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Racismo, discriminación racial, xenofobia y formas conexas de intolerancia: seguimiento y aplicación de la Declaración y el Programa de Acción de Durban

Informe del Comité Especial sobre la elaboración de normas complementarias acerca de su 12º período de sesiones* **

Presidenta-Relatora: **Kadra Ahmed Hassan** (Djibouti)

Resumen

Este informe se presenta de conformidad con la decisión 3/103 y las resoluciones 6/21 y 10/30 del Consejo de Derechos Humanos. El informe es un resumen de los trabajos del 12º período de sesiones del Comité Especial sobre la Elaboración de Normas Complementarias y de los debates sustantivos que tuvieron lugar en ese período de sesiones.

* Los anexos del presente informe se distribuyen únicamente en el idioma en el que se presentaron.
** Este informe se presentó con retraso para incluir en él la información más reciente.

I. Introducción

1. El Comité Especial sobre la Elaboración de Normas Complementarias presenta este informe de conformidad con la decisión 3/103 y las resoluciones 6/21 y 10/30 del Consejo de Derechos Humanos.

II. Organización del período de sesiones

2. El Comité Especial celebró 18 sesiones durante su 12º período de sesiones, que tuvo lugar en el Palacio de las Naciones de Ginebra del 19 al 29 de julio de 2022 en formato híbrido.

A. Asistencia

3. Asistieron al período de sesiones representantes de Estados miembros, de Estados no miembros en calidad de observadores, de organizaciones intergubernamentales y de organizaciones no gubernamentales (ONG) reconocidas como entidades consultivas por el Consejo Económico y Social (véase el anexo III).

B. Apertura del período de sesiones

4. El 12º período de sesiones del Comité Especial sobre la Elaboración de Normas Complementarias fue inaugurado por la Jefa de la Subdivisión de Estado de Derecho, Igualdad y No Discriminación, de la Oficina del Alto Comisionado de las Naciones Unidas para los Derechos Humanos (ACNUDH).

C. Elección de la Presidenta-Relatora

5. En su primera sesión, el Comité Especial eligió Presidenta-Relatora, por aclamación, a Kadra Ahmed Hassan, Representante Permanente de Djibouti ante la Oficina de las Naciones Unidas y otras organizaciones internacionales en Ginebra.

6. La Presidenta-Relatora agradeció al Comité su reelección. Apeló al espíritu de cooperación y de participación constructiva con vistas a que el Comité tuviera en cuenta, en el desempeño de su mandato, todos los puntos de vista de las delegaciones, los grupos regionales y la sociedad civil.

7. Recordó que, en virtud de la decisión 3/103 y de las resoluciones 6/21 y 10/30 del Consejo de Derechos Humanos, el Comité tenía el mandato de elaborar, como cuestión prioritaria y necesaria, normas complementarias en forma de convención o uno o varios protocolos adicionales de la Convención Internacional sobre la Eliminación de todas las Formas de Discriminación Racial. El Comité venía trabajando desde 2017 con un mandato actualizado, articulado por primera vez en la resolución 71/181 de la Asamblea General y en la resolución 34/36 del Consejo de Derechos Humanos, respectivamente, en las que la Asamblea y el Consejo habían pedido al Presidente-Relator que se asegurara de que comenzaran las negociaciones sobre un proyecto de protocolo adicional de la Convención en que se tipificaran como delito los actos de carácter racista y xenófobo.

8. La Presidenta-Relatora señaló que, si bien ese trabajo había sufrido cierto retraso debido a las exigencias de la pandemia de enfermedad por coronavirus (COVID-19) y al aplazamiento excepcional del 11º período de sesiones, en diciembre de 2021, en razón de un asunto personal urgente, ya era hora de trabajar con constancia y seguridad en la elaboración del protocolo adicional. Recordó la presencia insoslayable de la lacra del racismo, que mutaba, proliferaba y menoscababa los derechos humanos de millones de personas. En cuanto mecanismo multilateral, el Comité Especial debía mantener su pertinencia y abordar estos retos, de conformidad con su mandato.

9. La Presidenta-Relatora recordó que, en su 11º período de sesiones, el Comité había interactuado con expertos y debatido las cuestiones atinentes a los cuatro módulos examinados en el marco de la consulta celebrada con expertos jurídicos entre períodos de sesiones: a) difusión del discurso de odio; b) ciberdelincuencia racial (redes sociales y empresas); c) todas las formas contemporáneas de discriminación fundadas en la religión o las convicciones; y d) medidas preventivas para combatir la discriminación racista y xenófoba.

10. La Presidenta-Relatora explicó que, basándose en el informe de la consulta de expertos jurídicos[1] celebrada entre períodos de sesiones y en los debates del 11º período de sesiones, había preparado un texto anotado para contribuir a la reflexión y los debates del Comité e impulsar su labor con vistas a la adopción de algunas propuestas concretas.

11. La Presidenta-Relatora señaló que, si bien las sesiones del 12º período de sesiones se celebrarían en formato híbrido, alentaba a las delegaciones a estar presentes en la sala, contribuir de forma sustantiva y evitar formular declaraciones generales sobre posiciones ya conocidas por los demás participantes. Reconociendo la diversidad de opiniones sobre algunas cuestiones, dijo esperar que todas las delegaciones y los participantes mantuvieran debates e intercambios abiertos mientras el Comité trabajaba en aras del consenso.

12. En conclusión, la Presidenta-Relatora expresó su deseo de escuchar sustancialmente a los participantes para avanzar juntos. Alentó al Comité a seguir participando en el importante proceso de combatir el racismo contemporáneo, la discriminación racial, la xenofobia y formas conexas de intolerancia.

D. Aprobación del programa

13. En la primera sesión, el Comité Especial aprobó el siguiente programa para su 12º período de sesiones:

1. Apertura del período de sesiones.
2. Elección del Presidente-Relator.
3. Aprobación del programa y del programa de trabajo.
4. Presentaciones y debates sobre el impacto histórico del colonialismo en el derecho.
5. Presentaciones y debates sobre todas las formas contemporáneas de discriminación fundadas en la religión o las convicciones.
6. Presentaciones y debates sobre los principios y elementos de la penalización.
7. Presentación de las notas de la Presidenta-Relatora sobre el documento titulado “Resumen de las cuestiones y los posibles elementos examinados en relación con la aplicación de la resolución 73/262 de la Asamblea General y la resolución 34/36 del Consejo de Derechos Humanos sobre el comienzo de negociaciones acerca de un proyecto de protocolo adicional de la Convención para tipificar como delitos los actos de carácter racista y xenófobo”.
8. Conclusiones y recomendaciones del período de sesiones.
9. Aprobación de las conclusiones y recomendaciones del período de sesiones.

E. Organización de los trabajos

14. También en la primera sesión, la Presidenta-Relatora presentó el proyecto de programa de trabajo para el período de sesiones, que fue aprobado. El programa de trabajo, en su versión ulteriormente revisada, figura en el anexo II del presente informe. La Presidenta-Relatora invitó a los participantes a hacer declaraciones generales. Las

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

delegaciones felicitaron a la Presidenta-Relatora por su elección y formularon declaraciones introductorias.

15. El representante del Pakistán, hablando en nombre de la Organización de Cooperación Islámica (OCI), garantizó a la Presidenta-Relatora el apoyo de la OCI al desempeño del mandato del Comité Especial. Los Estados miembros de la OCI otorgaban gran importancia al mandato del Comité y reiteraban su apoyo a la consolidación de la estructura de derechos humanos contra el racismo, la xenofobia y formas conexas de intolerancia. Los desafíos del mundo contemporáneo iban en aumento, con las consiguientes pérdidas de vidas, lesiones, violaciones de los derechos humanos y violencia física y psicológica. Estas tendencias alarmantes exigían la adopción inmediata de medidas correctivas. La necesidad de una solución eficaz también estaba en consonancia con el mandato del Comité de colmar las lagunas jurídicas y reglamentarias de la Convención Internacional sobre la Eliminación de Todas las Formas de Discriminación Racial mediante un protocolo adicional que penalizara todos los actos de carácter racista y xenófobo. Dados los modestos avances logrados en el cumplimiento del mandato del Comité, la OCI consideraba que el statu quo ya no era una opción y que las acciones del Comité debían estar a la altura de la gravedad de los retos actuales. La OCI observaba con suma preocupación el aumento constante de los incidentes de discriminación, odio, hostilidad y violencia fundados en la religión, especialmente contra personas y comunidades musulmanas. Seguían produciéndose frecuentes actos antiislámicos o islamófobos, que eran tolerados o autorizados por algunos Estados, a menudo bajo el pretexto de la libertad de expresión, la lucha contra el terrorismo o la seguridad nacional. El auge de la política populista y de las ideologías de extrema derecha en todo el mundo estaba alimentando el odio religioso y la violencia contra las poblaciones musulmanas. La OCI condenaba enérgicamente los actos islamófobos en todas sus formas y manifestaciones y reiteraba su llamamiento a revocar y derogar ese tipo de leyes discriminatorias, así como a garantizar la rendición de cuentas de los autores y a proporcionar reparaciones a las víctimas. El Comité disponía de un mandato claro de la Asamblea General y del Consejo de Derechos Humanos, y la OCI no apoyaría ningún debate destinado a desviar la atención del mandato central del Comité. La OCI proponía a la Presidenta-Relatora que recurriera a expertos jurídicos, que reflejaran la diversidad geográfica y de sistemas jurídicos, con vistas a la preparación un proyecto inicial del protocolo adicional. Este proyecto podría ser usado posteriormente en el marco de otras negociaciones intergubernamentales. El representante del Pakistán expresó a la Presidenta-Relatora la actitud constructiva de la OCI en el marco del período de sesiones.

