Naciones Unidas A/HRC/51/56

Asamblea General

Distr. general
30 de septiembre de 2022
Español
Original: inglés

Consejo de Derechos Humanos
51er período de sesiones
12 de septiembre a 7 de octubre de 2022
Tema 9 de la agenda
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 11º 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 undécimo 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 tal como se recibieron, 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 la primera parte de su undécimo período de sesiones del 6 al 13 de diciembre de 2021. El período de sesiones fue aplazado debido a la ausencia de la Presidenta-Relatora, que tuvo que abandonar Ginebra urgentemente por razones personales. El período de sesiones se reanudó y clausuró el 18 de julio de 2022. En su undécimo período de sesiones el Comité celebró 15 sesiones en formato híbrido en el Palacio de las Naciones de Ginebra.

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 reconocidas como entidades consultivas por el Consejo Económico y Social (véase el anexo III).

B. Apertura del período de sesiones

4. El undécimo 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 del Presidente-Relator

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 con sede en Ginebra.

6. La Presidenta-Relatora dio las gracias al Comité Especial por su elección. Expresó su confianza en que los participantes manifestaran un compromiso constructivo y de cooperación durante el período de sesiones, y subrayó que, en el ejercicio de su mandato, el Comité debía tener en cuenta los puntos de vista de todas las delegaciones y agrupaciones regionales, así como de 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 a la Convención Internacional sobre la Eliminación de todas las Formas de Discriminación Racial, que subsanaran las lagunas de esta y que también establecieran una nueva normativa para combatir todas las formas de racismo contemporáneo, incluida la incitación al odio racial y religioso. El Comité venía desarrollando su labor desde 2017 en virtud de un nuevo mandato derivado de la resolución 71/181 de la Asamblea General y de la resolución 34/36 del Consejo de Derechos Humanos, en las que la Asamblea y el Consejo pidieron al Presidente-Relator que velase por la puesta en marcha de las negociaciones sobre un proyecto de protocolo adicional a la Convención que tipificara como delitos los actos de carácter racista y xenófobo. Posteriormente, la Asamblea General se refirió a ese mandato en sus resoluciones 72/157, 73/262, 74/137, 75/237 y 76/226.

8. La Presidenta-Relatora señaló que la eliminación de la discriminación racial había sido un objetivo de las Naciones Unidas desde su creación, y que se articulaba con mayor

claridad en la Convención Internacional sobre la Eliminación de Todas las Formas de Discriminación Racial. Pese a ello, en los últimos años, millones de personas de todo el mundo seguían siendo víctimas del racismo, la discriminación racial, la xenofobia y las formas conexas de intolerancia. En particular, las personas eran víctimas de formas y manifestaciones contemporáneas de esos fenómenos, que se difundían cada vez más por Internet y que, en algunos casos, eran de carácter violento. Ello ponía de manifiesto la importancia de la labor del Comité. La Presidenta-Relatora se refirió a las protestas y los movimientos que se habían producido en numerosos países tras el asesinato por la policía de George Floyd, un ciudadano estadounidense que iba desarmado. Además, la pandemia sin precedentes de la enfermedad por coronavirus (COVID-19) había tenido consecuencias sanitarias especialmente devastadoras para muchos grupos racializados, entre ellos los afrodescendientes, y había provocado actos de discriminación contra las personas de ascendencia asiática y discursos de odio dirigidos a las comunidades religiosas. La Presidenta-Relatora instó al Comité a que redoblara sus esfuerzos a fin de reforzar la protección del creciente número de víctimas de las manifestaciones contemporáneas de esos flagelos.

9. La Presidenta-Relatora presentó información actualizada sobre varias cuestiones que habían surgido desde el décimo período de sesiones del Comité Especial, que se celebró del 8 al 18 de abril de 2019, y manifestó que confiaba en que el Comité reanudara su labor sin contratiempos en el undécimo período de sesiones, sin perder el impulso de los períodos de sesiones anteriores. La Presidenta-Relatora expuso cómo, a lo largo de los años, el Comité había sentado las bases para avanzar, y había tenido en cuenta las aportaciones de más de 70 expertos sobre diversos temas relacionados con las formas contemporáneas de racismo, la discriminación racial, la xenofobia y las formas conexas de intolerancia. Recordó que, en su décimo período de sesiones, el Comité aprobó por consenso un 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 inicio de las negociaciones relativas a un proyecto de protocolo adicional a la Convención en el que se tipifiquen como delito los actos de carácter racista y xenófobo", lo que había permitido al Comité empezar a perfilar la manera de avanzar en relación con las normas complementarias.

10. Recordó la consulta de expertos entre períodos de sesiones[1] celebrada en Ginebra los días 21 y 22 de octubre de 2020 en formato híbrido para examinar el documento relativo a los elementos aprobado en el décimo período de sesiones, cuyo informe habían recibido todos los participantes por adelantado[2]. Indicó que los conocimientos jurídicos específicos aportados en esa consulta deberían ayudar al Comité a alcanzar un entendimiento común sobre las cuestiones planteadas, así como a definir las siguientes etapas del proceso.

11. La Presidenta-Relatora reconoció que las delegaciones tenían puntos de vista diferentes sobre algunas de las cuestiones y expresó su confianza en que el Comité mantuviera debates e intercambios abiertos en su búsqueda de consenso.

12. Explicó que el programa de trabajo del undécimo período de sesiones estaba dedicado a examinar el informe de la consulta de expertos tema por tema; ello consistiría en una exposición informativa sobre cada uno de los temas a cargo de uno de los expertos participantes en la consulta y, posteriormente, de un intercambio de opiniones y un debate. Los expertos habían presentado su asesoramiento jurídico y sus recomendaciones sobre las cuatro cuestiones, a saber: a) la difusión del discurso de odio; b) la ciberdelincuencia racial (redes y empresas de medios sociales); c) todas las formas contemporáneas de discriminación por motivos de religión o de creencias; y d) las medidas preventivas destinadas a combatir la discriminación racista y xenófoba. Ese asesoramiento debería contribuir a hacer avanzar la labor del Comité.

13. En respuesta a las peticiones de los coordinadores regionales, la Presidenta-Relatora alentó la participación de los expertos técnicos nacionales y señaló que una de las ventajas

[1] El seminario de expertos se celebró en cumplimiento del párrafo 6 de la resolución 42/29 del Consejo de Derechos Humanos.

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

de organizar reuniones en formato híbrido era que permitía a los expertos nacionales participar de forma virtual en el período de sesiones y al Comité mantener conversaciones técnicas y debates de fondo a fin de facilitar y enriquecer su trabajo. Indicó que los tres últimos días del período de sesiones se dedicarían a un debate general y al intercambio de opiniones, así como a la preparación de las conclusiones y recomendaciones del período de sesiones.

14. La Presidenta-Relatora concluyó expresando su deseo de poder contar con el compromiso y el apoyo del Comité en el ejercicio de su mandato. Instó a los participantes a que siguieran contribuyendo activamente a la lucha contra las formas contemporáneas de racismo, la discriminación racial, la xenofobia y las formas conexas de intolerancia, que siguen produciéndose y evolucionando en todas las regiones del mundo.

D. Aprobación del programa

15. En la primera sesión, el Comité Especial aprobó el siguiente programa para su undécimo período de sesiones:

1. Apertura del período de sesiones.
2. Elección del Presidente-Relator.
3. Aprobación del programa y del programa de trabajo.
4. Información actualizada sobre el Comité Especial, presentación general de la consulta de expertos entre períodos de sesiones y resumen del informe.
5. Ponencia y debate sobre la difusión del discurso de odio.
6. Ponencia y debate sobre todas las formas contemporáneas de discriminación por motivos de religión o de creencias.
7. Ponencia y debate sobre ciberdelincuencia racial.
8. Ponencia y debate sobre las medidas preventivas destinadas a combatir la discriminación racista y xenófoba.
9. Debate general e intercambio de opiniones.
10. Conclusiones y recomendaciones del período de sesiones.
11. Aprobación de las conclusiones y recomendaciones del período de sesiones.

E. Organización de los trabajos

16. 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 que formularan observaciones generales. Las delegaciones felicitaron a la Presidenta-Relatora por su elección e hicieron declaraciones introductorias.

17. El representante de Cuba reiteró el compromiso de su país con el mandato del Comité Especial y su voluntad de seguir esforzándose de forma constructiva para avanzar en su cumplimiento. Lamentablemente, 20 años después de la aprobación de la Declaración y el Programa de Acción de Durban y más de medio siglo después de la entrada en vigor de la Convención Internacional sobre la Eliminación de Todas las Formas de Discriminación Racial, el objetivo de erradicar todas las formas de racismo y discriminación por motivos de raza, xenofobia y otras formas conexas de intolerancia estaba lejos de alcanzarse. El racismo estructural persistía y se había producido un aumento del discurso de odio y de la violencia motivada por el odio contra las minorías, los migrantes, los refugiados y, en algunos casos, grupos enteros de personas. Agravada por la pandemia de COVID-19, la compleja crisis mundial no había hecho más que exacerbar esa situación. La Constitución de Cuba, aprobada en referéndum por la mayoría del pueblo en 2019, consagraba y reforzaba el derecho a la igualdad y la prohibición de la discriminación. Cuba estaba firmemente decidida a seguir

combatiendo los prejuicios y los estereotipos raciales que pudieran persistir en su sociedad. Cuba instó a todos los Estados a que mostraran voluntad política para aunar fuerzas a fin de combatir la discriminación racial y todas las formas de intolerancia mediante un diálogo constructivo y la colaboración de todas las instancias de las Naciones Unidas.

18. El representante de Argelia dijo que su país concedía una gran importancia a la labor del Comité Especial y a la necesidad de contar con normas complementarias que permitieran fortalecer el marco internacional de derechos humanos para combatir el racismo, la xenofobia, la discriminación racial y las formas conexas de intolerancia, y para hacer frente a los problemas que existen actualmente en esa esfera. Argelia veía con preocupación el aumento de los actos de racismo, violencia y odio por razones de religión y raza en el contexto de la pandemia de COVID-19, en particular contra personas de origen árabe y afrodescendientes y personas que practicaban el islam, así como contra los refugiados, los migrantes, las mujeres y los niños. Esos actos obedecían a ideologías populistas y extremistas, que estaban en plena expansión, así como a políticas basadas en el racismo y la discriminación, que atentaban contra la dignidad de esas personas. Era preciso impulsar una cultura que promoviera la tolerancia, mediante la eliminación de todas las políticas y leyes discriminatorias, y el establecimiento de medidas disuasorias y recursos claros.

19. El representante del Iraq destacó que el racismo, la discriminación racial, la xenofobia y las formas conexas de intolerancia eran totalmente contrarias a la Carta de las Naciones Unidas y a la Declaración Universal de Derechos Humanos. La igualdad y la no discriminación eran principios básicos del derecho internacional y de los derechos humanos. A pesar de las numerosas iniciativas adoptadas por los países para combatir el racismo y garantizar el pleno disfrute de los derechos humanos, muchas personas seguían siendo víctimas de ese fenómeno. La Convención Internacional sobre la Eliminación de Todas las Formas de Discriminación Racial era el instrumento óptimo para apoyar los esfuerzos internacionales de lucha contra el racismo y adoptar las medidas adecuadas para combatirlo. El racismo seguía estando muy extendido y era una fuente de inestabilidad en la sociedad, lo que socavaba la democracia. Todo protocolo adicional a la Convención debería incluir los elementos siguientes: a) la tipificación como delito de todas las formas contemporáneas de discriminación, incluida la discriminación por motivos de religión o de creencias, como la islamofobia, que actualmente era la forma más extendida de discriminación por motivos de religión o de creencias; b) el respeto a las diferencias entre culturas y países; c) la consideración del contexto propio de cada país; d) el respeto a los refugiados, los migrantes y los solicitantes de asilo; y e) la adopción de medidas para combatir las manifestaciones generalizadas de delitos de odio y discriminación en las redes sociales.

20. El representante del Japón dijo que su país seguía combatiendo el racismo y la discriminación racial, la xenofobia y las formas conexas de intolerancia. Citó como ejemplo la Ley de Eliminación del Discurso de Odio de 2016, que tenía en cuenta la importancia de defender la libertad de expresión al tiempo que promovía las iniciativas destinadas a erradicar el discurso y el comportamiento discriminatorios contra las personas de origen no japonés. El Comité Especial debía seguir centrándose en la aplicación plena y efectiva de la Convención Internacional sobre la Eliminación de Todas las Formas de Discriminación Racial a fin de alcanzar el objetivo de acabar con la lacra del racismo en todas sus formas. Dado que no hay un acuerdo claro sobre si existen lagunas en la Convención o si esta no aborda las formas contemporáneas de racismo, en la fase actual no parece oportuno iniciar las negociaciones sobre un protocolo adicional a la Convención que penalice determinadas actuaciones. La lucha contra el racismo y la discriminación racial, la xenofobia y las formas conexas de intolerancia constituía un reto al que se enfrentaban todos los Estados, que solo podía superarse por medio de la solidaridad y la cooperación. En consonancia con la Declaración y Programa de Acción de Viena, el Japón alentó a todos los Estados a que alcanzaran un consenso. El Japón seguía firmemente decidido a eliminar todas las formas de discriminación racial.

21. El representante del Reino Unido de Gran Bretaña e Irlanda del Norte declaró que era evidente que la Convención Internacional sobre la Eliminación de Todas las Formas de Discriminación Racial constituía, y debía seguir constituyendo, la base de todos los esfuerzos para prevenir, combatir y erradicar el racismo. La aplicación de la Convención era clave para combatir la propagación del racismo en todas las regiones del mundo. La Convención era un

instrumento vivo capaz de responder a retos nuevos e incipientes. A lo largo de los diez períodos de sesiones celebrados por el Comité Especial, no se había llegado a ningún consenso sobre la cuestión de si la Convención tenía lagunas o si en realidad no contemplaba las formas contemporáneas de racismo. Los miembros del Comité para la Eliminación de la Discriminación Racial no estimaban que fuera necesario elaborar un protocolo adicional a la Convención y consideraban que las lagunas que existían procedían de su aplicación o podían examinarse en sus observaciones generales. Las deliberaciones sobre la necesidad de contar con normas complementarias a la Convención continuaban; el Reino Unido consideraba que no era necesario elaborar un protocolo adicional a la Convención. La lucha contra el racismo, la discriminación racial, la xenofobia y las formas conexas de intolerancia se mantenía y concernía a todos. El Reino Unido seguiría participando en las deliberaciones y confiaba en poder mantener un diálogo constructivo e intercambiar las mejores prácticas al respecto.

22. El representante de Sudáfrica dijo que la Convención Internacional sobre la Eliminación de Todas las Formas de Discriminación Racial era una de las convenciones más importantes en lo que concernía a la eliminación del racismo y la discriminación racial en el mundo. No obstante, la Convención se había adoptado en 1965, cuando el mundo era muy distinto al de hoy, y no todos los Estados habían podido participar en su elaboración como Estados libres o entidades no coloniales. El mundo había cambiado considerablemente desde entonces y, en 2001, la comunidad internacional se reunió para poner al día sus puntos de vista sobre el racismo. Para entonces, casi todos los Estados habían escapado del yugo del colonialismo. En la Declaración y Programa de Acción de Durban, documento final de esa conferencia, los Estados expresaron de forma unánime su punto de vista sobre el racismo contemporáneo y su concepción de lo que constituía el racismo, la discriminación racial, la xenofobia y las formas conexas de intolerancia, además de abordar cuestiones como el racismo sistémico. Sudáfrica había albergado la esperanza de que, 20 años después de la aprobación de esos textos, la Declaración y Programa de Acción de Durban se aplicarían de manera íntegra, pero, lamentablemente, algunos Estados no querían asumir la nueva forma de entender el racismo y el modo en que afectaba la mayoría de la población mundial. Los países y los grupos que no habían participado en las conversaciones de 1965 consideraban que la Convención presentaba lagunas y que la concepción de lo que constituía el racismo sistémico y la forma en que seguía afectando la vida de la población en todo el mundo debía definirse con claridad a fin de garantizar que todos los Estados tuvieran la misma visión de los problemas. Por consiguiente, Sudáfrica alentó a todos los Estados a que participaran de nuevo en el Comité Especial a fin de subsanar esas deficiencias. Si bien la Convención había sido ratificada prácticamente por todos los países, todos los instrumentos se habían actualizado. En el sistema de las Naciones Unidas, la mayoría de los instrumentos se habían puesto al día mediante una serie de protocolos adicionales. No debía hacerse una excepción general con la Convención. Sudáfrica alentó a todos los Estados a que colaborasen con el Comité con una mente abierta para llegar a un mismo entendimiento.

23. El representante de China dijo que su país daba mucha importancia al Comité Especial. Era lamentable que, 20 años después de la adopción de la Declaración y Programa de Acción de Durban, el mundo siguiera siendo testigo del aumento del racismo, la discriminación racial, la xenofobia y las formas conexas de intolerancia. China apoyaba plenamente al Comité y esperaba con interés la continuación del período de sesiones, en el que cabía esperar que los participantes celebraran debates fructíferos y encontraran la manera de superar mejor los problemas a los que se enfrentaba el mundo.

