Faculty of Law, Nelson Mandela University; Mark DRUMBL, Class of 1975 Alumni Professor of Law and Director of the Transnational Law Institute, Washington and Lee University School of Law; Li-Ann THIO, Provost Chair Professor, Faculty of Law, National University of Singapore	Item 5 continued Discussion	Item 5 continued Discussion	Item 5 continued Discussion

2nd week

	Monday 29.05	Tuesday 30.05	Wednesday 31.05	Thursday 01.06	Friday 02.06
10:00 – 13:00	UN HOLIDAY	Item 4 continued Discussion with the legal experts (online) Beatrice BONAFE, Joanna BOTHA, Li-ann THIO	Item 4 continued Discussion with the legal experts (online) Beatrice BONAFE, Professor of International Law, Sapienza University, Rome	Item 6 continued General discussion and exchange of views Item 7 Conclusions and recommendations of the session	Item 7 continued Conclusions and recommendations of the session
15:00 – 18:00	UN HOLIDAY	Item 4 continued Discussion with the legal experts (online) Rhonda BAIN, Joanna BOTHA, Mark DRUMBL, Li-ann THIO	Item 4 continued Discussion with the legal experts (online) Rhonda BAIN, Joanna BOTHA, Mark DRUMBL General discussion and exchange of views	Item 7 continued Conclusions and recommendations of the session	Item 8 Adoption of the conclusions and recommendations of the 13th session

Annex III

List of attendance

Member States

Algeria, Argentina, Armenia, Azerbaijan, Bahamas, Bangladesh, Bolivia (Plurinational State of), Brazil, Burkina Faso, Cameroon, China, Colombia, Costa Rica, Côte d'Ivoire, Czech Republic, Djibouti, Indonesia, Iran (Islamic Republic of), Iraq, Libya (State of), Malawi, Malaysia, Maldives, Mexico, Niger, Nigeria, Pakistan, Paraguay, Russian Federation, Saudi Arabia, South Africa, Tunisia, Türkiye, Venezuela (Bolivarian Republic of), Zimbabwe

Non-Member States represented by observers

Intergovernmental organizations

European Union

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

Sikh Human Rights Group

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

Genève pour les droits de l'homme: formation internationale, Global Institute for Water, Environment and Health (GIWEH), The Institute for Conscious Global Change (ICGC), Instituto Alana, Salam for Democracy & Human Rights (Salam DHR)