16. El representante de Côte d'Ivoire, hablando en nombre del Grupo de los Estados de África, recordó que el Consejo de Derechos Humanos había encargado al Comité Especial que redactara normas complementarias, ya fuera en forma de convención o de uno o varios protocolos adicionales a la Convención Internacional sobre la Eliminación de Todas las Formas de Discriminación Racial, con vistas a subsanar las deficiencias existentes y elaborar nuevas normas para combatir todas las formas de racismo contemporáneo, incluida la incitación al odio racial. Lamentablemente, hacía varios años que el Comité no lograba avances sustanciales en el cumplimiento de ese mandato, principalmente en razón de diferencias de opinión de los Estados miembros sobre la necesidad de elaborar normas complementarias. El Grupo de los Estados de África estaba firmemente convencido de que las normas complementarias eran necesarias para luchar contra las formas contemporáneas de racismo, discriminación racial, xenofobia y otras formas conexas de intolerancia. El Grupo consideraba que el objetivo del Comité era avanzar en los debates iniciados en el décimo período de sesiones sobre la preparación de un proyecto de documento de trabajo acerca de un protocolo adicional. Se trataba de un proceso sumamente pertinente en vista de la realidad que vivían las víctimas del racismo, la discriminación racial, la xenofobia y formas conexas de intolerancia en todo el mundo. El representante instó al Comité a asumir sus responsabilidades para reforzar la protección del creciente número de víctimas de este tipo de actos, incluidas personas pertenecientes a diferentes grupos raciales, culturales y religiosos o a minorías, así como los migrantes, los refugiados y los solicitantes de asilo. El Grupo de los Estados de África exhortó a todos los Estados miembros y a las partes interesadas a aunar fuerzas a lo largo del período de sesiones.

17. El representante de Cuba reiteró el compromiso de su país con el mandato del Comité Especial, así como su deseo de seguir trabajando colectivamente y de forma constructiva en

pos de un acuerdo. Las persistentes dificultades para aplicar la Declaración y el Programa de Acción de Durban en todo el mundo más de 20 años después de su adopción se habían acentuado, en razón de un persistente racismo estructural y del incremento de los discursos odio y de los actos violentos motivados por el odio contra migrantes y refugiados, minorías y, en algunos casos, naciones enteras. Una crisis mundial multidimensional, agravada por la crisis de COVID-19, había exacerbado esta situación. La Constitución de Cuba consagraba el derecho a la igualdad y la prohibición de la discriminación, y Cuba mantenía su compromiso de combatir los prejuicios y estereotipos raciales en la sociedad. El representante reiteró el llamamiento dirigido a los Estados para que demostraran su determinación política de luchar contra la discriminación racial y todas las formas de intolerancia en todas las regiones y países mediante el diálogo constructivo y la cooperación en el marco de las Naciones Unidas y los mecanismos de derechos humanos.

18. El representante de la República Bolivariana de Venezuela afirmó que el Comité Especial era un mecanismo importante con un mandato claro para elaborar normas complementarias a la Convención Internacional sobre la Eliminación de Todas las Formas de Discriminación Racial. A mitad del Decenio Internacional de los Afrodescendientes, este colectivo seguía enfrentándose a numerosas dificultades. La República Bolivariana de Venezuela observaba con preocupación la proliferación de mentiras y discursos de odio, la retórica xenófoba y la incitación al odio, así como el auge de movimientos extremistas, que ponían en peligro los logros alcanzados en la protección de los derechos humanos de los grupos vulnerables. El Gobierno había tomado medidas para combatir la pobreza y la desigualdad con un enfoque multidimensional, empoderando a los grupos sociales más vulnerables. La República Bolivariana de Venezuela valoró el trabajo de redacción de normas complementarias a la Convención acometido por el Comité, que ayudaría a subsanar las deficiencias existentes y a establecer nuevas normas para reforzar la lucha contra todas las formas contemporáneas de racismo, incluida la incitación al odio racial.

19. El representante del Iraq confirmó que la xenofobia, la discriminación y muchas formas de comportamiento censurable eran una amenaza real para la labor de las Naciones Unidas y los derechos humanos en general, y contravenían los derechos humanos y las normas internacionales. A pesar de todos los esfuerzos desplegados hasta la fecha para garantizar el pleno disfrute de los derechos de las personas, seguía habiendo muchas víctimas de la discriminación racial. El Iraq apoyaba el establecimiento de un marco jurídico que pusiera fin a todas las formas de discriminación racial y estaba dispuesto a contribuir a esa labor. El protocolo adicional a la Convención Internacional sobre la Eliminación de Todas las Formas de Discriminación Racial debía comprender los siguientes elementos: a) la penalización del odio y la islamofobia, ya que constituía una discriminación por motivos religiosos; b) la no discriminación de las sociedades con valores diferentes; c) la importancia de enfrentarse a los desafíos contemporáneos, tipificando como delito todos los comportamientos racistas, el discurso de odio y cualquier forma de supremacismo, que constituía a su vez un acto de violencia punible; y d) el apoyo a la diversidad cultural.

20. La representante de la República Islámica del Irán dijo que su país se sumaba a la declaración realizada por el Pakistán en nombre de la OCI. Lamentaba que, a pesar de los numerosos documentos publicados y medidas adoptadas para combatir el racismo, la discriminación racial, la xenofobia y las formas conexas de intolerancia, el mundo padeciera un resurgimiento de formas y manifestaciones de discriminación racial, incluidas el racismo y la islamofobia observados durante la pandemia de COVID-19. Si bien era urgente actualizar la Convención Internacional sobre la Eliminación de Todas las Formas de Discriminación Racial, el Comité Especial aún no había logrado avances significativos en sus 15 años de existencia. La República Islámica del Irán apoyaba plenamente los trabajos del Comité y se sumaba al llamamiento para iniciar la redacción del protocolo adicional a la Convención. El protocolo adicional ofrecería una herramienta importante para luchar contra todas las formas contemporáneas de racismo y discriminación y aportaría los medios adecuados para penalizar los actos de carácter racista y xenófobo. El Comité debía tener en cuenta el papel clave de la Declaración y el Programa de Acción de Durban y de su aplicación a la hora de redactar las diferentes nociones de las normas complementarias con vistas a establecer un instrumento jurídicamente vinculante. Advirtió en contra de la ampliación conceptual de la Convención y señaló que habría que estudiar las propuestas de ampliación del ámbito de aplicación de la

Convención para determinar si aportarían un valor añadido o modificarían los objetivos de la Convención, diluyendo así la función del órgano de vigilancia.

21. La representante de la Federación de Rusia reiteró el pleno apoyo de su delegación al Comité Especial y señaló la persistencia de los problemas de racismo y la proliferación de ideologías supremacistas. Los esfuerzos desplegados por la comunidad internacional y los instrumentos de las Naciones Unidas existentes en este ámbito resultaban insuficientes. Los Estados que intentaban obstaculizar la labor del Comité no habían resuelto sus problemas en relación con el racismo y las ideologías supremacistas. Destacó la discriminación que habían sufrido recientemente las personas procedentes de África y Asia que huían de diversos conflictos. Algunos Estados que aseguraban no estar en condiciones de recibir más refugiados de África habían acogido a refugiados procedentes de un conflicto en curso. La representante relacionó la idea de la supremacía racial y las agresiones violentas recientemente cometidas en determinados países con las ideologías que profesaban algunos militares de fuerzas armadas nacionales. Las normas complementarias eran necesarias. En relación con los instrumentos intergubernamentales de lucha contra el racismo, cuantos más hubiera, mejor.

22. El representante del Estado Plurinacional de Bolivia expresó todo su apoyo al Comité Especial. Explicó que a finales de la década de 1990, su país había padecido un grave conflicto que había motivado la puesta en marcha de una investigación de las violaciones de los derechos humanos. Señaló la discriminación de las personas que practicaban el cristianismo evangélico, el auge del discurso de odio y la represión de la cultura indígena. Numerosos incidentes motivados por el odio habían propiciado la decisión de su país de convertirse en un Estado plurinacional e inclusivo. Los problemas vividos por su país durante el conflicto eran los mismos que estaba tratando actualmente el Comité. Reiteró el apoyo de su país a la labor del Comité para reforzar la protección de las víctimas del discurso de odio y otras manifestaciones de discriminación racial. Confirmó que el Estado Plurinacional de Bolivia apoyaba los esfuerzos para combatir la pobreza, el racismo y todas las formas de discriminación y patriarcado que oprimían a las mujeres, así como la eliminación de la discriminación contra las minorías étnicas. Por consiguiente, expresaba su apoyo al mandato del Comité.