24. El representante del Pakistán, hablando en nombre de la Organización de Cooperación Islámica (OCI), señaló que la OCI concedía una gran importancia al mandato del Comité Especial. La OCI reiteró que era partidaria de que se elaborasen normas complementarias para reforzar la arquitectura internacional de derechos humanos contra el racismo, la discriminación racial, la xenofobia y las formas conexas de intolerancia. Era lamentable que 14 años después de la creación del Comité siguieran sin producirse avances importantes, si bien los problemas en esa esfera se habían multiplicado. El *statu quo* ya no era aceptable. La OCI estaba sumamente preocupada por el constante aumento de los incidentes de discriminación, odio, violencia y hostilidad por motivos de religión, especialmente contra las personas y las comunidades musulmanas. El odio antimusulmán y la islamofobia, a menudo tolerados o autorizados por algunos Estados, seguían siendo omnipresentes, con frecuencia bajo el pretexto de combatir el terrorismo o de la seguridad nacional. El aumento de políticas

populistas y de las ideologías de extrema derecha en todo el mundo alentaban el odio religioso y la violencia contra la población musulmana. Influidos por esas ideologías, varios países habían introducido leyes que institucionalizaban la discriminación contra los musulmanes y los estereotipos y restringían el uso de pañuelos o velos faciales por las mujeres y niñas musulmanas. Los refugiados, los migrantes y las comunidades indígenas a menudo eran también objeto de una discriminación sistémica que menoscababa su dignidad, sus derechos y sus libertades. La pandemia de COVID-19 había acentuado aún más esas tendencias desconcertantes. La OCI condenaba enérgicamente la islamofobia en todas sus formas y manifestaciones y reiteró su llamamiento para que se revocaran y derogaran esas leyes discriminatorias. Consideraba que la cultura de la paz, la armonía, la tolerancia mutua y la conciliación eran antídotos esenciales contra el racismo, la discriminación racial, la xenofobia y las formas conexas de intolerancia. La acción afirmativa debía ir acompañada de medidas disuasorias que permitieran denunciar la impunidad sistemática, exigir a los responsables que rindieran cuentas y proporcionar recursos jurídicos a las víctimas. La OCI reiteró los llamamientos realizados por el Consejo de Derechos Humanos en su resolución 34/36 para que se iniciaran las negociaciones sobre un protocolo adicional a la Convención Internacional sobre la Eliminación de Todas las Formas de Discriminación Racial. El protocolo sería un instrumento fundamental que contribuiría a subsanar las lagunas jurídicas y normativas existentes en la lucha contra todas las formas de racismo contemporáneo, incluida la islamofobia. La OCI aseguró a la Presidenta-Relatora su compromiso a ese respecto.

25. La representante de la Unión Europea declaró que la Unión Europea rechazaba y condenaba todas las formas de discriminación y seguía firmemente decidida a combatir todas las formas de racismo, discriminación racial, xenofobia y formas conexas de intolerancia en la Unión Europea y en todo el mundo. Esos fenómenos eran incompatibles con el respeto a la dignidad humana, la libertad, la democracia, la igualdad y el respeto a los derechos humanos, que constituían el fundamento de la Unión Europea y eran principios que compartían todos sus Estados miembros. La Unión Europea había adoptado medidas importantes desde que el Comité Especial se reunió en abril de 2019. En septiembre de 2020, la Comisión Europea adoptó su primer plan de acción contra el racismo y en 2021, la Comisión y la presidencia portuguesa organizaron una importante cumbre contra el racismo. En mayo de 2021, se nombró un nuevo coordinador para la lucha contra el racismo, encargado de impulsar iniciativas contra el racismo en las instituciones europeas. Se estaba haciendo mucho hincapié en la aplicación del plan de acción contra el racismo de la Unión Europea y la Comisión Europea había publicado un nuevo marco estratégico reforzado para la población romaní, centrado en la igualdad, la inclusión y la participación. También había presentado la primera estrategia integral de la Unión Europea destinada a combatir el antisemitismo y a apoyar la vida judía. Además, en su afán por promover el principio de no discriminación y por prevenir y combatir el racismo, la xenofobia y otras formas conexas de intolerancia, la Unión Europea también había aportado fondos para crear sociedades inclusivas, fomentar el respeto a la diversidad en la educación y promover el pluralismo y la democracia en otros países. La Unión Europea consideraba que la Convención Internacional sobre la Eliminación de Todas las Formas de Discriminación Racial, de la que eran parte todos sus Estados miembros, era y debía seguir siendo la base de todos los esfuerzos para combatir, prevenir y erradicar el racismo. La Convención era el fundamento de toda acción emprendida y era un instrumento vivo que permitía afrontar los retos nuevos y los incipientes. Por consiguiente, el objetivo común debía ser favorecer la aplicación plena y efectiva de la Convención. La oradora señaló que todos los derechos humanos eran indisociables e interdependientes, y afirmó que la Convención no debía considerarse de forma aislada, sino que debía leerse junto con otros instrumentos existentes, como los artículos 19 y 20 del Pacto Internacional de Derechos Civiles y Políticos, sobre la libertad de expresión y la incitación al odio. No parecía haber acuerdo sobre si la Convención presentaba lagunas o sobre si esta no contemplaba las formas contemporáneas de racismo o si había datos probatorios que apoyasen ese argumento. La Unión Europea seguía estando comprometida con los principales objetivos y compromisos asumidos en la Conferencia Mundial contra el Racismo, la Discriminación Racial, la Xenofobia y las Formas Conexas de Intolerancia, así como con el Grupo de Trabajo Intergubernamental sobre la Aplicación Efectiva de la Declaración y el Programa de Acción de Durban. No obstante, cabía preguntarse si el hecho de reunirse seis semanas al año era la forma más eficaz de utilizar los recursos en la lucha contra el racismo,

dado que el Consejo de Derechos Humanos y la Asamblea General se habían dotado recientemente de otros medios para combatir el racismo. La Unión Europea seguía convencida de que debía evitarse la proliferación y la duplicación de los mecanismos y procesos de seguimiento de Durban, y de que los recursos debían dedicarse principalmente a la adopción de medidas concretas para combatir sobre el terreno el racismo y todas las formas de discriminación y a la eliminación de los obstáculos de fondo que dificultaban la aplicación de los instrumentos internacionales existentes. El sistema de las Naciones Unidas tenía la obligación de combatir la lacra del racismo, lo que únicamente podía lograrse superando las divisiones, incluso respecto de la Declaración y Programa de Acción de Durban, y examinando de forma consensuada cómo avanzar verdaderamente hacia su objetivo común, a saber: un mundo sin racismo, discriminación racial, xenofobia y formas conexas de intolerancia. La Unión Europea confiaba en poder compartir pronto su experiencia y en escuchar las aportaciones de todos los países del mundo.

26. El representante de la República Bolivariana de Venezuela dijo que el Comité Especial era un mecanismo importante dotado de un mandato claro para elaborar normas complementarias a la Convención Internacional sobre la Eliminación de Todas las Formas de Discriminación Racial, de conformidad con las resoluciones de la Asamblea General y la resolución 34/36 del Consejo de Derechos Humanos. Se trataba de una ocasión histórica para que el Comité cumpliera con el mandato que se le había otorgado en un momento en que todavía se observaban manifestaciones de racismo y discriminación y los problemas seguían siendo numerosos, especialmente en los países desarrollados donde las minorías eran víctimas de la exclusión, la discriminación y la pobreza. La República Bolivariana de Venezuela condenaba el aumento del discurso de odio y la incitación al odio, así como el ascenso de los partidos políticos de extrema derecha que ponían en peligro los logros alcanzados para proteger los derechos de los grupos vulnerables, en particular de los afrodescendientes. La República Bolivariana de Venezuela valoraba la labor del Comité en lo que respecta a la elaboración de normas complementarias a la Convención, que permitirían avanzar y subsanar las lagunas existentes, y constituirían una nueva norma para intensificar la lucha contra todas las formas de racismo contemporáneo, incluida la incitación al odio racial y religioso. La República Bolivariana de Venezuela seguía comprometida con la lucha contra el racismo, la discriminación racial, la xenofobia y las formas conexas de intolerancia, ya que esos desafíos seguían constituyendo importantes amenazas para toda la humanidad y debían combatirse.

27. El representante de la República Islámica del Irán dijo que su país se sumaba a la declaración formulada en nombre de la OCI. Constató con pesar que, no obstante, los numerosos documentos al respecto que se habían publicado y las numerosas medidas adoptadas para combatir el racismo, la xenofobia y las formas conexas de intolerancia, en particular 20 años después de la adopción de la Declaración y Programa de Acción de Durban, en el mundo se observaba un resurgimiento de distintas formas de discriminación racial. Catorce años después de la creación del importante Comité Especial, aún no se había logrado un avance real en la elaboración de normas complementarias. El clamor internacional que había suscitado la aparición de la islamofobia, el racismo, la xenofobia y las formas conexas de intolerancia, en particular durante la pandemia de COVID-19, había puesto de manifiesto que la comunidad internacional debía definir los principales obstáculos en la lucha contra el racismo y adoptar medidas serias para eliminarlos. No cabía duda de que el racismo, la discriminación racial, la xenofobia y las formas conexas de intolerancia seguían siendo una negación de los propósitos y principios de la Carta de las Naciones Unidas y de la Declaración Universal de Derechos Humanos, y que la igualdad y la no discriminación eran principios fundamentales del derecho internacional. La pandemia de COVID-19 puso de manifiesto que la lucha eficaz contra los actos de racismo y discriminación racial en todas sus formas era más necesaria y urgente que nunca. El orador instó a que se iniciaran los trabajos sobre el proyecto de protocolo adicional a la Convención Internacional sobre la Eliminación de todas las Formas de Discriminación Racial, dado que su país consideraba que el protocolo adicional sería una herramienta importante para combatir todas las formas de racismo y discriminación contemporáneas.

28. El representante de Egipto expresó su profunda preocupación por el hecho de que el Comité Especial no hubiera podido cumplir sus objetivos, a pesar de los largos años de experiencia y trabajo, y de que las negociaciones siguieran centrándose en la necesidad de

establecer normas complementarias. Insistió en la necesidad de respetar el mandato que el Consejo de Derechos Humanos había confiado al Comité y rechazó cualquier intento de cuestionarlo, señalando que era fundamental seguir trabajando dado el aumento de la lacra del racismo y el incremento de la discriminación en todo el mundo. Recientemente se habían observado nuevas manifestaciones de racismo y discriminación racial, que no se habían previsto inicialmente en la Convención Internacional sobre la Eliminación de Todas las Formas de Discriminación Racial, lo que explicaba la necesidad de contar con normas complementarias, sobre todo ante la propagación de la violencia, el discurso de odio, incluso a nivel oficial, y la violencia contra las minorías, en particular en ciertos foros internacionales en los que se debatía la cuestión. Era necesario subsanar las lagunas existentes, ya fuera en los instrumentos internacionales vigentes o en las leyes nacionales de lucha contra la discriminación racial. Egipto confiaba en que el Comité se apoyara en los avances logrados anteriormente para poder elaborar normas complementarias y garantizar la observancia de la Convención.

III. Debates generales y temáticos

A. Información actualizada sobre el Comité Especial, presentación general de la consulta de expertos entre períodos de sesiones y resumen del informe

29. En sus sesiones segunda y tercera, el Comité Especial examinó el tema 4 del programa, a saber, información actualizada sobre el Comité Especial, presentación general de la consulta de expertos entre período de sesiones y resumen del informe. En la 2ª sesión, la Presidenta-Relatora presentó información actualizada sobre el Comité Especial, dado que habían ocurrido muchas cosas desde su décimo período de sesiones. Resumió los trabajos de ese período de sesiones y destacó algunas de sus conclusiones y recomendaciones, y señaló a la atención de los delegados 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 inicio de las negociaciones relativas a un proyecto de protocolo adicional a la Convención por el que se tipifiquen como delito los actos de carácter racista y xenófobo”, que se había aprobado en esa sesión. También hizo un resumen de la consulta de expertos jurídicos entre períodos de sesiones, que se celebró en formato híbrido los días 21 y 22 de octubre de 2020 en Ginebra. En esa ocasión, dos expertos jurídicos de cada región, un miembro del Comité para la Eliminación de la Discriminación Racial y el Relator Especial sobre las formas contemporáneas de racismo, discriminación racial, xenofobia y formas conexas de intolerancia, se habían reunido para examinar el resumen de cuestiones y posibles elementos preparado en el décimo período de sesiones. La Presidenta-Relatora tomó nota de la presentación, en el septuagésimo quinto período de sesiones de la Asamblea General, del tercer informe sobre la marcha de los trabajos del Comité Especial por el antiguo Presidente-Relator y del diálogo interactivo mantenido con la Tercera Comisión, de conformidad con la petición de la Asamblea en su resolución 73/262.

30. También en la segunda sesión, el representante del Camerún hizo una declaración general en nombre del Grupo de los Estados de África. Dijo que el Grupo de Estados de África consideraba la Convención Internacional sobre la Eliminación de Todas las Formas de Discriminación Racial uno de los principales documentos en la lucha contra el racismo, la discriminación racial, la xenofobia y las formas conexas de intolerancia. No obstante, el Grupo también entendía que el instrumento se inscribía en una época determinada y que seguía siendo uno de los pocos tratados internacionales que no se había elaborado o actualizado mediante protocolos adicionales. Recordó que cuando la Convención vio la luz, la gran mayoría de los Estados de África seguían estando bajo dominio colonial, al igual que la mayoría de los países del Sur Global. Esos países, que seguían padeciendo el yugo del colonialismo, apenas habían participado libremente, si es que habían logrado participar, en la elaboración, definición e interpretación de lo que se consideraba racismo sistémico o estructural. En efecto, muchos de los Estados que habían participado en la redacción de la Convención eran ellos mismos racistas estructuralmente y no habían reconocido casi ningún

derecho a los africanos o a los afrodescendientes. Solo con posterioridad, cuando un mayor número de Estados se liberó de la opresión del colonialismo, se escuchó la voz de esos Estados recién liberados. Hubo que esperar hasta 2001 para que, por fin, la comunidad internacional se reuniera para elaborar un documento que reflejara las verdaderas aspiraciones de la inmensa mayoría de las personas víctimas de la discriminación racial en el mundo. Si bien ese documento, a saber, la Declaración y Programa de Acción de Durban, reflejaba la verdadera visión del mundo sobre el racismo y la discriminación racial, lamentablemente, 20 años después de su aprobación, muchos Estados que habían excluido a las víctimas del racismo de la elaboración de la Convención seguían sin hacer nada para aplicar la Declaración y Programa de Acción de Durban. Al Grupo de los Estados de África le resultaba difícil entender por qué esos mismos Estados no veían la necesidad de llegar a un entendimiento común sobre el racismo y la discriminación racial con quienes habían excluido a las víctimas de la conversación y habían perpetrado actos de racismo y aún seguían haciéndolo, en muchos casos por medio del racismo sistémico. El Grupo de los Estados de África pidió a todos los Estados que se reunieran para mantener un debate honesto sobre un documento que tenía 56 años de antigüedad y que tomaran conciencia de que se había elaborado en una época en la que el racismo sistémico y el discurso de odio contra los africanos y los afrodescendientes eran, de hecho, la norma, no la excepción. Instó al Comité Especial a que trabajaran juntos para actualizar esa importante Convención. Era difícil para los que habían sido excluidos de la conversación hace 56 años aceptar que era innecesario profundizar en lo que otros habían decidido por ellos.