23. La representante de Namibia dijo que su país se adhería a la declaración realizada en nombre del Grupo de los Estados de África. Señaló que la historia de Namibia estaba marcada por la discriminación racial, la segregación y el *apartheid*, cuyas secuelas seguían afectando al pueblo de Namibia, en particular a su derecho al desarrollo, entre otros derechos. Muchas personas en todo el mundo se enfrentaban a los mismos problemas. Namibia reconocía desde hacía tiempo la necesidad de establecer normas complementarias a la Convención Internacional sobre la Eliminación de Todas las Formas de Discriminación Racial, ya que esta había sido redactada en una época en la que muchos de los países que sufrían la brutalidad de la opresión racial y el *apartheid* todavía eran colonias. La realidad generalizada del racismo había llevado a los Estados a adoptar un documento integral y orientado a la adopción de medidas, la Declaración y el Programa de Acción de Durban, con vistas a luchar contra el racismo, la discriminación racial, la xenofobia y las formas conexas de intolerancia. Actualmente estaba claro que, a pesar de la existencia de la Convención y de la Declaración y el Programa de Acción de Durban, los Estados debían redoblar sus esfuerzos para hacer frente al fenómeno pernicioso y extendido del racismo. Era preciso, por otro lado, tener en cuenta que la Convención había sido adoptada en una época en que primaba la idea de que el derecho internacional, incluido el derecho internacional de los derechos humanos, debía aplicarse principalmente a los Estados en cuanto titulares de obligaciones, con exclusión de los actores no estatales. El derecho internacional moderno reconocía la responsabilidad de los actores no estatales, incluidas las empresas de medios sociales, de respetar los derechos humanos. Era imprescindible, a raíz de la evolución del derecho internacional, elaborar normas complementarias, entre otras cosas, para obligar a los Estados a imponer a las empresas de medios sociales la retirada de contenidos racistas, tal como señalaba el documento adoptado por el Comité Especial en su décimo período de sesiones. Destacó que Namibia apoyaba los debates del Comité y pedía a las delegaciones que se centraran, en el marco de esos debates, en las realidades del mundo, un mundo en el que se seguía discriminando y negando la humanidad de las personas en razón del color de su piel. El racismo, la discriminación racial, la xenofobia y el discurso de odio afectaban a las vidas de

millones de personas en todo el mundo y se manifestaban de formas muy diversas. Solo eso ya indicaba claramente la persistencia de lagunas jurídicas. Así pues, Namibia pedía a las delegaciones que se mantuvieran centradas en el mandato del Comité y que participaran de forma constructiva en los debates.

24. El representante de Sudáfrica dijo que su país se alineaba con la declaración del Grupo de los Estados de África y señaló que la Convención Internacional sobre la Eliminación de Todas las Formas de Discriminación Racial, adoptada en 1965, nunca había sido actualizada, a diferencia de la mayoría de las demás convenciones históricas. El mundo había cambiado mucho desde 1965 y no todos los Estados habían podido participar en la elaboración de la Convención como Estados libres, no coloniales. La comprensión del racismo y de sus causas y efectos había cambiado considerablemente desde entonces. En la Conferencia de Durban de 2001, el mundo se había reunido nuevamente para actualizar la visión del racismo, la discriminación racial, la xenofobia y las formas conexas de intolerancia, con la presencia de casi todos los Estados liberados del yugo del colonialismo. La Declaración y el Programa de Acción de Durban había profundizado las nociones de racismo, discriminación racial, xenofobia y formas conexas de intolerancia, así como la comprensión de cuestiones como el racismo sistémico. Más de 20 años después de su adopción, la Declaración y el Programa de Acción de Durban no habían sido plenamente aplicados, ya que un pequeño número de Estados importantes no querían comprometerse con esa nueva visión del racismo y de su impacto en la mayoría de la población mundial. Era importante reconocer que los grupos que no habían participado en la adopción de la Convención en 1965 consideraban que esta presentaba lagunas, particularmente en relación con la comprensión, entre otras cosas, del racismo sistémico, estructural e institucional y de su impacto en la vida de personas en todo el mundo. Era urgente desarrollar una visión común de estas importantes cuestiones. Era preciso trabajar en la elaboración de normas complementarias a la Convención para desarrollar rápidamente un protocolo adicional que garantizara una visión común de la lucha contra el racismo, la discriminación racial, la xenofobia y las formas conexas de intolerancia. Lo escrito en 1965 no podía aceptarse, ya que el colonialismo y el racismo sistémico y estructural que lo acompañaban estaban a la orden del día en aquella época. La Convención era un documento ratificado casi universalmente, también por Sudáfrica, y su país le otorgaba gran valor, pero no era menos cierto que todos los documentos históricos se actualizaban a través del Consejo de Derechos Humanos y todo el sistema de las Naciones Unidas, y que se habían añadido varios protocolos adicionales a la mayoría de las convenciones desde su concepción original. La Convención Internacional sobre la Eliminación de Todas las Formas de Discriminación Racial no debía ser una excepción. El representante alentó a todos los Estados a que trabajaran con mente abierta en la búsqueda de una visión común en este campo.

25. El representante de Argelia señaló que el Consejo de Derechos Humanos había encomendado al Comité la elaboración de normas complementarias sobre la eliminación de la discriminación racial en todo el mundo. Estas normas complementarias eran sumamente importantes a la hora de colmar las lagunas de las que adolecía la Convención Internacional sobre la Eliminación de Todas las Formas de Discriminación Racial. Era necesario adoptar normas para combatir las nuevas formas de discriminación, en particular la discriminación fundada en la religión. Era cada vez más necesario, a la luz de los escasos avances logrados por el Comité Especial hasta la fecha, elaborar normas complementarias para luchar realmente contra la discriminación, el racismo y la intolerancia. Propuso que el resultado del período de sesiones habilitara realmente al Comité a avanzar en la lucha contra la discriminación. Correspondía al Comité examinar a fondo las consecuencias que tenía el racismo en sus víctimas, con independencia de su condición. También era importante abordar la prolongación de ciertos procesos de colonización que habían sido históricamente obviados. El Comité debía remitirse a la Declaración y el Programa de Acción de Durban ya que seguían observándose diferentes formas de racismo y de discriminación racial, en particular contra los africanos y los afrodescendientes.

26. El representante de la ONG International Human Rights Council señaló que el término “racismo” se confundía a menudo con fenómenos parecidos, como los estereotipos, en algunos de los debates del Comité Especial. Destacó las diferencias existentes entre el racismo y otros fenómenos parecidos, en relación con su significado, importancia y

manifestaciones. Cada uno de estos fenómenos debía entenderse por separado para evitar confusiones.

27. El representante de la ONG International Human Rights Association of American Minorities subrayó la necesidad de aplicar plenamente la Convención Internacional sobre la Eliminación de Todas las Formas de Discriminación Racial, en particular todas las disposiciones del artículo 15, en relación con la reciente resolución 48/7 del Consejo de Derechos Humanos, relativa a las consecuencias negativas de las secuelas del colonialismo en el disfrute de los derechos humanos.

28. La representante de la Unión Europea declaró que la Unión Europea rechazaba y condenaba todas las formas de racismo y de intolerancia conexa y seguía firmemente comprometida con la lucha contra el racismo, la discriminación racial, la xenofobia y las formas conexas de intolerancia, tanto en la Unión Europea como en el resto del mundo. Estos fenómenos eran contrarios a los principios del respeto de la dignidad humana y la libertad, la democracia, la igualdad, el estado de derecho y los derechos humanos, en los que se fundamentaban la Unión Europea y los valores comunes a todos sus Estados miembros. La Unión Europea estaba trabajando para poner en práctica esos principios; contaba con una amplia legislación de lucha contra la discriminación y sólidos marcos jurídicos en materia de discriminación y el racismo. La prevención y la lucha contra el racismo, la xenofobia y otras formas de intolerancia también estaban integradas en las políticas de la Unión Europea. Por otro lado, había mecanismos internos de intercambio de buenas prácticas y toda la legislación era sistemáticamente revisada por el Tribunal de Justicia de la Unión Europea. A su vez, la Unión Europea había establecido un plan de acción plurianual contra el racismo con objetivos de actuación específicos. Dos cumbres de la Unión Europea también habían establecido la máxima prioridad a la lucha contra el racismo en la agenda ministerial y la Comisión Europea había designado a varios coordinadores para tratar aspectos específicos del fenómeno, como un coordinador de la lucha contra el racismo y sendos coordinadores de la lucha contra el odio antimusulmán y el antisemitismo. Un marco independiente de la Unión Europea garantizaba la igualdad y la inclusión de la población romaní. La Unión Europea supervisaba internamente lo que ocurría en los Estados miembros a través de su Agencia de Derechos Fundamentales, recogía datos y realizaba encuestas que contribuían a la elaboración de sus políticas internas. En diciembre de 2021, la Comisión Europea había puesto en marcha una iniciativa destinada a tipificar como infracción penal los discursos y delitos de odio en la Unión Europea. Si el Consejo adoptara una decisión a este respecto, la Comisión Europea podría proponer una legislación secundaria de la Unión Europea con vistas a tipificar como infracción penal formas de discurso de odio y delitos de odio distintos de los que implicaban motivos racistas y xenófobos, que ya estaban cubiertos por una decisión marco de la Unión Europea. La Comisión Europea y la Unión Europea estaban adoptando estas iniciativas en el marco de la Convención Internacional sobre la Eliminación de Todas las Formas de Discriminación Racial. Para la Unión Europea, la Convención era un documento en evolución, así como un tratado susceptible de integrar retos nuevos y emergentes. La obtención de resultados a nivel interno dependía de la voluntad política. Al margen de promover la adhesión universal a la Convención y su aplicación plena y efectiva —los dos principales pilares—, la Unión Europea consideraba asimismo que la Convención no debía considerarse de manera aislada sino leerse conjuntamente con otros instrumentos existentes, incluidos los artículos 19 y 20 del Pacto Internacional de Derechos Civiles y Políticos. La Unión Europea no estaba de acuerdo en que hubiera lagunas en la Convención, ya que esta permitía, a su juicio, emprender una lista interminable de actividades. Por último, en relación con una intervención anterior, lamentó que hubieran podido realizarse en ese foro semejantes declaraciones, que contenían información falsa sobre la retórica y el discurso de odio en eventos recientes.

29. La Presidenta-Relatora acogió con satisfacción el enfoque colectivo propuesto para examinar el racismo, así como los ejemplos y las mejores prácticas de políticas, medidas y planes de acción nacionales mencionados. Declaró que deseaba que el período de sesiones se centrara en el trabajo y el mandato del Comité Especial e instó a todos los participantes a abstenerse de entablar debates bilaterales y a mantenerse centrados en el programa de trabajo. Para hacer avanzar los trabajos del Comité, también los alentó a hacer gala de un espíritu práctico, orientado a la obtención de resultados.

III. Debates generales y contextuales

A. Presentaciones y debates sobre el impacto histórico del colonialismo en el derecho

30. En su segunda sesión, celebrada el 19 de julio, el Comité Especial examinó el tema 4 de la agenda, el impacto histórico del colonialismo en el derecho. Antony Anghie, profesor de Derecho en la Facultad de Derecho de la Universidad Nacional de Singapur y en la Facultad de Derecho de la Universidad de Utah (Estados Unidos), y José Manuel Barreto, profesor de la Facultad de Derecho de la Universidad Católica de Colombia y miembro investigador de la Facultad de Derecho de la Universidad de Bielefeld (Alemania), expusieron la cuestión. En el anexo I del presente informe figura un resumen de las ponencias y del debate posterior.

B. Presentaciones y debates sobre todas las formas contemporáneas de discriminación fundadas en la religión o las convicciones

31. En sus sesiones tercera y cuarta, celebradas el 20 de julio, el Comité Especial examinó el tema 5 de la agenda: todas las formas contemporáneas de discriminación fundadas en la religión o las convicciones. Erica Howard, profesora de derecho de la Universidad de Middlesex (Reino Unido de Gran Bretaña e Irlanda del Norte), y Rabiat Akande, profesora adjunta de la Facultad de Derecho Osgoode Hall de la Universidad de York (Canadá), presentaron sendas ponencias sobre el tema. En el anexo I del presente informe figura un resumen de las ponencias y del debate posterior.

C. Presentaciones y debates sobre los principios y elementos de la penalización

32. En sus sesiones quinta y octava, celebradas los días 21 y 22 de julio, respectivamente, el Comité Especial examinó el tema 6 de la agenda: principios y elementos de la penalización. Beatrice Bonafè, profesora de derecho internacional de la Universidad de la Sapienza de Roma (Italia), y Mark Drumbl, profesor de derecho y director del Instituto de Derecho Internacional de la Facultad de Derecho de la Universidad Washington y Lee (Estados Unidos), presentaron la cuestión. En el anexo I del presente informe figura un resumen de las ponencias y del debate posterior.

D. Debate general e intercambio de opiniones sobre los temas 4 a 6

33. En la sexta sesión, la Presidenta-Relatora presentó un proyecto de documento que resumía algunos temas e ideas generales preliminares de las presentaciones de los expertos, con el fin de facilitar un debate general y un intercambio de opiniones sobre las diferentes cuestiones. Se distribuyeron copias de ese documento en la sala de reuniones y el texto se proyectó en una pantalla que también podían ver los participantes en línea. La Presidenta-Relatora invitó al Comité a formular unas primeras observaciones generales, subrayando que el documento era un resumen fáctico de las presentaciones y opiniones de los expertos invitados a dirigirse al Comité durante el período de sesiones. El objetivo era destacar con precisión los puntos clave de las distintas presentaciones y de los debates interactivos celebrados hasta la fecha.

34. Varias delegaciones tomaron la palabra para expresar sus opiniones sobre el proyecto de documento. La Presidenta-Relatora expresó su agradecimiento a los miembros del Comité que habían tomado la palabra e invitó a todos los participantes, tanto en la sala como en línea, a presentar observaciones por escrito a la secretaría.

35. La Presidenta-Relatora facilitó el debate general y el intercambio de opiniones sobre el proyecto de documento, que prosiguieron a lo largo de las sesiones 12ª, 13ª, 14ª, 15ª y 16ª. Las sesiones fueron suspendidas en varios momentos para dar paso a debates informales. El Comité aprobó por consenso en su 16ª sesión las conclusiones generales del debate (temas 4 a 6).

E. Presentación y debate sobre el texto anotado de la Presidenta-Relatora

36. En su séptima sesión, el Comité Especial empezó a examinar el tema 7, las notas de la Presidenta-Relatora sobre el documento titulado "Resumen de las cuestiones y los posibles elementos examinados en relación con la aplicación de la resolución 73/262 de la Asamblea General y la resolución 34/36 del Consejo de Derechos Humanos sobre el comienzo de negociaciones acerca de un proyecto de protocolo adicional de la Convención para tipificar como delitos los actos de carácter racista y xenófobo".

37. La Presidenta-Relatora presentó el documento de trabajo que había preparado para la 12ª sesión del Comité Especial. Recordó que el documento había sido distribuido antes del período de sesiones a todos los participantes. El texto se proyectó en una pantalla, visible tanto en la sala como en línea durante las sesiones ulteriores. El objetivo del texto anotado era contribuir a la reflexión y los debates del Comité y facilitar los trabajos con vistas a la adopción de propuestas concretas. Estaba basado en el documento adoptado por el Comité Especial en su décimo período de sesiones, en el informe de la consulta de expertos jurídicos realizada entre períodos de sesiones y en los puntos y cuestiones examinados en la sala de reunión durante el 11º período de sesiones. Presentaba a grandes rasgos una lista no exhaustiva de términos clave (véase el párrafo 41) que era preciso definir con mayor precisión, a juicio de los expertos jurídicos consultados entre períodos de sesiones. La Presidenta-Relatora abrió el turno de intervenciones y comentarios generales.

38. El representante de Côte d'Ivoire hizo una declaración general en nombre del Grupo de los Estados de África, agradeció el texto a la Presidenta-Relatora y subrayó la importancia de contar con un marco de definición, ya que el protocolo adicional sería en último término un acuerdo entre Estados. El protocolo adicional debía tener el mismo rango que otros documentos destinados a eliminar la discriminación racial y la xenofobia. La posición del Grupo de los Estados de África era que la Declaración y el Programa de Acción de Durban comprendían definiciones, por ejemplo de perfil racial, acordadas por los Estados. Propuso que la definición de racismo se basara en el artículo 4 de la Convención Internacional sobre la Eliminación de Todas las Formas de Discriminación Racial, que aclaraba el significado del término y contribuía a combatir la superioridad racial. También propuso integrar elementos del artículo 2 de la Declaración sobre la Raza y los Prejuicios Raciales de 1978 de la UNESCO, que abordaba el racismo estructural y la diferenciación entre grupos. Propuso examinar el término "medios de comunicación" con arreglo a las leyes nacionales y sostuvo que los Estados deberían poder incluir sanciones no penales para luchar contra la discriminación racial y la xenofobia. El Grupo de los Estados de África seguía abierto a escuchar opiniones de otras delegaciones.

39. El representante del Pakistán, hablando en nombre de la OCI, agradeció a la Presidenta-Relatora su texto anotado. Señaló el auge de ideologías populistas y extremistas en diversos países. Los refugiados, los migrantes y los solicitantes de asilo eran objeto de un racismo estructural y de una discriminación sistémica. El texto de la Presidenta-Relatora señalaba con tino los términos que era preciso desarrollar y contribuiría al cumplimiento del mandato del Comité, facilitando su comprensión de la cuestión. Reiteró la propuesta de la OCI de que la Presidenta-Relatora solicitara la asistencia de expertos jurídicos de diferentes regiones del mundo para mejorar la comprensión del Comité de los diferentes términos y contextos, y señaló que existían claras lagunas jurídicas en la Convención Internacional sobre la Eliminación de Todas las Formas de Discriminación Racial, que la OCI se había propuesto subsanar.