31. El representante de la Unión Europea destacó varios aspectos fundamentales del informe de la consulta de expertos entre períodos de sesiones. El informe no contenía información relativa a ningún acuerdo sobre la necesidad de elaborar normas complementarias a la Convención Internacional sobre la Eliminación de Todas las Formas de Discriminación Racial. Los expertos habían deliberado ampliamente sobre cuestiones relativas a la redacción y sobre algunos de los términos que figuran en el resumen de los posibles elementos para un proyecto de protocolo adicional. De hecho, en el informe, los expertos recomendaron que se examinaran los elementos propuestos para determinar si eran demasiado amplios, o demasiado vagos, con el fin de que se ajustaran al lenguaje, los conceptos y las definiciones precisas y detalladas que exigen los principios del derecho penal. La Unión Europea consideraba que ello significaba que la propuesta no estaba preparada para pasar a la fase siguiente y que debía volver a revisarse a fondo antes de adoptar nuevas medidas. Los expertos habían mantenido deliberaciones similares a las que viene celebrando el Comité Especial desde su primer período de sesiones en 2009. El Comité no tenía el convencimiento de que existieran lagunas de fondo o de procedimiento en la Convención, lo que coincidía con la opinión del Comité para la Eliminación de la Discriminación Racial. En el octavo período de sesiones del Comité Especial, celebrado en octubre de 2016, el Presidente del Comité para la Eliminación de la Discriminación Racial, refiriéndose a las conclusiones del informe de ese Comité correspondiente a 2007 relativo a las normas internacionales complementarias[3], declaró que las disposiciones sustantivas de la Convención permitían combatir la discriminación racial en las condiciones actuales, y añadió que el artículo 1 de la Convención ofrecía la definición más amplia de discriminación racial. Los cinco expertos que elaboraron el informe de 2007 no llegaron a la conclusión explícita de que era necesario elaborar un protocolo adicional, sino que afirmaron que era preciso introducir mejoras, lo que, por ejemplo, podría lograrse mediante observaciones generales. Por ese motivo, la Unión Europea no podía apoyar que se iniciaran negociaciones sobre un protocolo adicional a la Convención que tipificara como delito los actos de carácter racista y xenófobo. La Unión Europea no estaba, de por sí, en contra del principio de adoptar normas complementarias, pero entendía que era necesario llegar a un común entendimiento. Se trataba más bien de la necesidad de determinar cuáles eran las lagunas a partir de datos, no de opiniones. La decisión de adoptar normas tenía que estar justificada racionalmente, basarse en datos empíricos y, a ser posible, alcanzarse por consenso. La Unión Europea no estaba segura de que esas condiciones se cumplieran, no porque pensara que no era necesario avanzar -siempre hay margen para avanzar- sino porque no estaba segura de que se fuera a progresar de esa manera.

[3] A/HRC/4/WG.3/7.

32. En la tercera sesión, la secretaría presentó un resumen detallado de la consulta y el informe correspondiente, el cual se había puesto a disposición de los participantes antes del inicio del undécimo período de sesiones. La Presidenta-Relatora invitó a los participantes a que examinaran el informe.

33. El representante de Sudáfrica preguntó si los expertos habían asesorado sobre el modo de gestionar las diferencias de opinión entre los miembros del Comité Especial, dado que algunos Estados consideraban que la Convención Internacional sobre la Eliminación de Todas las Formas de Discriminación Racial no presentaba lagunas mientas que otros opinaban lo contrario, y sobre la manera de avanzar en la elaboración de normas complementarias.

34. El representante del Pakistán, hablando en nombre de la OCI, manifestó su acuerdo con la declaración del representante de Sudáfrica, y señaló que varias de las cuestiones planteadas por los expertos jurídicos reflejaban la diversidad de opiniones dentro del propio Comité Especial. Dijo que habría agradecido que los expertos jurídicos hubieran respondido a algunas de esas preguntas. Las deliberaciones celebradas en el Comité habían puesto de manifiesto la existencia de lagunas en varias esferas. Compartía la opinión de los expertos de que, en lo que concernía al discurso de odio, el protocolo adicional debía ajustarse a los artículos 19 y 20 del Pacto Internacional de Derechos Civiles y Políticos, ya que el objetivo del protocolo adicional era reforzar los instrumentos de derechos humanos existentes en materia de racismo y combatir las manifestaciones nuevas y emergentes de ese fenómeno. Subrayó que el nuevo instrumento adicional debía estar en consonancia con los instrumentos existentes. Las cuestiones relativas a la difusión y la viralidad de los contenidos disponibles en línea exigían una atención especial. La OCI consideraba que debe prohibirse la apología del odio, la violencia y la discriminación, tanto por medios electrónicos como de otro tipo. Si bien las acciones afirmativas eran necesarias, las medidas punitivas también eran importantes para combatir el discurso de odio, especialmente cuando equivalía a incitar a la violencia, en particular por motivos de raza, religión, color o creencias. El equilibrio entre los derechos y las obligaciones constituía la piedra angular del derecho internacional de los derechos humanos. El orador recordó que la resolución 16/18 del Consejo de Derechos Humanos ofrecía un plan de acción integral para favorecer el diálogo en materia de odio religioso, y propuso que el Comité utilizara elementos de esa resolución en el protocolo adicional. Parecía que los expertos opinaban de forma unánime que existían lagunas en las normas jurídicas internacionales destinadas a combatir la discriminación religiosa. El orador no compartía su postura, según la cual había que distinguir entre la discriminación por motivos de religión o de creencias y la discriminación racial, dado que ello era contrario a los planteamientos interseccionales. Observó que el Comité para la Eliminación de la Discriminación Racial había examinado en detalle esa cuestión y que toda la gobernanza en materia de derechos humanos trataba todas las formas de discriminación en el mismo documento. Recordó que el Pacto Internacional de Derechos Civiles y Políticos no distinguía entre el odio racial y el odio religioso que constituía una incitación a la discriminación, la hostilidad o la violencia.

35. El representante de Egipto declaró que el informe de la consulta de expertos era importante porque señalaba las lagunas de los tratados internacionales, que no contemplaban ciertos delitos, y, por tanto, ponía de manifiesto la necesidad de elaborar un protocolo adicional. Egipto se sumaba a las declaraciones formuladas por Sudáfrica y en nombre de la OCI. Los expertos habían planteado la cuestión de las definiciones y estaba claro que existían lagunas; los expertos debían asesorar con respecto a la elaboración de esas definiciones. Existía un acuerdo de ámbito internacional sobre la necesidad de prohibir diversas formas de discriminación, para lo que la Convención Internacional sobre la Eliminación de Todas las Formas de Discriminación Racial constituía un precedente. Esos delitos fueron reconocidos y condenados por todos cuando se produjeron.

36. A petición de la Presidenta-Relatora, la secretaría precisó que la consulta de expertos jurídicos había tenido como finalidad solicitar la contribución de los expertos de forma preliminar con relación al documento relativo a los elementos acordado por el Comité Especial en su décimo período de sesiones. El Comité tendría la prerrogativa de acordar en su undécimo período de sesiones la adopción futura de medidas destinadas a subsanar las lagunas jurídicas o a recabar asesoramiento jurídico complementario.

B. Ponencia y debate sobre la difusión del discurso de odio

37. En sus sesiones cuarta, quinta y sexta, el Comité Especial examinó el tema 5 del programa, relativo a la difusión del discurso de odio. En la cuarta sesión, Joanna Botha, profesora asociada y jefa del Departamento de Derecho Público de la Facultad de Derecho de la Universidad Nelson Mandela de Puerto Elizabeth (Sudáfrica) y abogada del Tribunal Superior de Sudáfrica, expuso la opinión, las recomendaciones y las conclusiones formuladas por los expertos sobre la difusión del discurso de odio en la consulta celebrada entre períodos de sesiones los días 21 y 22 de octubre de 2020. En el anexo I del presente informe figura un resumen de la ponencia y del debate posterior.

38. También en la cuarta sesión, la Presidenta-Relatora informó al Comité Especial de que se había visto obligada a ausentarse de Ginebra con carácter urgente durante varios días por razones personales. Las siguientes sesiones estuvieron presididas por los presidentes interinos, Julia Imene-Chanduru, Representante Permanente de Namibia ante la Oficina de las Naciones Unidas y otras organizaciones internacionales con sede en Ginebra, y Salomon Eheth, Representante Permanente del Camerún ante la Oficina de las Naciones Unidas y otras organizaciones internacionales con sede en Ginebra.

C. Ponencia y debate sobre todas las formas contemporáneas de discriminación por motivos de religión o de creencias

39. En sus sesiones séptima y octava, el Comité Especial examinó el punto 6 del programa, que versaba sobre todas las formas contemporáneas de discriminación por motivos de religión o de creencias. La Sra. Imene-Chanduru presidió la séptima sesión y el Sr. Eheth la octava. En la séptima sesión, el Comité escuchó una presentación de Doudou Diéne, ex Experto Independiente sobre la situación de los derechos humanos en Côte d'Ivoire, ex titular del mandato de Relator Especial sobre las formas contemporáneas de racismo, discriminación racial, xenofobia y formas conexas de intolerancia y ex funcionario de la Organización de las Naciones Unidas para la Educación, la Ciencia y la Cultura, sobre la opinión, las recomendaciones y las conclusiones formuladas por los expertos acerca de la cuestión relativa a todas las formas contemporáneas de discriminación por motivos de religión o de creencias en la consulta entre períodos de sesiones. En el anexo I del presente informe figura un resumen de la ponencia y del debate posterior.

40. Al final de la octava sesión, el representante de Sudáfrica señaló que, al examinar los documentos del período de sesiones, había observado que los documentos, incluido el informe de la consulta de expertos, apenas presentaban propuestas concretas sobre los términos que debían utilizarse en la redacción de un protocolo, sino que se limitaban a enumerar preguntas y problemas. El orador esperaba que los expertos hubieran trabajado en la elaboración de un texto. La secretaría aclaró que, de hecho, el proceso había comenzado con el documento relativo a los elementos del décimo período de sesiones y el resultado final acordado por los Estados. Los expertos jurídicos habían recibido el mandato, en virtud de la resolución 42/29 del Consejo, de examinar los elementos de un proyecto de protocolo adicional a la Convención Internacional sobre la Eliminación de Todas las Formas de Discriminación Racial, preparados por el Comité Especial en su décimo período de sesiones, y de elaborar un informe sobre las deliberaciones y recomendaciones a fin de presentárselo al Comité en su undécimo período de sesiones. En esa fase, los expertos pudieron aportar sus observaciones, sus preguntas y sus reflexiones y propuestas de orden jurídico. El representante de Sudáfrica propuso que la secretaría examinara las definiciones contenidas en los documentos internacionales vigentes y recopilara las definiciones consensuadas existentes para que el Comité Especial las examinara.

D. Ponencia y debate sobre ciberdelincuencia racial

41. El Comité Especial examinó el tema 7 del programa, que versaba sobre la ciberdelincuencia racial, en sus sesiones 9ª, 10ª y 11ª, durante las que la Sra. Imene Chanduru y el Sr. Eheth sustituyeron a la Presidenta-Relatora. En la 9ª sesión, el Comité escuchó una ponencia presentada por Joanna Kulesza, profesora de Derecho Internacional de la

Universidad de Lodz (Polonia), miembro del Comité Científico de la Agencia de los Derechos Fundamentales de la Unión Europea y presidenta del Consejo Consultivo del Foro Mundial de Competencia Cibernética, en la que reflexionó sobre la opinión, las recomendaciones y las conclusiones formuladas por los expertos sobre la cuestión de la ciberdelincuencia racial en la consulta entre períodos de sesiones. En el anexo I del presente informe figura un resumen de la ponencia y del debate posterior.

E. Ponencia y debate sobre las medidas preventivas destinadas a combatir la discriminación racista y xenófoba

42. De conformidad con su programa de trabajo, el Comité Especial tenía previsto examinar el tema 8 del programa, sobre las medidas preventivas destinadas a combatir la discriminación racista y xenófoba, en su 12º período de sesiones. Anna Spain Bradley, Vicerrectora de Equidad, Diversidad e Inclusión de la Universidad de California, Los Ángeles, y ex profesora de Derecho de la Universidad de Colorado (Estados Unidos de América) no pudo pronunciar su ponencia sobre la opinión, las recomendaciones y las conclusiones formuladas por los expertos en la materia durante la consulta entre períodos de sesiones por dificultades técnicas.

43. En su calidad de Presidente de la sesión, el Sr. Eheth invitó a los delegados a que formularan declaraciones sobre las medidas preventivas destinadas a combatir la discriminación racista y xenófoba. Propuso que examinaran, entre otras cosas, la cuestión de si el protocolo adicional debería redactarse únicamente en términos jurídicamente vinculantes y si debería prever medidas que garantizasen la investigación pronta y eficaz de las denuncias de actos de carácter racista y xenófobo, el acceso de las víctimas a recursos efectivos y la asistencia jurídica a las víctimas para garantizar el acceso a recursos efectivos.

44. El representante de Sudáfrica dijo que su delegación no creía que el protocolo adicional debiera redactarse únicamente en términos jurídicamente vinculantes, dado que siempre era deseable que un documento de ese tipo contuviera principios rectores que ayudaran a comprender mejor el tema, la terminología y la forma de interpretarlo. Su delegación consideraba que una redacción de carácter orientativo sería lo adecuado.

45. El representante de la organización no gubernamental International Human Rights Association of American Minorities afirmó que la incapacidad de combatir el apartheid y otros crímenes de lesa humanidad asociados al racismo debido a la falta de voluntad política seguía siendo un problema. Era importante examinar los efectos de la resolución 48/7 del Consejo de Derechos Humanos sobre el legado del colonialismo. El colonialismo se había incorporado directamente al programa, junto con los crímenes de lesa humanidad provocados por el racismo, a pesar de que los titulares de los procedimientos especiales parecían carecer de voluntad política o no hacían lo suficiente para reducir el alcance del apartheid en asociación con la negación del derecho a la autodeterminación. El orador indicó que el Comité Especial debería considerar la necesidad de que el Comité para la Eliminación de la Discriminación Racial recibiera las peticiones y se las transmitiera a las entidades pertinentes del sistema de las Naciones Unidas, de conformidad con el artículo 15 de la Convención Internacional sobre la Eliminación de Todas las Formas de Discriminación Racial.

46. En la 13ª sesión, el Sr. Eheth, en calidad de Presidente interino, informó al Comité Especial de que se había tomado una decisión sobre la celebración del undécimo período de sesiones. Debido a una emergencia personal, la Presidenta-Relatora seguiría ausente de Ginebra. A la vista del programa de trabajo, era preciso contar con su presencia cuando se examinara la importante cuestión de las conclusiones y recomendaciones del período de sesiones. Por lo tanto, se había decidido, en consulta con la Presidenta-Relatora, aplazar el undécimo período de sesiones y reanudarlo lo antes posible en 2022.

F. Ponencia y debate general e intercambio de opiniones

47. El undécimo período de sesiones del Comité Especial se reanudó el 18 de julio de 2002. En su 14ª sesión, en relación con el tema 9 del programa, la Presidenta-Relatora proporcionó información actualizada sobre el Comité Especial y el Comité celebró un debate

general y un intercambio de opiniones sobre el undécimo período de sesiones, con el propósito de aprobar las conclusiones y recomendaciones del período de sesiones en relación con el tema 10 del programa.

48. En la 15ª sesión, en relación con el tema 8 del programa, el Comité Especial escuchó la ponencia pronunciada por la Sra. Spain Bradley (véase el párrafo 49 del presente documento), que resumía las orientaciones proporcionadas en la consulta de expertos jurídicos entre períodos de sesiones sobre la cuestión de las medidas preventivas destinadas a combatir la discriminación racista y xenófoba. En el anexo I del presente informe figura un resumen de la ponencia y del debate posterior.

IV. Aprobación de las conclusiones y recomendaciones del undécimo período de sesiones

49. **En la 15ª sesión, el Comité Especial aprobó las conclusiones y recomendaciones del undécimo período de sesiones, en relación con el tema 10 del programa. En el marco de su mandato, el Comité mantuvo conversaciones con los expertos jurídicos sobre las cuatro cuestiones, según se detalla a continuación.**

50. **En lo que respecta a la difusión del discurso de odio, el Comité Especial concluyó que debería:**

a) Obtener asistencia contextual y jurídica para subsanar posibles lagunas jurídicas o solicitar la opinión de otros expertos sobre cuestiones concretas como la tipificación, el contexto histórico en que se inscriben el derecho y los tratados, y las definiciones terminológicas;

b) Considerar la posibilidad de elaborar un documento que reúna la terminología y las definiciones de los instrumentos internacionales existentes que podrían utilizarse para elaborar el protocolo adicional;

c) Obtener cooperación internacional a fin de prevenir y combatir la difusión del discurso de odio y asistencia para erradicarlo.

51. **En lo que respecta a todas las formas contemporáneas de discriminación por motivos de religión o de creencias, el Comité Especial concluyó que debería:**

a) Continuar con las deliberaciones sobre la lucha contra todas las formas contemporáneas de discriminación por motivos de religión o de creencias y definir los elementos que debería incluir un protocolo adicional a fin de subsanar posibles lagunas jurídicas;

b) Considerar la posibilidad de utilizar los elementos incluidos en el plan de acción que figura en la resolución 16/18 del Consejo de Derechos Humanos (lucha contra la intolerancia, los estereotipos negativos, la estigmatización, la discriminación, la incitación a la violencia y la violencia contra las personas por motivos de religión o de creencias) para promover los debates sobre la religión o las creencias en el contexto del protocolo adicional.

52. **En lo que respecta a la ciberdelincuencia racial, el Comité Especial concluyó que debería:**

a) Estudiar el trabajo de otros órganos de las Naciones Unidas sobre el tratamiento de la ciberdelincuencia, como el Grupo de Expertos Gubernamentales sobre los Avances en la Esfera de la Información y las Telecomunicaciones en el Contexto de la Seguridad Internacional, el Grupo de Trabajo de Composición Abierta sobre los Avances en la Esfera de la Información y las Telecomunicaciones en el Contexto de la Seguridad Internacional, y el nuevo Comité Especial encargado de Elaborar una Convención Internacional Integral sobre la Lucha contra la Utilización de las Tecnologías de la Información y las Comunicaciones con Fines Delictivos, que debía presentarse con el proyecto de 2020 de una convención internacional sobre la ciberdelincuencia en enero de 2022;

b) Estudiar el modo de vincular elementos de su labor en materia de ciberdelincuencia racial con las iniciativas y el trabajo general de las Naciones Unidas sobre la ciberdelincuencia, como se indica en el párrafo a) anterior.

53. **En lo que respecta a las medidas preventivas destinadas a combatir la discriminación racista y xenófoba, el Comité Especial concluyó que debería revisar el proyecto de disposiciones del párrafo 108 g) del texto relativo a los elementos a fin de garantizar una mayor precisión y considerar la posibilidad de emplear una redacción y unos términos diferentes en esos párrafos.**

Annex I

Summaries of the presentations and initial discussions on the agenda topics

Presentation and discussion on dissemination of hate speech

1. At its 4th, 5th, and 6th meetings, the Ad Hoc Committee considered agenda item 5 on the dissemination of hate speech. Joanna Botha, Associate Professor and Head of the Department of Public Law at the Faculty of Law, Nelson Mandela University, Port Elizabeth, South Africa, and Attorney of the High Court of South Africa, gave a presentation on the advice, recommendations, and conclusions drawn by the experts on the dissemination of hate speech at their intersessional consultation of 21–22 October 2020.

2. Ms. Botha briefly situated the background of the experts' mandate, "to consider the elements of a draft additional protocol to the Convention and to prepare a report on our deliberations and recommendations for the Ad Hoc Committee at its 11th session," and noted that the purpose of her presentation at the 11th session is to report on the first issue the experts considered: dissemination of hate speech, as addressed in paragraph 108(a)–(d) of A/HRC/42/58, the report of the 10th session of the Ad Hoc Committee.

3. Ms. Botha then discussed article 4 of the ICERD – noting that article 4(a) has been the subject of much academic and political discussion – and outlined the interpretation of dissemination of hate speech in General Recommendation 35. She outlined the nexus between hate speech and discrimination, and highlighted the mandatory nature of article 4, which shows how central it is to the struggle against racial discrimination. She stated that it is a mistake to think that the ICERD defines hate speech, and that General Recommendation 35 clarifies this. She explained that racist hate speech can take many forms and is not confined to only explicitly racial remarks – it can include acts, signs, pamphlets, language, symbols, and can be both verbal and non-verbal, and occur offline or online. She also noted that recommendations apply to racist hate speech, whether from individuals or groups, in whatever form it manifests, orally or in print, or disseminated through electronic media, including the internet and social media, plus non-verbal forms of expression, for example display of racist symbols, images, and behaviour at public gatherings, including sporting events.

4. Ms. Botha then outlined state obligations regarding hate speech, which include giving urgent attention to all manifestations of racist hate speech and taking effective measures to combat them; taking "immediate and positive measures" to eradicate incitement and discrimination, and dedicating the widest possible range of resources to eradication of hate speech – including legislative, executive, administrative, budgetary, and regulatory instruments, plans, policies, programmes, and regimes; taking a holistic and integrated approach to regulation of hate speech; adopting legislation to combat racist hate speech that falls within the scope of article 4 of the ICERD.

5. Ms. Botha discussed factors and context to consider for criminalization, which she views as very important. Factors to consider include the content and form of speech; the economic, social, and political climate at play; the position or status of the speaker and the audience to whom speech is directed – which she considers very important, as a high-status speaker can lead to greater violence; the reach of the speech, or how broadly it is disseminated; and the objectives, or purpose, of the speech, which is important for determining incitement and whether a defence is available. Ms. Botha also stressed that restrictions cannot be too broad or vague. They must be formulated with precision, due regard, and a balanced approach. She noted, specifically that insult and slander cannot be criminalized for these reasons.

6. Addressing specific expert elaborations on the proposed draft elements in paragraph 108, Ms. Botha noted the experts' general discomfort with the wording. She recalled that the experts were uncomfortable that the criminal provisions would apply "irrespective of the author," as they all agreed authorship is a key component of a standard criminal law analysis, even though the experts understand the desire to capture both the original author and people

who share the content. She explained that when an act is being criminalized, we need to ensure that there is a very strict and precise definition being used, and that much of the language in paragraph 108 is not precise enough to meet this standard.

7. Ms. Botha noted the experts' suggestion that "acts" should be quite broad, including, for example, the display of signs, symbols, and gestures. She stressed the experts' position that, for criminalization to be appropriate, stronger definition for "racist," "xenophobic," and "religion/religious" should be elaborated. She also addressed the issue of online versus offline speech and that the experts agreed that everything which applies offline should also apply online, but there is more potential for material to "go viral" online, thus there is more potential for harm in that venue.

8. Discussing elements (a)–(c) of paragraph 108, Ms. Botha noted the experts' opinion that "hate speech" in 108(a) is far too broad and too vague. Terminology needs to have a precise, consistent definition and specific requirements when it is being used for the purposes of criminalization. She also believes there should be available defences, but that these do not necessarily need to be elaborated.

9. On 108(b) the experts agreed that the wording was quite problematic, as it conflates hate crimes and hate speech. Legally-speaking, as hate crime occurs when an existing criminal act is committed with a discriminatory bias. All States Parties should be regulating hate crimes, but there must be a distinction between regulation of hate crimes and criminalization of hate speech.

10. Ms. Botha relayed that the experts found paragraph 108(c) far too broad, but also redundant because a precise definition of hate speech would capture everything mentioned in this clause. She noted the experts felt it confused things rather than adding clarity or precision.

11. Regarding thematic issues, experts at the consultation focused on the interplay between criminal and civil law. While they believe criminalization of hate speech is necessary, it must be done with a precise definition and reserved for the most egregious cases. The experts also agreed – as has been stressed by CERD and the ICERD – that it would be misguided to rely only on legal measures and that positive and preventive measures are necessary as well. When law is involved, they also agreed that in addition to criminal law measures, civil law and effective human rights standards are of vital importance for a standard to have a broad range of recourse.

12. In response to Ms. Botha's presentation, the representative of South Africa acknowledged that the group of experts were asked specifically to look at the draft, and that he has heard their cautions to deal very specifically and carefully with language, but notes it would have been helpful to receive some language proposals as well. He shared that South Africa has been grappling with the subject of hate speech recently, and they have even had a case where someone said something discriminatory in Greece and it was prosecuted in South Africa, and requested that Ms. Botha share about the South African process.

13. Ms. Botha responded that, insofar as language is concerned, her presentation and the expert report have been shared with the Member States, and in her view when the dissemination of hate speech is criminalized, we need to use specific language, mainly "the advocacy of hatred against a person or group of persons based on the grounds which are specified in the Convention itself," potentially extending and exploring that, "and which incites to harm." From her perspective those are standard, clear terms that should be used for the criminalization of hate speech because it also captures hatred, intention, incitement, and harm – the key elements.

14. She also responded to the South African delegate's request to explain a bit about what is happening in South Africa, and she explained that the wording she had just suggested comes not only from the ICCPR, but also from the South African Constitution, which specifically protects freedom of expression but states that it does not extend to hate speech, as she has defined it.

15. Ms. Botha then outlined a piece of South African legislation known as the Promotion of Equality and Prevention of Unfair Discrimination Act, which was passed in 2000, and prohibits unfair discrimination, anti-human rights legislation, creates equality courts, and

prohibits hate speech. However, there is a problem with the prohibition of hate speech in this Act, as it is done in very broad terms and has just been declared unconstitutional due to overbreadth, even at a human rights level. She stated that it is not only overbroad, but also vague and very confusing to understand, so now the legislature has to go back and create a more precise definition for hate speech so that it can be operative even, she stressed, at a human rights level in equality courts.

16. She then noted that the case the delegate raised about the individual who disparaged people of African descent in South Africa on a European beach was very well dealt with, because the South African equality act contains a wide range of remedies, including positive measures that can be put in place where people can be educated and compelled to experience what it is like to be a member of the marginalized group and to understand the implications thereof. She explained that the Equality Act does well to prohibit discrimination, but it does not do well on hate speech due to the overbroad definition, nor has it yet properly enacted the provisions promoting equality. She also noted that South Africa does not have a specific hate crime offence, nor does it regulate hate crimes properly, although a number of bills have been put forward. She stated that from her perspective, South Africa is a perfect example of a country which should be criminalizing hate speech and regulating hate crimes, but which is not doing so perhaps because of some uncertainty as to what the standards are.

17. The representative of the EU made a statement on dissemination of hate speech, sharing that the EU is deeply concerned with rising hate speech including online, and the use of digital tools to spread hatred and violence and we have been working to prevent such incidents related to direct and indirect discrimination in order to punish perpetrators as well as to ensure justice, protection, and support to victims, and has been working closely with online platforms and internet service providers on these matters. In general, she stated, the European Union does have quite firm framework legislation on combating certain forms of racism and xenophobic crimes, and this sets the frame for common response of all member states to hate speech and hate crimes since it obliges member states to penalize the public incitement to violence against a group of persons or a member of such a group defined by reference to race, colour, religion, descent, or national or ethnic origin and that has to do with hate speech specifically. She noted, furthermore, that member states of the European Union must also ensure that racist or xenophobic motivation is considered as an aggravating circumstance, or alternatively that such a motivation may be taken into account in determination of penalties for any other criminal offences. This legislation, she explained, is also complemented by rules to protect victims of crime since it obliges member states to ensure their non-discriminatory treatment of victims of crime, including in respect to their resident status, and pays particular attention to the victims of bias-motivated crime. The delegate shared that, when it comes to the opinions expressed during the expert consultation, the European Union shares many of the outlined on pages 6–8 of the report, and agrees with the position that the ICERD already covers hate speech, hate crimes, and racial superiority, as well as racial profiling and discriminatory access to human rights, and that CERD has already given recommendations on these issues to many individual countries, including Member States. She suggested that it may be useful to look first at what already existed before trying to add elements to the existing law.

18. Ms. Botha responded that she is aware of the EU's position in relation to the regulation of hate crimes and dissemination of hate speech, both online and offline, and agrees that what the EU does is exceptional, but stressed that, in her view, more is needed to ensure a common standard at the international level because the recommendations we have are merely that, and the Convention itself does not use the word hate speech at all. It is clear that other Member States and States Parties are not doing what is required of them, which could surely be addressed with clearer standards as to the level of compliance.

19. The representative of the Russian Federation expressed support that this work should continue, and made a comment about the presentation. The delegate noted that, despite efforts of the international community, around the world we are observing the more active use of hate speech, as well as incitement to acts of hatred and violence and the growth of extremist movements who spread an ethos of racial superiority. He said it is to be noted that these phenomena take place in states which declare themselves to be democratically mature, and to be promoting democratic standards, and such states take almost no actions or measures to

halt hate speech, incitement to hatred, incitement to violence, and the right to free expression and opinion. The Russian Federation considers this position to be damaging and to violate international standards in the area of human rights, which are undergirded by the International Convention on the Elimination of Racial Discrimination, as well as the International Covenant on Civil and Political Rights. Freedom of expression should not be justification for extremist movements to be able to promote any kind of racist dialogue, he stated. He also noted the danger we experienced in the first part of the 20th century, given the rise of Nazism. The representative raised serious concerns regarding the violation of human rights and dissemination of violent rhetoric in online spaces, and stated that this phenomenon is strengthened by contemporary technology. He stated it is clear that measures must be taken to prevent and halt the spread of hate speech in social media, and that it is important to recognise the necessity to create legislative, institutional, political, and administrative frameworks in the area of online communication.

20. The representative of Pakistan posed a question about the contextual factors and 5 points outlined by Ms. Botha for determining hate speech. Recalling the workshop organized in Rabat a number of years ago by the OHCHR, he noted that some of the factors from the Rabat outcome were the same, but two or three were different. He requested the speaker to compare both thresholds, but also noted that under freedom of expression some States are making vague laws and providing space that could lead to hate speech and incitement to violence. He wondered if it would be feasible for any country to apply a five or six layer test to determine what constitutes hate speech, because many may not have the time or capacity to apply such an elaborate test, as it could result in a number of losses to innocent lives or damage to property.

21. Ms. Botha thanked the representative of Pakistan for mentioning the Rabat Plan of Action, which deals specifically with article 20 of the International Covenant on Civil and Political Rights, and places an obligation on States Parties to limit freedom of expression to regulate hate speech. She went through the 6-part threshold test noting that the first step is context, which is very much the same as she mentioned earlier. The second is speaker and the speaker's status, and the audience to whom the speech is directed, which is also the same as one of the steps she mentioned. The third step is intent, and she expressed hope that she had been clear when commenting on the wording of paragraph 108(a) versus the recommendations of the Committee that she specifically dealt with intent and required the in the language used that there be the advocacy of hatred and the incitement of harm, and that is encapsulated in the intent requirement out of the test from the Rabat Plan. The fourth Rabat Plan requirement is content and form, which is exactly the same as the number one requirement of the recommendation coming from the Committee. The fifth, she stated, is the extent of the speech act, which is talking about reach, and when we speak of dissemination, we obviously mean speech that is disseminated and broadcast, not just a conversation. And the sixth requirement is likelihood, including imminence, which is looking at potential for harm – in other words that this speech act has a very real possibility not necessarily of causing physical harm to the group targeted, but could be indirect harm in the form of psychological and emotional well-being being undermined, but also it is the standing in society being undermined. That where a group is targeted because of who they are based on skin colour, religion, language, ethnicity, and cost as members of an outgroup that is not wanted that this undermines their standing in society which is an indirect harm, but also undermines the social cohesion that is necessary for a democratic state that actually prizes everybody's worth and capability.

22. Ms. Botha explained that her recommendations come directly from the CERD committee itself, and she believes it has encompassed what is in the Rabat Plan of Action. She agreed that this is an urgent and pressing matter which needs to be dealt with sooner rather than later. Insofar as the relevance of this test is concerned, she stated the point is that the wording of any protocol or complementary standard should be clear as to what states parties obligations are. This test – the Rabat Plan of Action test plus the test that she mentioned earlier would also assist domestic institutions in formulating their criminal prohibition and then prosecuting authorities being able to decide what speech falls in the ambit thereof. These, she explained, are considered standard, good requirements for regulating hate speech under the criminal law.

23. Noting there were no further requests for the floor at that time, the Chair-Rapporteur proceeded with a question of her own. She sought Ms. Botha and the delegations' views on the discussion elements paper circulated in advance of the 11th session, and sought further understanding on the benefits, risks, and challenges of a criminal law versus a civil law approach, and whether a regulatory framework is sufficient to eliminate hate and discrimination.

24. Ms. Botha responded first by outlining the risks. She explained that if the standard is not clear – if legislative measures are too broad, or too vague – they can end up stifling freedom of expression, which is vital to ensure the importance of democracy and the peoples' views and voices are heard, and that they feel valued. She notes that she has stressed throughout her presentation and this dialogue the importance of freedom of expression and proper balancing. She explained that the risk of an unclear standard is that, in an attempt to promote human equality and dignity, there might be a regulator that is too broad and captures insults and ridicule, which in her view should never form part of criminal legislation. That part should be reserved for civil law, but even with civil law and human rights law there is a need for a precise regulator – though in those cases it need not include intent, because it is the impact on the victim that is important.

25. As for the benefits, Ms. Botha noted that it is critically important that we do not see regulation in isolation. We need to appreciate that when we aim to combat, to eliminate, to protect victims of unfair discrimination and racial and religious violence, this is a huge problem that is caused by humanitarian crises, international conflicts, human mobility, migration, climate change, etc. She stressed that we need to understand the necessity of a multi-faceted approach to deal with this crisis. Human rights law is important, the civil law is important, the criminal law is exceptionally important to deal with those cases which are egregious, which aggravate hatred, which call for groups to be eliminated, that call for groups to be othered, not to be wanted at all, because when the victims of those speech acts were ignored, in essence it deemed them unworthy, that they were not wanted in our society, and the authorities are not prepared to put a law in place to deal with that type of situation. Ms. Botha noted that when a state enacts legislation at multiple levels to protect the victims of such speech discrimination, at a criminal level, a civil and human rights level, and has measures in place to overcome discrimination – positive measures – then the benefit is that everybody in society feels worthy and feels that the state respects their rights. The work done on victims and not being felt wanted and the state ignoring the symbolic value of the law in this respect is absolutely critical. She also stressed that we need to get it right, because freedom of expression is also important.

26. Addressing the question of challenges, Ms. Botha suggested the need to accept that this should not be a political process can be a challenge, as can egos, and historical challenges as to who can and cannot be racist and who can and cannot be protected. She said it is important to draw lines empathetically, fairly, and humanely, and to bring everyone to the table. She also stressed that she believes the benefits outweigh the risks and challenges.