40. El representante de Cuba se hizo eco de los comentarios del Grupo de los Estados de África y de la OCI y declaró que Cuba consideraba que el documento de la Presidenta-Relatora ofrecía una base concreta y de utilidad para el trabajo del Comité, y marcaría una etapa en el cumplimiento de su mandato. Cuba estaba dispuesta a participar de forma activa y constructiva, y esperaba lo mismo de las demás delegaciones.

41. La Presidenta-Relatora dirigió el examen del texto anotado en las sesiones 9ª, 10ª, 11ª y 12ª, durante las cuales el documento fue puesto a disposición de todos los participantes y proyectado en una pantalla visible tanto dentro de la sala como en línea. Los participantes

aportaron observaciones, orientaciones, puntos de vista y señalaron áreas de interés y otros documentos o instrumentos pertinentes en relación con las definiciones de los siguientes términos: “racismo/racista; establecimiento de perfiles raciales; xenofobia; contenidos/actos de carácter racista y xenófobo; discurso de odio; delitos de odio; intolerancia; todas las formas contemporáneas de discriminación fundadas en la religión o las convicciones; estereotipos despectivos; personas y grupos específicos; y medios de comunicación”.

42. Al final de la 11ª sesión, se cedió la palabra al Embajador y Representante Permanente de Barbados ante la Oficina de las Naciones Unidas y otras organizaciones internacionales en Ginebra para que pronunciara una declaración. Afirmó que no podía aprobarse ni tolerarse ninguna forma de discriminación, racial o de otro tipo, no solo en virtud del derecho internacional, sino también por ser contrarias a la humanidad. Barbados había sido en su día la capital mundial de la trata de esclavos; su país era muy consciente del efecto que seguía teniendo en las personas mucho después de la abolición de la esclavitud. Los estereotipos se manifestaban de diferentes formas: institucionales, a escala nacional y en las comunidades. Con independencia de la forma que revistieran, los estereotipos seguían presentes en la actualidad, lo que exigía reforzar, en la medida de lo posible, todos los mecanismos jurídicos del marco internacional y crear otros que todavía no existían, con vistas a habilitar herramientas y ponerlas a disposición de la comunidad internacional en el futuro. Los estereotipos no solo existían en las instituciones, sino también, de forma subliminal o manifiesta, en los medios de comunicación de toda la comunidad internacional y en los prejuicios periodísticos, que en ocasiones eran evidentes y debían ser eliminados. Reiteró el apoyo de Barbados a la Presidenta-Relatora y al trabajo del Comité Especial.

F. Debate general e intercambio de opiniones sobre las conclusiones y recomendaciones del período de sesiones

43. En su 16ª sesión, celebrada el 28 de julio, el Comité Especial celebró un debate general e intercambio de opiniones con vistas a aprobar las conclusiones y recomendaciones del período de sesiones.

44. El representante del Pakistán, hablando en nombre de la OCI, propuso que, en el futuro, se recurriera a un grupo de expertos jurídicos, que representaran las diferentes regiones y sistemas jurídicos, para encargarle la tarea de presentar a la Presidenta-Relatora orientaciones y aportaciones destinadas a la preparación de su documento. Por otro lado, sería conveniente pedir a la Alta Comisionada de las Naciones Unidas para los Derechos Humanos que colaborara con los expertos jurídicos y facilitara su participación en el 13er período de sesiones del Comité Especial.

45. La representante de la Unión Europea declaró que era necesario seguir estudiando la cuestión y que no habría tiempo para elevar una propuesta a ese respecto al siguiente nivel. Todos los expertos habían señalado que seguía faltando información importante y una mayor comprensión práctica y técnica de los temas.

46. La Presidenta-Relatora señaló que se había tomado nota de las ideas y propuestas presentadas por el Comité Especial durante el período de sesiones, especialmente en relación con el texto anotado. Sería muy útil para el Comité contar con expertos que los apoyaran en el desempeño de su mandato. Prolongar el debate sobre la cuestión sería ineficaz y supondría un desperdicio de los recursos de la Organización. La voluntad política y la cooperación eran importantes para cumplir el mandato establecido por el Consejo de Derechos Humanos y la Asamblea General. La representante agradeció todas las intervenciones de las delegaciones sobre el tema 8 de la agenda, relativo a las posibles conclusiones y recomendaciones del período de sesiones y los alentó a presentar propuestas por escrito.

47. El representante de la ONG Sikh Human Rights Group señaló la existencia de puntos de vista divergentes sobre la nomenclatura y se preguntó cómo definir el racismo y la xenofobia: ¿dónde terminaba el orgullo comunitario y empezaba el supremacismo? ¿Y en qué punto el compromiso con la nación se convertía en xenofobia? Eran preguntas difíciles, a las que no se respondería igual en todas las partes del mundo, lo que podía resultar problemático.

48. El representante de la ONG International Human Rights Association of American Minorities propuso que en el futuro también se invitara a expertos indígenas a participar en la labor del Comité Especial de preparación de un protocolo adicional, toda vez que no se había desarrollado el derecho internacional para los pueblos indígenas. También invitó al Comité Especial a que considerara la propuesta presentada por su organización al Comité para la Eliminación de la Discriminación Racial de que aceptara y revisara las peticiones con arreglo a sus procedimientos conformes al artículo 15 de la Convención Internacional sobre la Eliminación de Todas las Formas de Discriminación Racial.

49. En el 17ª sesión del Comité Especial, celebrada el 29 de julio, la Presidenta-Relatora presentó un proyecto de documento que recopilaba las ideas y propuestas presentadas durante el período de sesiones en relación con las conclusiones y recomendaciones del 12º período de sesiones, distribuido el día anterior. Invitó a los participantes a formular declaraciones generales sobre el proyecto de texto, que fue proyectado en una pantalla visible tanto dentro de la sala como en línea.

50. La representante de la Unión Europea señaló que los participantes habían dispuesto de poco tiempo para revisar el proyecto de conclusiones y recomendaciones que contenía el documento y recibir la correspondiente validación política. No había acuerdo sobre varios puntos incluidos en el proyecto de documento. La Unión Europea sostenía que no había lagunas sustantivas ni de procedimiento en la Convención Internacional sobre la Eliminación de Todas las Formas de Discriminación Racial, ya que era un instrumento vivo.

51. El representante del Pakistán, hablando en nombre de OCI, pidió más tiempo para revisar el proyecto de texto. No obstante, observó que era una práctica habitual, en otros foros intergubernamentales, recibir el texto de los proyectos de resultados el penúltimo día del período de sesiones. No debía haber discusión sobre el mandato del Comité Especial, puesto que había quedado claramente establecido en la resolución 10/30 del Consejo de Derechos Humanos. Los expertos que habían participado en el período de sesiones habían manifestado claramente que existían lagunas jurídicas en la Convención Internacional sobre la Eliminación de Todas las Formas de Discriminación Racial. Si bien estaba dispuesta a dar cabida a la diversidad de opiniones en las conclusiones del período de sesiones, la OCI no consideraba la posibilidad de hacer compromisos en relación con el mandato del Comité.

52. El representante de Egipto señaló que el persistente arraigo social del racismo y la discriminación racial ponía de relieve la necesidad de establecer normas adicionales a la Convención Internacional sobre la Eliminación de Todas las Formas de Discriminación Racial. Egipto estaba dispuesto a cooperar con todas las partes interesadas para cortar el fenómeno del racismo en su raíz. Había tomado nota del proyecto de documento que incluía las conclusiones del período de sesiones e instaba al Comité a que procediera a elaborar el proyecto de protocolo adicional.

53. El representante de Barbados agradeció el proyecto de documento que incluía las conclusiones y recomendaciones del período de sesiones y declaró que el mandato del Comité Especial había quedado establecido y que las opiniones de las diferentes delegaciones eran conocidas. Era hora de poner en práctica el mandato del Comité.

54. El representante de Argelia declaró que ya era hora de que el Comité Especial avanzara y progresara en sus trabajos sobre un protocolo adicional a la Convención Internacional sobre la Eliminación de Todas las Formas de Discriminación Racial.

55. El representante de la República Islámica del Irán se mostró de acuerdo en que era importante respetar y aplicar el claro mandato recibido por el Comité Especial.