27. The Chair-Rapporteur followed up by asking Ms. Botha what, to her view, does the additional protocol aim to prevent or protect against, and how would the additional protocol ensure regulation of hate speech does not place undue limits on freedom of opinion and expression?

28. Ms. Botha responded that, in her view, the additional protocol aims to prevent a situation where States Parties can say they are uncertain of what the standard is and what is required of them. She noted that the existing Convention is unclear on exactly what States are required to regulate, because it merely says "an offence punishable by law," which could be interpreted to not necessarily include the criminal law. While she thinks that is a stretch, she stated it is clear that more certainty is needed as to what states' obligations should be in this respect, and also given the proliferation of what is going on now in the world in relation to discrimination and hate speech, it's clear that we need to do more. She reiterated that the Convention needs to be clearer, made priority, and it needs to be completely up-to-date with the online space. In her opinion, the existing Convention does not speak too clearly to what States Parties' obligations are.

29. On the issue of ensuring freedom of opinion and expression is protected, Ms. Botha noted that she has aimed to answer that, but wished to stress that the criminal law should be reserved only for those cases that fall within a very strict test, and that we have a threshold test that States Parties can use to assess what is and isn't speech deserving of criminal sanction. She further explained that penalties must be consistent, and that we need to look at custodial sanction. She noted these are very complex issues that need to be explored in more detail and tapped into to ensure there is due regard for all rights in the human rights framework.

30. The representative of South Africa commented that the African Group and South Africa have raised that the ICERD was written 56 years ago and that the writers, unfortunately excluded many of the people that were victims of racial discrimination, since they were mostly colonies and, in many of the countries, had no rights at all – including in some of the countries that actually proposed and wrote the document. The fight for racial freedom in those countries still had not finished, and it was only more than a decade later that many of the freedoms of movement and equality came about in many of these countries. In 2001 the Durban Declaration and Programme of Action brought almost 200 countries in the world together where the issue of the definitions and elaborations of what is understood as racial discrimination, racism, systemic racism, racist hate crimes and it was elaborated by countries which wrote the ICERD in 1965 and ones that were not at the conversation in 1965 working together. He stated that, unfortunately, some of those countries who wrote the 1965 document do not support the DDPA and are working very hard against it, while others support it. The problem was that the Convention must be one of the only conventions that is old and without an additional protocol. For example, the Convention on social and economic rights, women's rights, and children's rights have additional updates as the world has changed and people have accepted the rights of these groups, yet this Convention seems to be a "holy cow', and the African Group did not understand why some states considered it is so perfect as to not require any elaboration, especially because the document itself has only a small section that speaks in broad, general terms about racial discrimination. It did not specify what was meant by racial discrimination. He indicated the lack of participation from some of these countries, which was needed for further elaboration. In light of this, the representative asked, how the Committee might move forward. He highlighted the need to bring the Committee together to form a common understanding in order to elaborate and update the ICERD.

31. Ms. Botha replied that, in her view, recognizing this problem, perhaps in relation to the SDGs and looking at how SDGs are met might be useful. She believes the way forward is to acknowledge upfront that is a very real problem undermining our world, and victims and people are regularly targeted, ostracized, and made to feel othered. She noted that she suspects, ironically, that some of the Member States the representative mentioned do, in fact regulate this type of speech in their own countries very well, and further ironically some of the Member States who push for the additional protocol to be implemented actually in their own countries do not regulate online and offline hate speech and discrimination. Ms. Botha suggested that we need a common approach where there is buy in that this is an issue we all face. It is a reality that when people are made to feel unwelcome in a society because they are different, that you're undermining the whole ethos of society and who we are as a people. We need to acknowledge this problem and do more work like we did at Durban, which was in 2001 – but now we are in 2021. She noted that if we look at the SDGs, some of them spotlight exactly what is happening here, so perhaps the answer is to work together as teams and not in silos to do our best to change the world for the better. She stated that she does think it is time for us to move past a Convention that was developed in the 1960s.

32. The Chair-Rapporteur requested Ms. Botha's reflections on whether the additional protocol should provide guidance on offline and online provisions separately? She also asked who are the intended perpetrators of the criminal provisions, and does the identity of the author matter? Does the reach of a powerful author provoke a different response than a less powerful actor? What is the required intent to prove the criminal act?

33. Ms. Botha responded that, in her view, the basics – what the elements are – of hate speech at the criminal level are the same online or offline; but the reality is that with online hate speech and the hate groups and organization thereof there would need to be more specific requirements as to what constitutes online speech, as opposed to offline speech and what it

is that you're trying to regulate. She noted that, the basic elements should be the same for the offence, but you would need to require a bit more particularity as to the distinctions between the two. Experience shows, if one looks at the European example and the work that is being done by EU and indeed other countries, to regulate the issue of online hate speech, and cybercrime, and cyber speech, that you need to be more specific there.

34. On the second and third questions, which Ms. Botha found had some overlap, she responded that when you deal with a criminal sanction, the identity of an author and their reach that that would be a critical factor in deciding a) whether or not to prosecute, b) whether there has been incitement of hatred, because then you look at the audience as well – the intended audience as well as possibly the unintended audience, and c) would look at the impact of the harm. Because it's the potential for harm that is really important when deciding if someone should be prosecuted for the criminal offence of hate speech. Ms. Botha clarified that she was not suggesting that this be part of the elements, but when it comes to the hearing of the case and deciding whether or not to prosecute, and if this person is found guilty what the sanction should be, then undoubtedly the author of the speech is going to be really important. She explained that this is why she believes there is a problem with the wording to the introduction of to paragraph 108 where it say "irrespective of the author." She suggests that it be removed, and for it to be made clear that this is relevant to the consequences of hate speech.

35. Ms. Botha also raised the issue of required intent, and the need to distinguish between hate speech that is so serious as to warrant criminal regulation and hate speech which should be dealt with as a human rights-type intervention. She stated that intent is necessary in criminal law to protect freedom of expression: there must be intent to advocate hatred, which is different than insult, ridicule, and offense. She explained that hatred has been defined quite extensively in international law and also at various domestic levels. She noted that in her extensive work on the problem with hate, she has found it clear that hate against people who are different to us is a specific intent where you advocate that hatred, and you must also incite others to harm societal well-being or the group of individuals. So incitement requires intent, advocacy requires intent at the criminal level. At the human rights level, which is different from the criminal or civil levels, she notes it is necessary to look at the words that were actually used, who it targets, and the impact of that speech. But she stressed the need for a criminal law response as well and questioned why this type of hate is any different than murder or rape, for example, when the harm can be as severe.

36. The Chair-Rapporteur then questioned Ms. Botha about whether there are any existing regulations on hate speech outside of ICCPR article 20. Ms. Botha responded that the ICCPR is the go-to, but that there are other treaties that talk about discrimination and hate speech: CEDAW, for example, in the context of women. But in those cases, Ms. Botha explained, it is all done peripherally in a way that does not address the issue head-on. From her perspective, the primary international treaties are the ICERD and the ICCPR.

37. At its 5th meeting, the Chair-Rapporteur was called away from Geneva on an urgent personal matter, and Ms. Julia Imene-Chanduru, Permanent Representative of the Republic of Namibia to the United Nations in Geneva chaired the meeting. She recalled the presentation by Ms. Joanna Botha at the 4th meeting, and suggested the 5th meeting begin by considering the definitions in the Committee's discussions. She asked the Committee how to define racism, xenophobia, hate speech, hate crime, racial profiling, intolerance, racist and xenophobic content, and opened the floor for discussion, reminding delegates that the questions are from the elements document that had previously been circulated.

38. The representative of Venezuela delivered a statement about hate speech where he expressed appreciation for the work of the Committee and the discussions intended to steer it toward consensus on the elaboration of complementary standards which will allow a filling of gaps in the Convention, to strengthen the fight against racism, racial discrimination and forms of related intolerance, which include hate speech and incitement towards racial hatred. He requested that steps be taken to eliminate incitement to racial hatred as part of the complementary standards, and stated that all should be concerned about the upswing around the world, particularly in developed countries, of increased incitement of racial hatred and racial incitement as well as extremist speech all used by political parties including political parties of a neo-fascist and extreme right which put at risk all that had been achieved in the

field of human rights, in particular concerning Afro-descendants and other vulnerable groups. He explained that Venezuela itself has taken key steps to ensure that diversity is one of the strengths of the Venezuelan state through proactive approach to involve all sectors of society in line with the provisions of the convention. In 2017, it adopted constitutional law against hatred and for peaceful coexistence and tolerance, the purpose of which is to recognize diversity and ensure tolerance and prevent and stamp out any forms of hate or discrimination, harassment or violence.

39. The representative of Cameroon expressed the importance of this Committee to his country, and the essential, important nature of the subject matter it deals with. He wished to underscore the pertinence of ensuring that the Committee contribute to a specific determination and definition of the terminology. He noted that the majority of international texts, including the Charter and the Conventions, as well as various other international instruments contain very specific and clear definitions with regard to what is hate, racial hate speech, racism and all of the terminology concerning this subject matter. He stated that his delegation insisted that in an increasingly globalized world, that is pursuing ways of peaceful and harmonious coexistence, practices such as racism are not acceptable in the current era and they hinder development. The lack of a specific definition, which is duly aligned with the definitions which found in existing texts, and also found in national legislation, is a major failing which must be addressed. Today's societies are clamoring and making their claims in the different political movements across the political spectrum which are emerging. Therefore there is a need to contribute to specific definitions that are easy to interpret, use and understand, and which would facilitate the crafting of a universal international instrument that will be broadly and universally accepted. The work being undertaken is vitally important, underlining the necessity to be very precise and specific with language. The definition of terms, clarification of language and meaning would put an end to any confusion. The additional protocol should be a useful one, that will contribute to the harmonization of relationships in and between societies.

40. The representative of the IHRC stated that IHRC has launched educational campaigns on television and social media to combat false and misleading news and hate speech and reduce the stigmatization of people due to their infection with coronavirus.

41. Ms. Imene-Chanduru then asked a further question of the Committee, requesting delegates' perspectives on whether there should be a distinction between the author of the speech and a person who forwards or shares it. The representative of South Africa responded that his country has been moving toward the criminalization of hate speech, and legislation has been drawn up and used in a number of cases where persons were seen to have used racial hate language that caused harm to the public. He noted some of these prosecutions have been quite successful and that as new laws are put in place, they are tested in the courts against the Constitution to ensure that it is defined and adheres to the best tests for what hate speech is. He agreed with the representative of Cameroon that it is extremely important for the Committee to elaborate further on the ICERD – as it is an older document and there is not common understanding of the terminology, and it would be very important to find common understanding. He expressed South Africa's understanding that there is a difference between the original author of hate speech, but the problem that comes with modern technology is while the original author might have been an important person, which makes it a serious issue due to the person's standing in the community, the problem is that these statements are often picked up by other internet influencers, and some of them have a much larger following than the original author themselves. They therefore spread it very quickly. He suggested that perhaps the Committee should classify between the two in its text and its language, but a lesser punishment or lesser form of damage done by the person who spreads it than the original author should not be assigned. While the intent of the original author is important, it could be possible for the person spreading the information to do more damage.

42. The representative of Cameroon stated that his South African colleague had raised a central issue of the debate, and noted that the problem facing the Committee is the question of whether the author of the crime and/or the accomplice to the crime should be held accountable, is a classic issue in criminal law. The question was who caused the greater harm, and what is the responsibility of the author and of the accomplice? He noted there is tremendous legal scholarship on this matter. But there needs to be a clear distinction between

the author and the person spreading the information. The delegate also raised the importance of intention, noting that perhaps there was a specific problem that the author was trying to resolve. He surmised that this work is quite delicate and will contribute to providing further specifics on the exact meaning of the terms and terminology that would be used in elaborating the additional protocol to the Convention.

43. Ms. Imene-Chanduru then asked whether the identity of the author matters: does the reach of a more powerful actor provoke a different response than a less powerful actor? The representative of Pakistan responded, stating that the person who is in power can damage the most with hate speech or incitement to violence, but for the sake of developing law or convention it would be difficult to differentiate on the individual based on their position, so in Pakistan's view, we need to treat them equally within the ambit of the additional protocol.

44. The representative of South Africa stated that the representative of Pakistan on behalf of the OIC made very valid points, adding that the position or status of a certain person may lead the audience to accept the words or speech more easily, therefore impacting the reach of the hate speech. But he questioned, how this could be differentiated in a treaty or document. He noted that a certain person may be very important in one country, but unknown in another. He stated that this equally in the text. He noted that, whilst in the end there is an effort to take the author to task in a legal situation, there they will judge the influence of such a person. But in a text you can't really do it. It's a fact that here one deals with the fundamental principle of it, and once it reaches prosecution, etc. if it ever goes that far, that's where the damage is done by the person would be evaluated and that includes the person's status in society. Because a person of high value and status in society can very easily do much more damage than an ordinary person does, but there should be no difference under the law. The law should treat everybody equally.

45. The representative of Cameroon commented that the relevant statements by the representatives of Pakistan on behalf of the OIC and South Africa raised the important issue of aggravating circumstances. When racial hate speech is disseminated by a high profile actor it was more likely to be accepted as this person is an authority. The author of the statement and the person who is spreading the hate speech disseminates the speech as a function of their social status was also an important consideration.

46. Ms. Imene-Chanduru posed another question to the Committee about whether there should be an emphasis on working with the private sector to accomplish the goals of the additional protocol. The representative of South Africa believed it extremely important to take the views of and work with civil society on these matters, as in the private sector and civil society there were media houses, which included social media systems. He noted that currently some of the social media platforms were addressing the issue of hate speech on their platforms, following pressure that various civil society movements. He stated that social media platforms could not argue they were only a platform for freedom of speech while cognizant of the harm which could result and that the platform is the vehicle that allows hate speech to be disseminated very easily and very far. He emphasized that civil society should help drive change and respond to calls from people, societies, and organizations in countries. He explained that South Africa's Constitution is very strict on freedom of speech, because of its past experience when apartheid restricted what people could say or publish. Therefore, South Africa believes the ability to say what needs to be said is sacrosanct, but no right is unlimited. He recalled that the ICERD itself and the ICCPR mention there are times when the ability for freedom of speech could eb limited, and that no right is absolute. The Committee should be very careful and narrow its definitions and focus in order not to infringe upon freedom of speech, but that there be a careful consideration of the kind of speech that caused harm or damage. Therefore he agreed with Ms. Botha that sometimes in writing regionally the documents are quite broad, but we should narrow the definitions to better target hate speech.

47. Responding to South Africa, Ms. Imene-Chanduru noted the importance of starting with definitions. The representative of the IHRC took the floor to agree with the South African representative, stating that IHRC sees false media reporting as a contributor to creating problems without accountability. Therefore, international laws must bring accountability and be applied equally. He stated that it created confusion when there is false

media reports on private and religious matters, and urged focus on such laws and how to make them equitable and effective.

48. At the Committee's 6th meeting, Mr. Salomon Eheth stood in for the Chair-Rapporteur during her continued absence and resumed the discussion on item 5 concerning the dissemination of hate speech. He recalled the presentation at the 4th meeting by Ms. Joanna Botha, and the discussion at the 5th meeting regarding definitions. He opened the floor for comment and suggested revisiting the differences between a criminal law versus a civil law approach to the issue.

49. The representative of South Africa commented on the issue of defining terminology and noted that many of the terms are clearly defined in other documents, including the DDPA. As for the discussion of criminal versus civil law, the difference was that often the victim of hate crime or hate speech or racism was usually a person from a disadvantaged community. The problem of using a civil law process is that the aggrieved party would likely need to employ a legal professional to take the perpetrator to civil proceeding. This was unlikely due to the availability of resources for the aggrieved party. Even in countries where there are public prosecutors or lawyers to assist, that access to that is almost impossible. Looking at the criminal justice system, if the speech itself or the incitement itself is aggrieved enough that it causes harm – it is not normal speech – and must be legislated. While complicated, with clear definitions, or narrow definitions, on what hate speech constitutes, there should be an ability by states to protect all their citizens. Civil law could also be useful resources could be made available to assist people.

50. Mr. Eheth shared that it is important to consider both civil and criminal law in the protection of victims. He then guided discussion to the responsibility of the author and those who spread information, and opened the floor. He raised the point that the South African delegate made about the risks and benefits of civil and criminal law and the protection of victims. He also asked how the Committee would address overbreadth and vagueness, and use precise definitions of language. He asked how the additional protocol would ensure that the regulation of hate speech does not place undue limits on freedom of expression and opinion.

51. The South African representative responded saying that it is important that terms be defined but that he thinks that the legal experts and lawyers should have done so, but they just asked a lot of questions. He articulated that the difference between hate speech and normal speech is the intent of the person to use derogatory language that deliberately is of a higher calibre that degrades people to an extent that it shows the speaker's superiority over them and that negative characteristics are put forward against the other person. He continued that also requesting their audience to suppress or to shun the other person and marginalize them would be captured by this. He stated that incitement to hatred is the similar. He recalled the case of Rwanda where, before the genocide there public speakers on the radio dehumanizing a segment of the population by calling them cockroaches, and noting that it invoked notions of extermination them through various means. He recalled the effect of that kind of hate speech, which dehumanization incited other people to treat a group as inhuman. He concluded by saying that normal speech is not necessarily with the full intent to cause harm, whereas hate speech is used to dehumanize or cause harm to people.