56. La Presidenta-Relatora agradeció sus intervenciones a todas las delegaciones; todas ellas expresaban sus legítimas opiniones. Sin embargo, el papel de la Presidenta-Relatora era velar por el cumplimiento del mandato, que era el resultado de un texto inclusivo y negociado en el Consejo de Derechos Humanos y en la Asamblea General. Parecía existir la impresión de que las diferencias de opinión respecto de la labor del Comité Especial denotaban una falta de adhesión a dicha labor, pero no era el caso, ya que tanto el Consejo como la Asamblea habían renovado reiteradamente el mandato del Comité. La Presidenta-Relatora reiteró el mandato original establecido en virtud de la decisión 3/103 del Consejo, posteriormente recordada en las resoluciones 6/21 y 10/30 del propio Consejo y en varias resoluciones de la

Asamblea General. Pidió que el texto de la decisión 3/103 fuera proyectado en la pantalla para que pudiera ser leído tanto en la sala como en línea. El mandato concedía a los miembros del Comité flexibilidad en relación con el contexto y la forma de un protocolo adicional, de modo que el Comité debía centrarse en las tareas pertinentes, en vez de cuestionar el mandato. Como ocurre con todas las resoluciones, una vez que la mayoría decide un mandato legislativo, este debe ser aplicado. Instó al Comité a avanzar en el desempeño de su mandato y señaló que la voluntad política determinaría el contexto y la forma del protocolo adicional. Dijo que ni la Presidenta-Relatora ni el Comité debían cuestionar el mandato. Subrayó que todas las delegaciones de la Comisión se encontraban en pie de igualdad y que, en muchos casos, sus opiniones y posiciones eran conocidas desde hacía más de 15 años. En cuanto al contenido del proyecto de conclusiones y recomendaciones, declaró que era preciso asignar una tarea a los expertos; era fútil invitar a expertos para que reiteraran las mismas ideas y consejos. Al abrir el debate del Comité sobre la estructura y el texto del proyecto de documento que incluía las conclusiones y recomendaciones, la Presidenta-Relatora señaló la importancia de reflejar en las conclusiones y recomendaciones la necesidad de asignar a los expertos estudios específicos y servicios de asesoramiento, de conformidad con el mandato del Comité Especial.

57. El delegado de Sudáfrica, hablando en nombre del Grupo de los Estados de África, señaló que: a) había un consenso general sobre la necesidad asignar la labor de formular las definiciones a expertos para evitar todo equívoco; b) era necesario contar con un marco de definición y, tras el acuerdo, los Estados deberían aplicar la Convención Internacional sobre la Eliminación de Todas las Formas de Discriminación Racial; c) las definiciones propuestas debían basarse en el artículo 4 de la Convención, que incluía la condena de las ideas de superioridad racial; d) cada Estado debía definir el término “medios de comunicación” en el contexto de sus respectivas leyes nacionales, y las sanciones no penales debían ser incluidas en ese contexto; y e) en la lucha contra el discurso y los delitos de odio, también debía hacerse hincapié en la prevención. En cuanto a las conclusiones y recomendaciones, si bien era importante asignar tareas específicas a los expertos, necesitaban la orientación y la dirección del Comité.

58. Las delegaciones solicitaron un aplazamiento de la reunión para llevar a cabo consultas informales sobre el proyecto de documento.

IV. Aprobación de las conclusiones y recomendaciones del 12º período de sesiones

59. Al comienzo de la 18ª sesión, los miembros del Comité informaron a la Presidenta-Relatora sobre el avance de sus consultas informales y solicitaron más tiempo para trabajar en el proyecto de conclusiones y recomendaciones del 12º período de sesiones. Tras nuevas conversaciones informales, se volvió a solicitar más tiempo para completar las negociaciones.

60. Durante la reunión, el representante de la ONG Ascendances Afro Océan-Indien afirmó que los trabajos del Comité debían avanzar y que era muy importante asignar tareas a los expertos. No había confusión sobre el mandato del Comité de elaborar normas complementarias y colmar las lagunas existentes, dada la realidad cotidiana de las personas que se enfrentaban a la discriminación racial en el siglo XXI. Algunos participantes habían sostenido que no debía modificarse nada en relación con la Convención Internacional sobre la Eliminación de Todas las Formas de Discriminación Racial, pero lo cierto era que la realidad de tantas personas en todo el mundo daba a entender lo contrario. Tras señalar que el 18 de julio era el Día Internacional de Nelson Mandela, recordó que Mandela había pasado 27 años en la cárcel, durante los cuales la Convención no lo había protegido a él ni a otros como él. Había ONG que se preguntaban por qué se intentaba rechazar el mandato que el Consejo de Derechos Humanos y la Asamblea General habían asignado al Comité Especial. La Conferencia Mundial contra el Racismo, la Discriminación Racial, la Xenofobia y las Formas Conexas de Intolerancia, celebrada en Durban en 2001, había sentado nuevas bases para eliminar la discriminación racial y establecido un nuevo enfoque y una voluntad política para luchar contra el racismo. El Comité debía mejorar el texto de la Convención, ya que las realidades de 2022 eran muy diferentes de las de 1965. En la actualidad, los problemas de

discriminación racial se extendían como un reguero de pólvora en todo el mundo, lo que ponía de relieve la enorme importancia de que el Comité cumpliera sus responsabilidades, y eliminara el racismo y el odio.

61. La reunión fue nuevamente suspendida para permitir las negociaciones informales finales sobre el proyecto de conclusiones y recomendaciones del período de sesiones.

62. Las delegaciones informaron al Comité Especial sobre las conclusiones de las negociaciones informales y se distribuyó entre los participantes de la reunión, tanto en línea como en la sala, la versión más reciente del proyecto, que también fue proyectado en pantalla. El Comité examinó el texto negociado antes de aprobarlo por consenso. También debatió los calendarios de los trabajos que se asignarían a los expertos y la importancia de las peticiones de los expertos que figuraban en los párrafos 8 y 9 del texto aprobado, consciente de que sería necesario justificar la incidencia presupuestaria de los recursos asignados a la realización de las tareas.

63. El representante de Barbados, respondiendo a la invitación de la Presidenta-Relatora a formular declaraciones generales finales, expresó el apoyo de su país a la labor del Comité Especial y ponderó las contribuciones realizadas por todos los participantes, así como la conducción de la Presidenta-Relatora. Agradeció a los colegas que habían participado en todo momento, incluso en los arduos debates informales, y expresó el compromiso de Barbados con el trabajo y los objetivos del Comité.

64. La representante de la Unión Europea agradeció a la Presidenta-Relatora su capacidad de conducción y la creación de un entorno propicio en el Comité Especial para que los participantes pudieran involucrarse y trabajar de forma constructiva. Si bien los participantes se habían topado con algunas dificultades, el trabajo realizado en los días previos había demostrado que el Comité seguía siendo capaz de obtener resultados. También expresó su agradecimiento a los colegas que habían hecho un esfuerzo para estar presentes en la sala.

65. El representante del Pakistán, hablando en nombre de la OCI, agradeció el buen desempeño de la Presidenta-Relatora al frente del Comité Especial. Tomó nota de las deliberaciones que habían tenido lugar durante el 12º período de sesiones y del hecho de que los expertos habían destacado la necesidad de redoblar esfuerzos para reforzar el marco internacional de derechos humanos contra el racismo. En vista de la alarmante progresión mundial del racismo, la discriminación racial, la xenofobia y la intolerancia conexa, el estancamiento de la labor del Comité no era una opción. La OCI condenaba y rechazaba la violencia y la discriminación contra las personas por motivos de raza, color, religión o lengua. Los migrantes, los refugiados y los solicitantes de asilo eran víctimas habituales de formas múltiples y agravadas de discriminación. El objetivo último de la OCI seguía siendo colmar las lagunas jurídicas de la Convención Internacional sobre la Eliminación de Todas las Formas de Discriminación Racial y demostrar su compromiso con la lucha contra el racismo en todas sus formas y manifestaciones. Reiteró el llamamiento de la OCI a entablar sin demora negociaciones sobre el texto del protocolo adicional a la Convención con vistas a tipificar como delito todos los actos de carácter racista y xenófobo. Con vistas al cumplimiento del mandato del Comité, la Alta Comisionada debía recurrir a los servicios de expertos, garantizando el equilibrio geográfico y la representación de una diversidad de sistemas jurídicos, para que ayudaran a la Presidenta-Relatora del Comité a preparar el proyecto inicial de protocolo adicional a la Convención, teniendo en cuenta las opiniones expresadas por las diversas partes interesadas en los períodos de sesiones anteriores del Comité.

66. En sus observaciones finales, la Presidenta-Relatora agradeció a los participantes del Comité Especial su cooperación y sus contribuciones, así como el enfoque constructivo y la voluntad de compromiso que habían demostrado durante el 12º período de sesiones. Se mostró especialmente agradecida con los delegados que habían mantenido conversaciones informales para revisar los textos y lograr resultados consensuados del período de sesiones. Señaló que, a pesar de algunas diferencias internas del Comité, existía la creencia compartida en la lucha contra el racismo. El Comité estaba trabajando intensamente por lograr un consenso que, en última instancia, le permitiera cumplir su mandato. A su juicio, era preciso perseverar en la misma línea para entablar negociaciones sobre el proyecto de protocolo adicional a la Convención Internacional sobre la Eliminación de Todas las Formas de

Discriminación Racial en el que se tipificaran como delitos los actos de carácter racista y xenófobo. Era una labor compleja pero importante. Hizo votos por que el Comité siguiera demostrando su voluntad política de avanzar y cumplir su mandato. La Presidenta-Relatora clausuró el 12º período de sesiones del Comité Especial.