Presentation and discussion on all contemporary forms of discrimination based on religion or belief

52. At its 7th and 8th meetings, the Committee considered item 6 on all contemporary forms of discrimination based on religion or belief. Ms. Julia Imene-Chanduru, Permanent Representative of Namibia to the United Nations at Geneva stood in for the Chair-Rapporteur at the 7th meeting, and Mr. Salomon Eheth, Permanent Representative of Cameroon to the United Nations at Geneva stood in for the 8th meeting. At the 7th meeting, the Committee heard a presentation from Mr. Doudou Diene, United Nations Independent Expert on the situation of human rights in Cote d'Ivoire ; former United Nations Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance; and former UNESCO official on the advice, recommendations, and conclusions drawn by the experts on all contemporary forms of discrimination based on religion or belief at their intersessional consultation of 21–22 October 2020.

53. After his introduction by Ms. Imene-Chanduru, Mr. Diene began his presentation by outlining the relevant issues from the elements document and suggested that the main issue was to revisit paragraph 108(a)–(d) to elaborate actionable provisions, including a complete and precise definition of what constitutes "contemporary forms of discrimination on the grounds of religion or belief." He stated that combining religion and belief in this additional protocol alongside racial discrimination could have unintended consequences for existing ICERD provisions, but that separate standards addressing race or religion and belief could lead to a protection gap for individuals experiencing multiple and compounding forms of discrimination.

54. Mr. Diene outlined the questions raised by the legal experts at their consultation of whether an additional protocol to the ICERD is the proper venue for addressing discrimination on the basis of religion or belief; whether there is a nexus between race or racial identity and religion or belief; if there is merit to the idea of limiting the additional protocol to instances where there is a clear confluence or intersection between race or racial identity and religion or belief; what does the criminalization of all contemporary forms of discrimination based on religion or belief entail; might the term xenophobia be broad enough to capture discrimination on the grounds of religion or belief; and what could or should be the precise definition of what constitutes religion?

55. Mr. Diene stated that, in his view, contextual issues will be very important in the decision making process, and proceeded to highlight issues he considers risk factors. He noted that we are living in the context of very profound and multiculturalization of societies, where the issue of racism and discrimination is present and strong, because different communities living together in a multicultural society leads to this tension.

56. Mr. Diene explained that immigration is profoundly changing the reality and perception of identity and relationships between different communities and that it is now being instrumentalized by political parties. He also highlighted the ideological context, marked by the central issue of the link between identity and state security practices. He explained that since 9/11, this has become central, and the issue of race and religion have become entwined. He noted that the concept of terrorism is central in the way that governments are touching on race and religion.

57. He then explored the contradictory current context regarding belief, where there is a powerful movement on one side for respecting freedom of opinion and expression and freedom of information, but in the same society there is a strong dynamic of more people not believing in religion while using religion as an ideological instrument.

58. Mr. Diene also raised the issue of political agendas where some political parties – particularly extreme right parties – link race and religion together in their political messaging, and he cautioned that they are very close to gaining power and their influence is increasing. Mr. Diene then drew a connection to the context of neoliberalism, where the market is a central force, and consequently promoting materialist values rather than the human values linked to religion or belief.

59. Finally, Mr. Diene referred to what he considers a very slow crisis of erosion of international law where, after 9/11, there has been a debate between lawyers and experts about whether torture is acceptable to save lives. The simple fact that lawyers have been discussing this indicates to him that there is an erosion of international law, and it touches on complementary standards.

60. Ms. Imene-Chanduru thanked Mr. Diene, summarised some of the issues and questions raised by his presentation before opening the floor. The representative of Cameroon thanked Mr. Diene for his in-depth, extensive, and relevant analysis. He wished to stress the fact that religion-based discrimination is a fundamental concern both in international law and in domestic law – proof of this being that in international law all relevant instruments condemn all discrimination based on religion. All national domestic laws, considering the pyramid of laws, starting with the constitution, laws and rules, all prohibit all forms of discrimination based on religion. Having said that, religious beliefs, religious convictions, constitute fundamental human rights and they are all well protected in law and enshrined in law. The representative agreed that as the world moves towards globalization, huge migratory

flows and migration are being witnessed and the contemporary times were one of cultural plurality which emphasized the need to see social cohesion forged.

61. He also expressed his agreement with Mr. Diene about the ideological and international law contexts. The representative wished to focus on political movements that are making their voices heard globally and developing philosophies which might well infringe the idea of social cohesion and living together which might impact of people's freedom of religion and the protection of these fundamental rights. He noted that it is this kind of stigmatization and discrimination which modern society, moving towards globalization, must avoid and combat. He agreed with Mr. Diene that the world is a material one to the extent that belief in human values and humanism are almost taking a backseat, with materialism taking a front seat. All human rights recognize these rights, but the advent of technology is developing in such a way and at such a pace that one could think that everybody is developing in the same way. He also agreed with Mr. Diene about the issue of terrorism, noting that these issues are enshrined in international law, and that with the spike in terrorism these rights could have a tendency to be infringed.

62. The representative of South Africa responded to Mr. Diene's presentation, specifically concerning whether the term xenophobia wide enough to include other discriminatory terms, including that of religion. He recalled discussions from item 5 on dissemination of hate speech where experts recommended that it is very important from a legal basis for the text to be clear and that terminology should be narrow enough to focus and prosecute people who use such language or hate speech. The question therefore is if xenophobia, or the terminology for xenophobia becomes broader so as to include specific speech against religion will it not make it more difficult for any legal process in courts of law for the judges and juries, etc. to be able to ascertain what was the hate speech, incitement, or discrimination involved. The delegate noted that most Constitutions, including South Africa's, have very strict rules for discrimination on the basis of religion, any kind of religion. He agreed that countries are becoming much more multicultural than they were before and that tolerance and non-discrimination are changing, and the attitudes of countries have to change along with the demographics. He noted that the expert also raised the issue that there is a changing religious focus in certain countries, and a large shift toward people becoming non-religious as well, therefore laws have to adapt. The representative then asked Mr. Diene if the definition of xenophobia was broadened, would it not become more difficult to put into practice any discriminatory issues based on xenophobia. The representative questioned whether it would not be best, best when it comes to discrimination based on religious to focus on it separately rather than including it in the broad term of xenophobia.

63. The representative of Pakistan delivered a statement on behalf of the OIC, noting that international human rights law is explicit in the responsibility of all states to uphold the human rights obligations without any discrimination on the basis of race, colour, sex, language, and religion. This principle is codified and spelled out in the landmark Universal Declaration of Human Rights, all global human rights governance, as well as the Durban Declaration. The OIC knows the diversity of views of legal experts with reference to religious discrimination, either through an exclusively separate legal instrument or plugging the gaps with an additional protocol to the ICERD. Further, it is evident from these discussion that substantive gaps do exist in international legal standards for protection against discrimination on the basis of religion or belief. This recognition of legal gaps underscores the need for a legal instrument to counter contemporary forms of discrimination including Islamophobia. The OIC stands ready to begin negotiations on a new instrument while at the same time building on the committee's valuable work to strengthen the ICERD through an additional protocol. Evaluating this challenge from the perspective of multiple and compounding forms of intersectionality of discrimination remains paramount. CERD has been and continues to raise its concern over continuing incidents of discrimination on the basis of religion, including Islamophobia in certain countries. In its General Recommendation 32 CERD has recognized the intersectionality of racial and religious discrimination, which is also rooted in individuals national and ethnic origin. To a wide protection gap reinforcing ICERD through additional protocols is therefore timely and ripe to combat contemporary forms of discrimination. For these reasons the OIC reaffirms its commitments to remain constructively engaged with trust that other stakeholders will constructively participate and engage to

commence the process of negotiation on a legally binding instrument or an additional protocol to ICERD.

64. Ms. Imene-Chanduru sought reflections from the expert and posed two additional questions: first, is an additional protocol to the ICERD a proper venue to address discrimination on the basis of religion or belief; and second, what does criminalization of all contemporary forms of discrimination based on religion or belief entail? Mr. Diene responded that the Committee must consider two central points: first, that societies have been evolving for many years, especially considering powerful forces like immigration, and race and religion are not being associated with each other and instrumentalized as part of a political agenda for many powerful parties. This, he explained, means that there is a linkage in the contemporary intercultural and multicultural world. The race of people is being linked to their religious ideology. Experts at the consultation gave some meaningful points of reflection, but he wished to highlight the complex dynamic in which we are living. He said that in the post-George Floyd era as far as race is concerned, this means societies have witnessed and recognized that racism is violent. It kills. It kills individuals like George Floyd, but also groups. In some countries it is a slow-motion genocide, and recent genocide that we have seen in Africa and elsewhere.

65. Mr. Diene suggested that to combat the growing racism, we need to focus and promote the different instruments and institutions we have established to combat racism and help member states to do it, which means that we have to recognize the very excellent work being done by ICERD, because ICERD has not ignored the linkage between the two and the intersectionality. But given the centrality of racism I think it's important not to change the ICERD's mandate. Secondly, Mr. Diene said, we must recognize that religion is being instrumentalized by political groups using violence and religion, but at the same time communities that are at the forefront of developing materialistic values are going through violence and economic and social hardships and calling for meaningful life and they are relying on spiritual values. He said there is a test for spirituality and religion that must be taken into account. The consequence of this is that, while it is important to keep in mind the interconnectedness of the two issues, different mechanisms and institutions should do their work, but separated in terms of additional protocols. He stated that in his view, with the erosion of international law, the drafting of an additional protocol may be a difficult exercise, and it may not be to the international community's means to deal with race and religion as they are in their own fields but keeping in mind their linkage.

66. Mr. Diene concluded by highlighting what he sees as the three contemporary risk factors: first, the political instrumentalization and conflation of race and religion, and linkage many governments have made between state security and identity; second, immigration is altering the construction and reality of national identities and is drawing fear from certain communities, especially in Europe, and bringing the fact that political agendas are being based on the fear of immigration; and third, the context of neoliberalism, where the market is becoming the central force, and finance and the economy and materialistic values are prevailing, and communities where religion is taking less of a focus, political parties are linking these two issues. He stated that, while the churches are being emptied, the political parties are using nationalism to say they are defending Christian values, while not practicing them. He also reminded the Committee that religion, particularly Islam – though not the majority of Islam at all – is being used by certain groups as a means of violence and as political speech.

67. Mr. Diene urged the Committee to defend and protect the legal instruments that have been achieved so far. He said that if different instruments like the ICERD, ILO and others were accepted by governments and it they respect the integration of those norms in international law, he thinks they may change their policy.

68. Ms. Imene-Chanduru returned to the question posed by South Africa about whether incorporating religion into the term xenophobia would broaden that term too much. Mr. Diene stated that in some ways he had answered that, but thinks that broadening the linkage and engaging in the very long process of drafting and formalizing an additional protocol may weaken the defence of countries in front of actual present-day challenges of the ideological instrumentalization of race and religion. He expressed his belief that we must reinforce existing international instruments and institutions and accept the separation, because in some

ways the linkage is an ideological weapon being used by extreme right parties, those who are engaged in the strategy of identity as a central issue and defending their old national identities which they have built and adopted centuries ago – which included discrimination of different races, communities, and religions – and now refuse to recognize multiculturalism and pluralism. He suggested that we work on promoting pluralism and integrating that concept into the work being done, asking different mechanisms and institutions to make it more comprehensive, and calling on government to give value to the notion of pluralism in their societies, Constitutions, and instruments.

69. Mr. Diene expressed his belief that, while the media may make it appear so, we are not witnessing the increase of racism or intolerance, but rather witnessing a mutation, profound change, or the birth of multicultural, multi-ethnic, and multireligious societies, and all births are violent. He elaborated that we are living in the context of transformations, and the societies we are living in in a few years race and religion will be forces of transformation. These forces of transformation are being rejected by the old forces of ideological identity.

70. He noted that the law is an important instrument, but not unique and that the cultural and spiritual forces of civil society have an important role to play, so it will be important in the Committee's work to invite legal experts by also take a multidisciplinary approach by inviting sociologists, anthropologists, and religious and spiritual leaders to testify about what they are encountering. He suggested that one of the weak parts of our strategy is that we have not strengthened the human dimension, which means understanding the powerful forces structuring societies and the international community.

71. The representative of Pakistan took the floor to pose a question to Mr. Diene. Noting first that they had read in the report of the legal experts while they were discussing discrimination on the basis of religion or belief and there were views from some of the experts in the report that we need to separate racial discrimination from religious discrimination because one can change their religion and race cannot be changed and certainly some other issues but Pakistan and the OIC do not agree with the argument, but they would like to know the expert's perspective on this. The representative explained that when reading the Universal Declaration of Human Rights, other declarations, governance, the ICCPR, ICERD, or talking about discrimination, we need to prohibit discrimination based on race, colour, language, or religion, and it has been indicated in the same article. The delegate sought clarity on why some legal experts give this argument and the reason behind it.

72. Mr. Diene responded that the answer is not simple, as there is an ideological debate going on new in the context of the linkage by governments and political forces of identity and security in the context where security is given very central priority. In the context where the market, in many ways is dehumanizing societies, promoting materialistic forces, and marginalizing spiritual and cultural and human values. In those contexts it should be recognized that the two are being linked and may be linked in historical contexts. But to combat each of them, we have to separate them very profoundly. Recognizing that tension, identifying the nature of that tension is the fact that this linkage is being ideologically instrumentalized, but at the same time knowing that is urgent and central to defend, promote the different instruments we have approved in all these past years on race and religion, and the institutions like ICERD and others we have established. Mr. Diene's expressed concern that if the that linkage is accepted those political forces, who refuse the process of multiculturalization will eb reinforced, and the strategy to combat racism will be weakened.

73. Ms. Imene-Chanduru recalled that Mr. Diene mentioned that behind the complexity is the linkage between the two and that the two need to be separated, and asked how he proposed this might be done. Mr. Diene reiterated that the answer is not simple, the formulation of recommendations that may help existing institutions to link this complex reality and this dynamic of transformation and integrate that in their work would be useful. This means that the UN system and human rights mechanisms and institutions have to be strengthened, defended, but nuanced, and it needed to analyze why societies are becoming more multicultural at this time due to the dynamic of history, migration. The structure of power which still does not reflect this diversity, and the promotion of materialistic values and the denial of centrality of spiritual values for different societies should also be explored. This understanding is important, therefore the work of the Committee should have a

multidisciplinary approach through the involvement of lawyers, experts in human rights law, and social human science experts as well.

74. At the beginning of the 8th meeting, Mr. Eheth noted the important discussion held in the 7th meeting on item 6, and reflected on and summarized the presentation by Mr. Diene, and opened the floor requesting further comments on the issues raised at the 7th meeting.

75. The representative of the European Union delivered a statement, noting that the EU's position has long been that substantive discussions on issues such as the Rabat Plan of Action and the Istanbul Process are not part of the Ad Hoc Committee and should not be considered by the Committee. She clarified that this is not to say that these are not important topics, on the contrary, but the EU thinks that mixing the two processes – one is the fight against racism and the other is the fight against religious intolerance – in the end risks weakening them both, and therefore it is good to have these discussions separately and reinforce the fight against intolerance in each of these respective fields. She wished to underline that the report mentions that the experts generally also drew a hard line between racial discrimination and discrimination based on religion or belief. They explicitly recommend that paragraph 108(d) be revisited and that there should be reconsideration of whether an additional protocol to the ICERD is an appropriate venue for addressing discrimination on the grounds of religion or belief, and also recommend to reflect on whether the notion of criminalization, as such, is the right path. Consequently, the EU would like to strongly encourage the Ad Hoc Committee to follow the experts' lead on this matter and speak to that same position, though she recognizes this is likely not what many colleagues in the room want to hear, but it is her mandate to repeat this position.

76. The representative of South Africa noted the statement of the EU and indicated understanding of the position, noting South Africa had asked similar questions at the 7th meeting. He stated that he understands the experts also focused on the fact that there is a lot of intersectionality between religious intolerance and also the movement of certain people to join the two – racism and religious intolerance – and that often when they are speaking of one they also aim at the other. The representative notes that Mr. Diene mentioned xenophobia and when it is aimed at religions it is also aimed at those same peoples' race, that it intersects; and where it comes to this Committee, we should be looking at the use, especially by certain politicians, of the two where religion and race are both intersecting and hate speech and intolerance is aimed at both at the same time. The delegate noted that, as other colleagues mentioned earlier in the session, the importance of the Rabat process and other processes within the Human Rights Council to deal with religious intolerance are very important. His understanding from Mr. Diene's presentation is to look at the intersectionality of the two where they are used at the same time to aim at specific vulnerable groups.