V. Conclusiones generales de los debates contextuales (temas 4 a 6 de la agenda)

A. Impacto histórico del colonialismo en el derecho

67. El colonialismo, el racismo y la discriminación racial tienen un contexto histórico. La relación entre el colonialismo, el racismo y la discriminación racial es compleja. Es una vía de doble sentido; ambos fenómenos se refuerzan mutuamente. Sin embargo, el racismo no es únicamente una construcción del colonialismo. Existe asimismo en numerosos países y regiones sin historia colonial.

68. Durante el debate se plantearon las siguientes cuestiones:

a) La elaboración de principios de derecho internacional por parte de las potencias coloniales con vistas a justificar la discriminación racial;

b) Las formas de neocolonialismo, particularmente en el contexto de los regímenes de comercio e inversión;

c) El racismo y la discriminación racial que sufren los refugiados, los migrantes y los solicitantes de asilo;

d) La participación de actores privados no estatales, como las empresas transnacionales y los medios de comunicación social.

69. Los oradores presentaron las siguientes propuestas:

a) La elaboración de un protocolo adicional a la Convención Internacional sobre la Eliminación de Todas las Formas de Discriminación Racial ofrece una oportunidad de tratar problemas de derechos humanos derivados del colonialismo en aras de la igualdad racial;

b) Los organismos de las Naciones Unidas, en particular la UNESCO, deben elaborar políticas educativas destinadas a los Estados sobre los fenómenos del racismo, la discriminación racial y el colonialismo;

c) Los Estados deben reconocer las raíces históricas del racismo y la discriminación racial, así como el legado negativo del colonialismo y el imperialismo;

d) Las antiguas potencias coloniales deben reconocer su participación en la colonización y condenarla como inmoral e injusta para hacerse cargo de su pasado y confrontarlo;

e) El Sur Global debe reflexionar por su cuenta y tomar medidas contra el racismo y la discriminación racial.

B. Todas las formas contemporáneas de discriminación fundadas en la religión o las convicciones

70. Los oradores plantearon las siguientes cuestiones durante el debate:

a) Definir la religión o las convicciones resulta difícil, ya que las definiciones pueden ser poco o demasiado inclusivas y entrañar juicios de valor inadecuados. Sería aconsejable no definir esos términos;

b) La protección contra la discriminación fundada en la religión o las convicciones es más débil que la protección contra la discriminación racial, ya que la Declaración sobre la Eliminación de Todas las Formas de Intolerancia y Discriminación

Fundadas en la Religión o las Convicciones no es una convención. La definición de discriminación fundada en la religión o las convicciones es en gran medida simétrica respecto de la definición de discriminación racial de la Convención Internacional sobre la Eliminación de Todas las Formas de Discriminación Racial. Así pues, la discriminación fundada en la religión o las convicciones podría encajar en las disposiciones de dicha Convención o actualizarlas;

c) La discriminación racial suele ser interseccional. La Declaración y el Programa de Acción de Durban se refieren al hecho de que las víctimas pueden sufrir formas múltiples o agravadas de discriminación por motivos de raza y otros motivos relacionados, como la religión. Cabe reforzar la Convención Internacional sobre la Eliminación de Todas las Formas de Discriminación Racial añadiendo un texto sobre las formas múltiples e interseccionales de discriminación;

d) La discriminación racial suele estar vinculada a la situación de vulnerabilidad, como suele ser el caso de los refugiados, los migrantes y los solicitantes de asilo, así como de las personas pertenecientes a comunidades religiosas, los pueblos indígenas, los afrodescendientes, las personas de ascendencia asiática y las comunidades romaníes;

e) La discriminación racial puede darse junto con la discriminación fundada en la religión o las convicciones. Sin embargo, la discriminación fundada en la religión o las convicciones no siempre está racializada;

f) Las personas pueden sufrir discriminación por tener un aspecto diferente. La línea que separa la discriminación por motivos de raza y la discriminación por motivos de religión o convicciones puede ser tenue. Esto crea una laguna en la protección del derecho internacional contra la discriminación fundada en la religión o las convicciones y genera una desprotección de las víctimas, así como un resquicio que permite a los autores ocultar sus motivaciones raciales escudándose en la religión o las convicciones, que no siempre están tipificadas por ley;

g) Puede resultar difícil trazar la línea que separa el derecho a la libertad de expresión y de opinión del discurso de odio. Sin embargo, no existe un derecho a no ser ofendido. En una sociedad abierta, debe haber espacio para la crítica. Los derechos humanos no protegen las religiones. Los derechos humanos protegen a las personas;

h) Los Estados deben proceder con cautela a la hora de penalizar el discurso de odio, ya que puede tener un efecto asfixiante. La penalización forma parte del proceso, pero es solo una entre diversas respuestas. También deben considerarse otras vías, como fomentar el diálogo, invertir en educación, promover el respeto y la tolerancia y abordar los problemas que dificultan la aplicación de la ley. Las autoridades encargadas de hacer aplicar la ley tienen un importante papel que desempeñar en la lucha contra el racismo, la discriminación racial, la xenofobia y las formas conexas de intolerancia;

i) El término “intolerancia” puede interpretarse de tal manera que incluya la discriminación fundada en la religión o las convicciones. La intolerancia no está definida en ningún instrumento legal y es un concepto demasiado vago para ser tipificado como delito.

C. Principios y elementos de la penalización

71. La Convención Internacional sobre la Eliminación de Todas las Formas de Discriminación Racial prevé diferentes regímenes:

a) El artículo 2 establece las obligaciones internacionales del Estado y el artículo 5 garantiza los derechos fundamentales. Ambos obedecen a la lógica de la responsabilidad del Estado en el marco del derecho internacional;

b) El artículo 4 enuncia obligaciones en materia de penalización y establece una responsabilidad penal individual en la legislación nacional. Obedece a la lógica de la responsabilidad penal;

c) El artículo 6 prevé recursos efectivos, como el acceso de las víctimas a reparación y satisfacción con arreglo a la legislación nacional. Obedece a la lógica de la responsabilidad civil;

d) El artículo 7 establece medidas administrativas y de aplicación;

e) Cada régimen abarca ámbitos diferentes, bajo condiciones diferentes, con consecuencias jurídicas también diferentes. Estas opciones deberían ser tenidas en cuenta a la hora de redactar un protocolo adicional. En particular, deberían tomarse en consideración la penalización, la responsabilidad internacional y los recursos civiles en virtud de la legislación nacional. Cada opción es diferente y atañe a temas diferentes, en condiciones diferentes, con consecuencias jurídicas diferentes. Hay diferentes tipos de delitos: el Comité Especial debería examinar más detenidamente los elementos del delito;

f) En derecho penal, la denominación de un instrumento debe corresponderse con su contenido. El proyecto de documento de elementos debe tener un título y subtítulos que reflejen el contenido del documento;

g) La falta de una definición jurídica precisa de los términos “racismo” y “xenofobia” en el derecho internacional podría conducir a la fragmentación y la confusión. Las definiciones son un requisito previo a la formulación de un protocolo adicional relativo al derecho penal;

h) La penalización requiere de ciertos elementos básicos, en particular, al menos una definición precisa del *actus reus* que se ajuste al principio básico de legalidad, la *mens rea*, los tipos de responsabilidad y las defensas y posibles circunstancias agravantes y atenuantes;

i) Es imperativo aclarar los umbrales jurídicos, o sea, los tipos de actos punibles o penalizados. Lo más probable es que un protocolo adicional tipifique actos tales como el uso de palabras, la elaboración de políticas y la institución de prácticas que conduzcan a la comisión inminente de actos de violencia física o muerte;

j) Si bien las definiciones del derecho internacional tienen vocación universal, los actos, efectos y manifestaciones del racismo y la discriminación racial son locales y a menudo están basados en el colonialismo y la historia local. El contexto es de vital importancia;

k) El derecho penal tiene sus límites, y la penalización casa mal con el racismo y el derecho internacional. Es importante elaborar una combinación de disposiciones de derecho penal y de derecho civil. La elección de las sanciones debe quedar en manos de los sistemas nacionales;

l) Las sanciones penales pueden consolidar las actitudes y motivaciones racistas. Además del castigo, la rehabilitación y la reprogramación resultan fundamentales para rehumanizar a los autores de actos racistas. La remediación, la resocialización y la vuelta a una vida social sana tienen gran importancia;

m) Existe una intersección entre la juventud y el racismo, que se manifiesta en los fenómenos de los niños soldado, las bandas juveniles criminales y el adoctrinamiento y militarización de los jóvenes. Será importante desarrollar iniciativas para hacer frente a los actos racistas y xenófobos, de tal modo que cuando un joven se vea implicado en actos racistas, habiendo sido adoctrinado, este hecho pase a considerarse como factor agravante. Las víctimas del adoctrinamiento racista deben ser objeto de un tratamiento diferenciado y debe hacerse mucho hincapié en las medidas preventivas.