77. The representative of Pakistan responded to the EU's comments, wishing to convey that the discussion of religion and intolerance on other platforms including the Istanbul Process meetings does not prevent us from discussing this issue in the Ad Hoc Committee, and in line with the mandate given by the Human Rights Council as we are moving towards negotiations to strengthen the international legal framework on racism and racial discrimination. He stated that, as highlighted by South Africa, the issue of intersectionality with regard to the basis of discrimination on multiple and aggravated forms of discrimination cannot be ignored. Pakistan thinks that in its last report the Committee rightly highlighted the issues, and noted that one thing the legal experts agreed on was that there is a gap in existing international standards in dealing with religious discrimination, although there were differences in their views on whether they should be dealt with in the additional protocol or whether there should be a separate protocol or separate instrument. But there was no ambiguity with regard to the gaps, and certainly a number of other issues have been highlighted over previous years that require the attention of the ad hoc committee to strengthen of collective endeavours in the fight against racism, so we think that's a very pertinent topic to be reflected in the additional protocol.

78. Mr. Eheth suggested focusing the Committee's analysis on the merits of the idea of limiting the additional protocol to instances where there is a clear confluence on the intersection between racial identity and religion or belief. The representative of South Africa stated that considered it a good idea to focus on the confluence of the two.

79. Mr. Eheth asked about the term ‘xenophobia’ and whether it was broad enough to capture discrimination on the basis of religion or belief. The South African delegate explained that, as far as South Africa understands, xenophobia is the discrimination, the fear of foreigners, of outsiders, of people other than oneself. He said that where it comes to religious belief that could occur specifically from inside your own country among your own citizens, not just people from outside or foreigners who come into your system. From his point of view, xenophobia would be too narrow to also capture religious discrimination from within the country itself. He reiterated his concern from the 7th meeting: if the term xenophobia gets broadened too much, it can basically then encompass everything; anything of anybody who’s different to the majority, which will encompass so many different kinds of discrimination. For legal problems, during a court proceeding dealing with hate speech, etc. it would be very difficult to effectively prosecute when a term is too broad. He thinks that, in the case of intersectionality between the two where certain intolerance for religion is often equated directly with a certain “race”, there is a clear intersectionality towards that. He noted that in Africa and many other places, people from various groups practice the same religion, and there can be intolerance towards those religions regardless of racial, national or ethnic origin. Xenophobia would catch everything, especially internally, and also thinks it should remain narrowly defined for when you aim or have prejudice against foreigners, or people coming into a country, or immigrants. This would be easier for courts to deal with than a broader definition.

80. The EU delegate agreed on the issue of intersectionality, and stated that the EU is also of the opinion that if you want to fight racism and racial discrimination in all its forms that require an intersectional approach. The key question is rather in the case of international law in general, what is needed and are the instruments there. She recalled that Mr. Diene also mentioned that there are good instruments already, and the ICERD is already being used to promote these kinds of approaches. In regard to discrimination based on religion or belief, she believes the ICERD forms a good basis and there are a number of general comments that add to the ICERD and that interpret the ICERD. Indeed, if the conclusion of this Committee is that more work needs to be done with regard to this specifically, then this could be something that the CERD Committee itself, could reflect upon if it believed that further guidance is needed as they have done for the past number of years on specific topics. She also wished to highlight more generally that part of the reason the EU is a bit reluctant in going along this path is because they have quite a solid framework on all these points, and feel strongly about protecting it. She noted that there is always room for improvement, which is also the case for the EU which they do recognize.

81. The representative of South Africa noted that the EU has been using regional laws and there is a lot of good practice within that system. He posed the question about court cases in the EU and asked whether those best practices could be shared with the Committee so that it may consider internalizing them, as these are the laws. He stated that the problem was that while general comments are good guidelines, how could they be internalized in a better form where states would be more inclined to implement them in a better manner. He requested that if the EU had found a way to put these general comments into hard law, that would be valuable information to share with the Committee.

Presentation and discussion on racial cybercrime

82. The Committee considered item 7 on racial cybercrime at its 9th, 10th, and 11th meetings, for which Ms. Julia Imene-Chanduru, Permanent Representative of Namibia to the United Nations at Geneva and Mr. Salomon Eheth, Permanent Representative of Cameroon to the United Nations at Geneva once again acted as interim Chairpersons, in the absence of the chair.

83. At the 9th meeting the Committee heard a presentation from Ms. Joanna Kulesza, Professor of international law, Faculty of Law and Administration, University of Lodz, Poland; member of the Scientific Committee of the European Union Fundamental Rights Agency; and Chair of the Advisory Board of the Global Forum on Cyber Expertise, reflective of the advice, recommendations, and conclusions drawn by the experts on the topic of racial cybercrime at their intersessional consultation of 21–22 October 2020.

84. Ms. Kulesza began by displaying a list of documents that she strongly supports analysis of for the purpose of the work of the Ad Hoc Committee, and noting that international law does offer a detailed framework for addressing the challenges racial cybercrime has put on the international agenda. She explained that she would like to focus her intervention on one particular example, the Council of Europe Convention on Cybercrime, or Budapest Convention, so that she may draw conclusions and recommendations from lessons learned from that particular experience. She began with a brief analysis of the successes and challenges of the Convention, and more specifically on the first additional protocol addressing freedom of expression issues, hate speech, and what could be referred to as racial cybercrime.

85. Ms. Kulesza explained that the Budapest Convention is, arguably, the only international law treaty that addresses the challenges of racial cybercrime. She noted it is just 47 states within the Council of Europe, but the Budapest Convention's reach is much broader as it includes states from outside the Council of Europe, including Africa, South America, Asia, and notably the United States who have been very involved in the drafting. She pointed to the success of 66 ratifications, but also highlighted those who have decided not to adopt the Budapest Convention.

86. Ms. Kulesza noted that here are ever more states considering signing and ratifying the Budapest Convention, but when the numbers and the process behind it were considered, it must noted there are certain states that are missing from those that are willing to accede to the convention. For example Ireland has signed it, but not ratified, as has South Africa and Poland. While not ratifying the convention does not imply that racial cybercrime is not addressed, she was trying to draw law-making conclusions, so those that are absent should be paid particular attention so the Committee might prepare a more accommodating instrument.

87. Ms. Kulesza stated that if she were to summarize this document briefly, should would say that the Cybercrime Convention in itself is a success. It is the only internationally-binding treaty on cybercrime, and it defines individual cybercrimes. No other international document does that. She explained that critics, however, highlight the fact that the collection of individual cybercrimes is somewhat arbitrary. You will find DDOS attacks, you will find data interventions as cybercrimes, you will find child abusive material – distribution, possession – as a cybercrime, rightfully so. But right next to it in the cybercrime convention, you will find intellectual property violations considered on equal footing as cybercrime and that has been one of the arguments that has been raised against ratifying the cybercrime convention by some of the great absentees.

88. Ms. Kulesza explained that the norms in the Budapest Convention are not self-executing, and highlighted two provisions of the additional protocol to indicate the mechanism behind it. She elaborated that the Cybercrime Convention needs to be transposed into national law, which effectively might imply the lack of uniformity among states or states parties. 66 states have ratified the convention. This is a success because the topic is so controversial, but at the same time the level of ratification is not as high as we might want it to be for a treaty that addresses a global challenge.

89. She also noted that there is not a cooperation mechanism that is automatically triggered. The Budapest Convention provides for states to act together on a largely voluntary basis. It is a very flexible standard that allows a state party to deny assistance in a cybercrime investigation. She noted that the Octopus Conference assists in the implementation, but it is a largely informal platform. Looking at the jurisdictional framework, it is also a reiteration of principles of international law and there is not a convention body that could assist member states or states parties in solving disputes or interpretation issues.

90. Ms. Kulesza suggested that the Budapest Convention offers a solution to the challenge that the Ad Hoc Committee is addressing, particularly through its additional protocol. She noted that this is the additional protocol because the drafting states could not agree on the scope of racial cybercrime that should be added to the Convention itself, and it had proven to be too contentious because of political, social, and ethical issues.

91. Ms. Kulesza noted that the additional protocol contains a definition of "racist and xenophobic material", the distribution of which is to be prohibited. She explained that the

formulation in the convention implies that states are to implement national laws that will achieve that aim, and the definition of racist and xenophobic material in the additional protocol to the Budapest Convention is not inventive. She elaborated that it barely repeats everything that we have known in international law and covers any written material, image, or other representation of ideas or theories that are directed at advocating, promoting, inciting hatred, discrimination, or violence against any individual or group based on racial or national or ethnic criteria if used as a pretext for any of these factors. Nothing near a comprehensive definition or as clear a definition as we could have based on current international law and human rights. She also noted the additional protocol articles that oblige each party to adopt such legislative or other measures as may be necessary to prohibit such activities.

92. Further to this, Ms. Kulesza highlighted that article 3, regarding the crime of racist discriminatory material being distributed, emphasizes the exemptions. Fundamentally, she notes the protocol itself introduces exemptions for states where a prohibition of such content would not reflect national values or be affordable under national laws. Consequently, she explained, if there is no law on hate speech in a given country, then likely that state would be exempt from implementing provisions of the protocol.

93. Ms. Kulesza then discussed the low ratification rate, as only 33 parties have ratified the additional protocol, including some states that are members of the Council of Europe, which tells us how controversial this regulation – as precise as it is – continues to be on a political level.

94. Ms. Kulesza then drew the Committee's attention to two current United Nations processes on cybersecurity. One is the United Nations Group of Governmental Experts (UNGGE), and the other is the United Nations Open-Ended Working Group. The scope of these two groups and their mandates are very similar, but the construction of their mandates is different. The UNGGE is composed government experts appointed by a select group of states with a select group of members, whereas anyone can join the open-ended working group to try and shape the way international law is applied in cyberspace.

95. Looking at the final conclusions of these groups, Ms. Kulesza notes one element is clear, which is that international law in its entirety applies in cyberspace, including all the provisions that have been subject to the elaborations of this Ad Hoc Committee. She also drew the Committee's attention to recent calls to establish an ad hoc committee that would look into confluence of international conventions on countering the use of information and communications technologies for criminal purposes, which will likely be launched in early 2022. This initiative was established in 2019 and in 2020 a draft was submitted of a potential international convention on cybercrime, detached from the Budapest Convention, which will likely be presented in January 2022 to the newly formed group of experts, which might be a chance to feed into ongoing processes with the expertise that has already been granted by the group, or on the contrary to relieve those experts of the work that will probably give them additional challenges while trying to reiterate these issues.

96. Ms. Kulesza concluded her presentation by noting that these instruments are merely the UN processes, but that there are other activities on the table. She explained that Internet governance – norms, principles, and laws – are developed by three groups of stakeholders: governments, business and civil society, and end-users and academics like herself. She highlighted two examples of complementary work. The first of which was Microsoft's 2018 tabling of the digital Geneva Convention to ensure that humanitarian law is applied online. She suggested that this was an interesting proposal because a large international company was inciting governments to keep cyberspace peaceful, including laws that would prohibit promotion of genocide. Ms. Kulesza noted that this proposal did not meet with much governmental support because it came from a private US company. But it also is a reflection of current ongoing processes within the business community.

97. In her second example, Ms. Kulesza highlighted a group she is involved with – the Internet Cooperation for Assigned Names and Numbers, which acts as the internet's phone book. It is very technical, and works toward cybersecurity with reference to what they call DNS abuse. She explained that there is a DNS abuse framework, or policy, which she believes may prove more effective than the legal measures we have in place thus far. It is the most effective measure in place right now, but it does not cover hate speech or racial

cybercrime, as there is not consensus among registries and registrars that anything to do with hate speech or freedom of expression falls within the DNS abuse category. Ms. Kulesza explained that the DNS abuse definition includes child and sexual abuse material, as well as intellectual property rights violations, but does not include any kind of free speech categories and does not reference hate speech, or include any kind of privacy violations.

98. In terms of recommendation for venues to observe further advancement of racial cybercrime discussions, Ms. Kulesza pointed to ICANN, the UNGGE and open-ended working group, as well as the work of the new committee on cybercrime. Also the ITU and NATO, and technical organizations like the Internet Engineering Task Force.

99. 1The representative of South Africa noted that, whilst the Budapest Convention has been ratified by many countries, it is not a UN convention that would then be universally accepted by countries once signed, and there are a number of other issues with it that make it difficult for some countries to accept. He asked Ms. Kulesza, based on her study of the issue of cybercrime relating to racism, which texts she believes the Committee should take into an account in its document. He further elaborated that South Africa is quite active in dealing with issues of hate speech and racism on the internet, and that these issues are taken up at various levels. He noted that she has done a great deal of work across the board, and asked if there was a way experts like herself could propose language to the Committee that would be acceptable to all states. He acknowledged that Europe is doing a lot through their national laws and asked if there might be a way some of these regional laws and cases could be brought to this committee to be elevated as an international standard. He notes that modern technology platforms could become massive disseminators of hate crime and hate speech and racism, and often people are not held accountable for it, including the original author and the people who spread it. He commented that sometimes the initial author is not a very influential person, but the people who spread it are, and there can be two different motivations for that: one to raise awareness of stopping this type of hate crime, and the other to spread the message further. He asked how to accurately reflect all of this in the language.

100. 1Ms. Kulesza responded that she had a suggestion for a point of departure, that being the Budapest Convention and its additional protocol. She stated she personally views it as a well-balanced exercise that accounts for the different elements of international debate highlighted in the South African delegate’s intervention. She suggested looking to articles 2 and 3, and potentially 4-6 of the additional protocol for wording that reflects current international compromise on racial cybercrime. While she is well-aware that this is not an international instrument, she stated that it is open to international signature and ratification and is, to her knowledge the best reflection of current international compromise. She did caution, however, that none of the 33 states who have ratified this language are big states who wish to govern cyberspace by their rules. She recommended, therefore, to start with the wording based articles 2 and 3 of the additional protocol and to seek input from the technical community. She noted there is a governmental advisory committee within ICANN, which could be a stream of expertise into technical solutions that would be effective to combat racial cybercrime.

101. The representative of the EU noted that, while the online world offers great opportunities for economic growth and is an enabler for communication serving freedom and democracy, it also offers unlimited platforms for extremism and intolerance to spread virally in a way that would have been unthinkable basically 15 years ago. And hate speech online not only harms targeted groups and individuals, it also stops citizens from speaking out for freedom, tolerance, and non-discrimination in online environments. Meaning that it has a chilling effect on the democratic discourse on online platforms. The European Commission has over the past years worked intensely to ensure that the internet remains a free, safe, and tolerant space where European Union laws are enforced with full respect to the right of freedom of expression and significant measures have been made in particular to counter the proliferation of illegal hate speech online, as defined by national laws implementing the framework decision on racism and xenophobia. Among the main measures taken in this area, the European Commission has agreed with Facebook, Microsoft, Twitter and YouTube a Code of Conduct on countering illegal hate speech online to help users notifying illegal hate speech in these social platforms and to improve support to civil society, as well as coordination with national authorities. The Commission, closely manages the progress made

on the implementation of the code, and regularly reports on its activities in this area. The results do show a very positive trend, because 2.5 years after the signature of the code, evaluations showed that IT companies respond within 24 hours in the majority of cases and remove on average 72% of reported content, compared to 59% in 2017 and only 28% in 2016. In addition to this progress in the removal of hate speech, the Code of Conduct has fostered synergies between the IT companies civil society, and member states' authorities in the form of a structured process of mutual learning and exchange of knowledge. And this has contributed to the effectiveness of the notification procedures and the quality of the content management policies in the companies. And it has also encouraged joint projects and learning opportunities in the area of education and counternarratives.

102. Another best practice or a development, with regard to racial cybercrime is that the commission published on the 22nd of July this year [2021], a study called Heroes and Scapegoats Right Wing Extremism in Digital Environments. And the study focuses on the different aspects of digital violence in right wing extremist content. So with that we mean visual or textual messages that express acceptance, condoning, justification, or acclamation of violence for the sake of a racial, nationalistic ideal. And the different strains of violent right-wing extremist content include identitarianism, counter-jihad, national socialism, white supremacy, and eco fascism. And emerging content strains include accelerationism, siege culture, and hive terrorism. The main aspects of this content that are examined in this report are either target-oriented, like toxic language including hate speech, dehumanizing language, and far right conspiracy theories; or perpetrator oriented. And the study also maps the online landscape and describes how this content is expressed on different platforms. Lastly the European Commission provides financial support to national authorities and civil society in this area through rights, equality, and citizenship program, as well as, for example, through the safer internet program, which aims at protecting children using the internet and other communication technologies – for example by fighting against racist and xenophobic content. With regard to the report of the expert seminar and based on national and regional experiences, it is worth investing in coregulation models and corporate social responsibility structures. We furthermore agree that all guidance should come from article 20 of the ICCPR as far as limiting the right to freedom of expression and opinion is concerned. The expert fully agreed with the references made to the Budapest Convention on cybercrime, because for all member states it is also a key document in this regard.