VI. Conclusiones y recomendaciones del 12º período de sesiones

72. **El Comité Especial reconoce la existencia de un contexto histórico del colonialismo, el racismo y la discriminación racial. La relación entre el colonialismo, el racismo y la discriminación racial es compleja. Se trata de una vía de doble sentido: fenómenos que se refuerzan mutuamente. Sin embargo, el racismo no es una mera**

construcción del colonialismo. Se da asimismo en numerosos países y regiones que no tienen historia colonial.

73. **El Comité Especial subrayó que los Estados miembros deberían adoptar medidas, en particular en los ámbitos de la educación, la cultura y los medios de comunicación, para combatir los estereotipos negativos, que conducen a la discriminación racial, y que los organismos de las Naciones Unidas, incluida la UNESCO, deberían elaborar políticas educativas para los Estados sobre los fenómenos del racismo, el colonialismo y el imperialismo, como han hecho con otros fenómenos.**

74. **Algunos expertos y Estados miembros destacaron la debilidad de la protección ofrecida contra la discriminación fundada en la religión o las convicciones, y subrayaron la conveniencia, a la hora de elaborar un protocolo adicional, de considerar la posibilidad de incluir la lucha contra la discriminación fundada en la religión o las convicciones. Otros Estados discreparon y sostuvieron que la Convención Internacional sobre la Eliminación de Todas las Formas de Discriminación Racial no era el instrumento apropiado para abordar la discriminación fundada en la religión o las convicciones.**

75. **En el contexto de la penalización de los actos de carácter racista y xenófobo, los Estados miembros deben tomar en consideración las modalidades a menudo interseccionales de la discriminación racial. La línea que separa la discriminación racial de la discriminación basada en otros motivos, como la religión y las convicciones, puede difuminarse hasta que se constituye una discriminación múltiple.**

76. **El título de un protocolo adicional a la Convención Internacional sobre la Eliminación de Todas las Formas de Discriminación Racial debe reflejar con exactitud el contenido del instrumento. Debe considerarse la posibilidad de modificar el contenido del proyecto de documento de elementos para incorporar la frase "penalización de los actos de carácter racista y xenófobo" o ampliar el título con vistas a incluir, además de la penalización, las medidas preventivas, la responsabilidad internacional y los recursos civiles.**

77. **En el contexto de la penalización de los actos de carácter racista y xenófobo, es imprescindible contar con definiciones jurídicas precisas del racismo y la xenofobia, así como de los tipos de actos (umbrales) punibles o penalizables, con vistas a garantizar una interpretación uniforme.**

78. **La mayoría de los Estados señalaron que la importancia de un marco de definición radica en el hecho de** que **un protocolo adicional de esta naturaleza constituiría ulteriormente un acuerdo entre Estados, lo que incidiría en la interpretación de la Convención Internacional sobre la Eliminación de Todas las Formas de Discriminación Racial y ampliaría su ámbito de aplicación.**

79. **En el marco del desempeño de su mandato, el Comité Especial recomienda, de conformidad con su mandato, recurrir a un grupo de expertos jurídicos, representativos de diferentes regiones y sistemas jurídicos, y asignarles la tarea de presentar a la Presidenta-Relatora, con vistas a la preparación de su documento, orientaciones y aportaciones precisas sobre las siguientes cuestiones:**

a) ¿Cuáles son los elementos que deben definirse jurídicamente para tipificar como delito los actos de carácter racista y xenófobo en los planos nacional, regional o internacional?

b) ¿Qué estructura tendría un documento jurídico destinado a penalizar los actos de carácter racista y xenófobo?

c) ¿Cuál debe ser el alcance de ese documento?

d) ¿Qué términos deben definirse como mínimo?

80. **Los expertos deben:**

a) Tener presentes las persistentes dificultades de los debates celebrados sobre la cuestión de un protocolo adicional a la Convención Internacional sobre la Eliminación de Todas las Formas de Discriminación Racial durante el 12º período de

sesiones del Comité Especial, ya que gran número de participantes destacó la necesidad de un protocolo adicional que subsanara las lagunas jurídicas existentes, en tanto que otros mantuvieron la postura de que la Convención no presentaba lagunas sustantivas ni de procedimiento;

b) Garantizar que su trabajo sea conforme a los instrumentos internacionales vinculantes existentes;

c) Inspirarse en todas las fuentes pertinentes indicadas en el texto anotado de la Presidenta-Relatora, que ofrece una lista no exhaustiva de instrumentos y documentos, entre ellos la Convención Internacional sobre la Eliminación de Todas las Formas de Discriminación Racial y la Declaración y el Programa de Acción de Durban;

d) Examinar las repercusiones del racismo estructural y sistémico, manifestaciones como los perfiles raciales y la discriminación fundada en la religión o las convicciones, así como la situación de los migrantes, los refugiados y los solicitantes de asilo;

e) Tener presente que el derecho penal tiene límites y que la penalización es solo una de las varias medidas que cabe incluir en el protocolo adicional. En particular, deben tener en cuenta la importancia de la educación, la formación y otras medidas preventivas;

f) Considerar la posibilidad de adoptar medidas de derecho penal y civil y de medidas de carácter no jurídico;

g) Calibrar si la penalización debe adoptar la forma de disposiciones jurídicas independientes o se debe considerar como un factor agravante de los delitos penales existentes;

h) Hay que tener en cuenta que el contexto es sumamente importante y central a la hora de determinar el daño que puede causar un acto delictivo previsto en el protocolo adicional;

i) Centrarse, entre otros, en el artículo 4 de la Convención Internacional sobre la Eliminación de Todas las Formas de Discriminación Racial y en los artículos 19 y 20 del Pacto Internacional de Derechos Civiles y Políticos, que deben leerse conjuntamente;

j) Indagar si el uso del término “xenofobia” podría abarcar la discriminación basada en la religión o las convicciones;

k) Estudiar la posibilidad de definir de manera más precisa el término “formas conexas de intolerancia”;

l) Prestar asesoramiento con vistas a definir de manera más precisa el término “delitos de odio”, teniendo en cuenta las referencias pertinentes de los instrumentos internacionales de derechos humanos, las resoluciones de las Naciones Unidas, los instrumentos regionales y la legislación nacional específica, y examinando en particular el límite entre el discurso de odio y los delitos de odio, y el contexto o las circunstancias que deben tenerse en cuenta;

m) Establecer una lista de las diferentes vías disponibles para hacer frente a los delitos de odio en el derecho penal, en el derecho civil y en el ámbito no jurídico, y determinar en qué circunstancias es aconsejable optar por unas u otras;

n) Examinar las múltiples formas de discriminación basadas en dos o más motivos, que a menudo están inextricablemente relacionados;

o) Aplicar un enfoque que tenga en cuenta las cuestiones de género y examinar las formas de discriminación racial a las que se enfrentan las mujeres y las niñas;

p) Tener presentes las circunstancias específicas de los niños y los jóvenes al debatir las medidas que deban incluirse en el protocolo adicional.

81. **Se debe solicitar a la Alta Comisionada que recurra a expertos jurídicos y facilite su participación en el decimotercer período de sesiones del Comité Especial para que presten asesoramiento y contribuyan a los debates sobre la elaboración de un proyecto de protocolo adicional que tipifique como delito los actos de carácter racista y xenófobo, con vistas a aplicar el mandato del Comité.**

Annex I

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

Context discussion 1: Historical impact of colonialism on the law

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

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

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

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

5. Professor Anghie stated that he hoped to suggest and outline why race became so integral to international law. He provided a quote from John Westlake, a19th century Whewell Professor of International Law at Cambridge University, stating "the inflow of the white race cannot be stopped where there is land to cultivate, ore to be mined, commerce to be developed, sport to enjoy, curiosity to be satisfied. If any fanatical admirer of savage life argued that the whites should be kept out, he would only be driven to the same conclusion by another route, for a government on the spot would be necessary to keep them out." Professor Anghie explained that, in this statement, Westlake essentially argued that, in the end, it is the "white race" that possesses power, and the "white race" cannot be kept out of other (non-white) territories.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

particularly paragraphs 3, 5, and 6.[2] She highlighted the following forms of discrimination: advocacy to religious hatred (through any means); incitement to imminent violence based on religion or belief; discrimination on the basis of religion or belief; use of religious profiling and the invidious use of religion as a criterion in conducting questionings, searches, and other law enforcement investigative procedures; and denigration or derogatory religious stereotyping.

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

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

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

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

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

[2] A/HRC/RES/16/18.
[3] CCPR/C/21/Rev.1/Add.4.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Context discussion 3: Principles and elements of criminalization

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Annex II

Programme of work – Resumed 11th and 12th sessions, Ad Hoc Committee on the Elaboration of Complementary Standards, 18–29 July 2022
(as adopted 19.07.22)

1st week

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

2nd week

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

Annex III

List of attendance

Member States

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

Non-Member States represented by observers

Holy See, State of Palestine

Intergovernmental organizations

European Union, Organization of Islamic Cooperation

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

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

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

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