103. Ms. Kulesza replied that she strongly supports all those instruments, but was bound by the brevity of her presentation and wanted to highlight an instrument that was available for universal ratification.

104. The representative of Pakistan on behalf of the OIC took note of Ms. Kulesza's comments regarding the Budapest Convention, but would have appreciated hearing more about the views and observations of the legal experts on racial cybercrime, and details that might facilitate the work of the Committee for developing elements for the additional protocol. He noted that the Committee could take guidance from the Budapest Convention, but emphasized that the current discussion was in regards to an additional protocol under the ICERD. He asked for the view of the expert on three elements: first, why online hate speech is difficult to counter and why there are more challenges as opposed to offline. He elaborated that we cannot differentiate at times between the writer and the individual who disseminated because of the vague nature of the content available online at times, and at times it is difficult to identify the author. There is vagueness in terms of online material and material in cyberspace. Secondly, he sought advice on the issue of virality and spread, as it is very fast and need tools to counter these challenges. Thirdly, he sought input on how to address the challenges posed by private sector influence, particularly in cases where it is more influential than the government in terms of resources. He requested the expert's opinion on countering these challenges in the additional protocol because Pakistan thinks the ICERD cannot address those challenges because it was negotiated years ago, and we are witnessing multiple and compounding forms of discrimination.

105. Ms. Kulesza replied that she was just using the Budapest Convention to point out phrasings that might be useful to the work of the Committee, as she believes it resembles as closely international consensus as we have gotten in the international dialogue. She continued to answer that, when we speak about viral spreading of content and the power that platforms

hold, she would refer to the final points of her presentation. She believes that only through strong public-private partnerships, can this element of cybercrime be mitigated. She noted this might imply that the Ad Hoc Committee may consider including in their final wording a reference to the need to work together with private actors, and it might imply the need to go back to look at social responsibility of business as a necessary measure to implement existing human rights law. She expressed her strong support that the general provisions of international human rights law fail to address current challenges and it is the task of the Committee to try and adjust these principles to fit current challenges, and she believed that this could only be achieved by working together with the private sector. She reiterated that internet governance is the joint elaboration of norms and standards by governments, civil society, and business. Only through a reference to what is in international human rights law with regards to corporate social responsibility can these aims be achieved.

106. She also suggested that installing a platform, or body, that would resort to solving jurisdictional issues might be useful, and also pointed to the EU, where informal collaborations like the code of conduct working together with service providers to identify challenges and stop viral spread before it increases has proven effective. She also suggested building partnerships with the DNS community to work on stopping racial cybercrime though the DNS abuse framework. She noted, however that these are practical and pragmatic answers, whereas the mandate of the Committee is to work on the wording of law.

107. The representative of South Africa noted that an issue with a universally-available regional instrument for many states is the requirement to report consistently to a regional organization on the issue is not always feasible and therefore it could be suggested that an international instrument under the UN would more likely be universally ratified by all states. He asked if Ms. Kulesza might share further insights on some other instruments, especially language that the Committee could consider to move forward. He noted that the sooner this could be accomplished in an additional protocol, the less harm that would be done.

108. He continued to state that, although it was a very good document, the ICERD was written in 1965, and the world has changed a lot and the people who were in the room in 1965 were not the victims of the discrimination and it was only many decades later that many of the people who were not in the room were able to voice their concerns and definitions and elaborate on how they saw racism and systemic racism, hate speech, etc. where certain speech were very acceptable in 1965 and was not seen as hate speech or even racism because it was an accepted norm. A few decades later that was absolutely not the case and therefore it was difficult to understand when it was said that the ICERD is perfect and did not require further elaboration and that there are no gaps. He noted that in 2001, 200 countries came together and found consensus language on these issues, defining them, getting common understanding when they wrote the DDPA – the Durban Declaration and Programme of Action. He asked the expert how she might propose some other relevant language because in 2001, while internet and cell phones were very new the DDPA actually referred to it and about discrimination in the new technologies. He inquired about how to merge all the valuable language from regional instruments to use for the Committee's elaborations, as South Africa did not believe the ICERD did not have gaps, considering their country and people were not part of the conversation in 1965 and were victims of racial discrimination.

109. Ms. Kulesza responded that she pleased to support the Committee, but that she had not proposed wording for the Committee to consider at this specific point. She indicated that she would be pleased to follow up, and noted that the drafting and wording of the ICERD dating back to the 1960s might not be relevant to all the circumstances we are facing today. She explained that, through her research she has come to stand with those that say the technology is changing too rapidly for us to be able to develop a time-resistant international instrument. This is not to say that such a wording of a provision targeting racial cybercrime should not be elaborated, but that she has learned that the quickest, most efficient way to address these processes and the internet governance ambience might not be through law and elaborating a binding standard for states, but rather working together with those who make those day-to-day decisions. She suggested if we work together with those actors, we deploy artificial intelligence analysis of algorithms to understand how the viral spread is imposed we might be able to achieve quicker and more tangible results. She stated she would be happy

to work on wording that would be accurate today in 2021, and probably 2022, but that it would a challenge to frame wording that would still be viable in 2025 or 2031.

110. The representative of the IHRC took the floor with a statement that, according to the European Convention on Cybercrime held in Budapest in 2001, the fact is that national criminal courts today are facing fundamental difficulties which is the time lost between discovering violations of new technologies and amending the penal laws to combat them. Necessary amendments to national penal codes are often slow because they require the following steps to be achieved by discovering the content of violence in new technology, finding loopholes in the penal code to address them, and adopting new laws that criminalize computer-related offences. There are challenges in combating cybercrime such as the need for equipment and techniques that may not be available to investigate potential criminal acts, and the requirement to have regular updating of laws to accommodate new technologies.IT would be important to involve the private sector and civil society in combating cybercrime to assist public authorities.

111. Ms. Kulesza said she was pleased to comment on this statement, but that these comments would be somewhat departed from the racial cybercrime debate. She duly noted the representatives observations, and strongly agreed that there was a slowness to the judicial process, noting that this is has been a challenge addressed since the start of cyber investigations. She noted there is work being done in the European Union with advancing the conversation with critical infrastructure operators, including the DNS operators, and a large component of private-public partnerships as well. She suggested that these comments concerned issues of encryption, privacy, the right to have encryption keys by law enforcement authorities, and she noted a vivid ongoing debate around active cyber defence – the issue of infiltrating other networks, in the jurisdiction, or under the control of other states to obtain evidence or stop an attack. That is an ongoing international law discussion focused on cybersecurity and she strongly supported the observations made. She stated that these debates on the processes – the collection of electronic evidence; stopping of a cybercrime as it unfolds, was beyond the ambit of her current intervention, which focused on the problem of racial cybercrime.

112. Ms. Imene-Chanduru asked Ms. Kulesza elaborate further on article 3 of the Budapest Convention that she mentioned earlier. Ms. Kulesza explained the language, starting with article 2, explaining that racist and xenophobic material means any written material, any image, or any other representation or ideas or theories which advocate, promote, or incite hatred, discrimination or violence against any individual or group of individuals based on race, colour, descent or national or ethnic origin, as well as religion if used as a pretext for any of these factors.

113. She suggested that the Committee may also consider the current discussion around gender-based violence where gender is added to the scope of categories indicated when trying to define hate speech. While possibly a political issue, her recommendation would be to consider including such xenophobic material and also the concept of gender.

114. She continued that article 3 prohibits, as per national law, the distribution or otherwise making available of so-defined racist and xenophobic material to the public through a computer system. She noted the provisions of the Budapest convention indicates that such an act is to be committed intentionally and without a right, which she understands that, as per the explanatory report, for this to be the result of a certain compromise made by the negotiating parties. She reminded the Committee that the provisions of the Budapest Convention are non self-executing. She said she welcomes observations from the Committee about the possibility of installing a universal point of reference or commissioner, if it was appropriate, to support that work with a dedicated point of reference for defining racial cybercrime.

115. Ms. Kulesza noted the exemptions in article 3, paragraph 2 and 3, stating she believes this wording reflects the current compromise; however, it also reflects the challenge faced when looking at defining racist or xenophobic material, in general, here referred to as racial cybercrime. She read through the provision to highlight the challenge: “A party may reserve the right not to attach criminal liability to conduct as defined by paragraph one where the material we have defined for the purposes of this convention as racist or xenophobic

advocates, promotes, or incites discrimination that is not associated with hatred or violence, provided that other effective remedies are available."

116. She noted that there is an ongoing debate around civil law remedies to the violation of individual rights. She viewed hate speech as falling outside the category of free speech and effectively requiring a criminal law provision. The consensus reflected in the Budapest Convention, however, does give a state the freedom to decide whether it wishes to introduce other effective remedies outside the scope of penal law. Paragraph 3 goes even further to trying to seek that balance between national and international understanding of freedom of expression. "A party may reserve the right not to apply paragraph 1, which provides for the prohibition of dissemination of racist and xenophobic material to those cases of discrimination for which duty to established principles in its national legal system concerning freedom of expression provide for effective remedies, as we have referenced in paragraph 2."

117. Ms. Kulesza then briefly noted that as a non-binding norm, article 4 refers to providing for criminal offences under domestic law, when committed intentionally and without the right, one threatens through a computer system with the commission of a serious criminal offence as defined in domestic law, persons for the reason that they belong to the group distinguished by race, colour, descent or national or ethnic origin as well as religion if used as a pretext for any of these factors, alternatively if that threat is addressed to a group of persons which is distinguished by any of these characteristics. She concluded that those are the examples she would use as a point of departure for the wording of the work of the Ad Hoc Committee.

Preventive measures to combat racist and xenophobic discrimination

118. At the second meeting of the 11th session on 18 July 2022, the Committee heard a presentation from Ms. Anna Spain Bradley, Vice Chancellor for Equity, Diversity, and Inclusion at the University of California Los Angeles and former Professor of Law at the University of Colorado summarizing the advice and comments provided at the intersessional legal expert consultation on the issue of preventive measures to combat racist and xenophobic discrimination.

119. Ms. Spain Bradley began her presentation by recalling the urgency for elaborating an additional protocol that has been felt in the years following the murder of George Floyd in the United States. She noted that the legal experts highlighted that the obligations to which States have already agreed remain necessary.

120. In evaluating the documentation from the 10th session of the Ad Hoc Committee, Ms. Spain Bradley explained that the experts began their discussion by positing the question of how to criminalize harms that are racist and xenophobic in nature in both real world and online contexts. She said the experts suggested the Committee look at how to address harms caused by individuals as well as groups and entities. The experts, she recalled, also offered language suggestions to make items clearer and more specific to avoid language that is vague, and she offered examples such as "cultural diversity," which she said is too narrowly constricted; and "education and awareness," which experts found to be overbroad.

121. Ms. Spain Bradley told the Committee that the legal experts talked at length about which measures state actors could take, and what to do with private actors and about online acts. She recalled the experts' emphasis on the importance of having states truly commit to education that is honest and full, and to acknowledge that history is subjective. More specifically, they discussed the need for education and training of specific groups – notably that governments should ensure that all people working for them are properly equipped to act in a way that does not further perpetuate racism and discrimination (including police).

122. Regarding the experts' thematic discussions, Ms. Spain Bradley indicated they found it paramount that the Committee endeavour to clarify what the existing obligations are, and where they would extend to in the elaboration of a new complimentary standard. They suggested obligations should be extended to places and spaces that did not exist at the time the ICERD was drafted and signed.

123. Ms. Spain Bradley also noted the legal experts' insistence that there needs to be greater clarity around definitions in the additional protocol. They highlighted that neither

racism or xenophobia are defined under international law, and that the International Court of Justice has had questions about the definitions that currently exist in the ICERD, most notably in regard to the definition of nationality and national origin.

124. Ms. Spain Bradley highlighted the need for practical realism about the role, type of, and reason for education and training. She noted that this is a broad category of activity, and that research shows that certain kinds of education are more useful: for example, doing activities with people who are different from ourselves has been shown to create new neural pathways in the brain and new habits.

125. Ms. Spain Bradley recalled the experts' suggestion that there is a need to distinguish between different kinds of racism that exist: systemic and structural racism in an entire field; institutional racism within an organization; interpersonal racism; and intrapersonal racism (that is, unconscious or implicit bias). They noted that preventive measures would need to distinguish between these and address each one.

126. She also stated that the experts discussed the increasing challenge of human migration and the need to address harms that they experience on the basis of their identities – particularly how religious and racial discrimination are sometimes connected, and there is a nuance needed to address both.

127. Ms. Spain Bradley concluded her presentation by stating that preventive measures are truly needed today, and that resources need to be put forth to address this cause. She suggested that we remind ourselves of the values of the United Nations Charter and for which the United Nations stands, and recalled that the fight against racism is a fight for dignity.

128. Responding to Ms. Spain Bradley's presentation, the representative of the European Union noted that there is already a preamble to the ICERD that speaks to preventive measures, as does article 3. Thus, in the EU's reading of the ICERD, there are already strong measures there. She asked Ms. Spain Bradley what is to be gained by adding more to it? The representative also recalled expert suggestions that the Committee be careful about including in a legally binding document items that are recommendations, and that the EU agrees on the goal, but perhaps not on the method for achieving it and sought guidance from Ms. Spain Bradley on how to address this.

129. The representative of South Africa expressed his understanding from Ms. Spain Bradley's presentation that experts do believe there are gaps that could be filled, and that states need to make sure they are doing training. He asked Ms. Spain Bradley what about non-state actors? He also noted that the ICERD does not speak much to systemic or structural racism, and asked how the Committee could deal with systemic, structural, and institutional racism that is engrained in both states and non-state actors when many countries do not criminalize racism or racial discrimination.

130. The delegation of Pakistan on behalf of the OIC stated that increasingly visible discrimination across the globe, particularly in relation to refugee and asylum seeker programs that discrimination based on race, nationality, or colour is being witnessed. He asked Ms. Spain Bradley – working under the assumption that there are serious legal gaps in the ICERD – which state obligations and non-state obligations should the Ad Hoc Committee consider?

131. Responding to the EU, Ms. Spain Bradley emphasized the need to understand that the goal of elimination of all forms of racial discrimination was absolutely true in 1965. She said the declaration had language that said this is a pervasive global problem that needs to be addressed, but that the two strong threads if it's not in the treaty, then treaty [the ICERD] walked this back a bit. She stated that there have been frustrations, her own included, about the limits of what has been achieved following the ICERD. This connects, she explained, to how we define racism and race, because we hear some countries saying that it doesn't happen in their own countries. In her opinion, we are now back in a perspective that people are being harmed and the harms are much broader than they were in 1965, and that if we understand the elimination of all forms of racism then we reach the second question about what is needed for prevention.

132. On the issue of prevention, Ms. Spain Bradley highlighted two viewpoints: first that states are only obligated to do what is in the ICERD, and second that treaty language can be

interpreted in light of the world we live in today – for example, in light of issues like migration where states are seeking guidance.

133. Ms. Spain Bradley highlighted another discussion about the criminalization of racist acts and the question of whether intent must be shown or whether it is just the outcome that should be the prevailing way to look at it. She discussed the need for states to harmonize legal mechanisms to hold non-state actors accountable, noting that without harmonization it is unlikely that non-state actors will be held accountable.

134. In addressing the question of Pakistan on behalf of the OIC, Ms. Spain Bradley communicated her understanding of the urgency, and noted that there are at least three cases the International Court of Justice is looking at related to the ICERD – particularly as the ICERD covers nationality, but not national identity. She suggested that this is a challenge that could be resolved through the elaboration of a complementary standard.

135. The Chair-Rapporteur asked two questions of Ms. Spain Bradley to assist in clarifying specific elements later: first, should the additional protocol promote restorative justice measures in cases of non-violent crime? Second, should the additional protocol contain measures guaranteeing timely and effective investigations and access to effective remedies for victims?

136. Ms. Spain Bradley replied by acknowledging that, speaking to the additional protocol, she wished to acknowledge that when speaking about prevention we are looking at societies and cultures as ecosystems. She explained that in closed ecosystems where people have to remain where they are, restorative justice is paramount, as it provides an approach where offenders can remain in this society. First, she suggested, it must be answered whether racism is a crime. If so, then restorative justice may be one way of accounting for that crime. If we criminalize, she stated, we will have to think of ways to account for what we have labelled as offences.

137. She also explained that, if people are going to be prosecuted, they will need to know for what they are being prosecuted, and will need to be accorded due process rights. These include knowing what the details of the offences are and expectations about the process. She stated that if an additional protocol calls for these kinds of accounting, it would need to be linked to the question of prevention and to the question of criminalization. She noted that some forms of restorative justice can be preventative, but not all.

Annex II

Programme of Work – 11th Ad Hoc Committee on the Elaboration of Complementary Standards, 6–17 December 2021 (as adopted 06.12.2021)

	1st week				
	Monday 06.12	*Tuesday 07.12*	*Wednesday 08.12*	*Thursday 09.12*	*Friday 10.12*
10:00 – 12:00	Item 1 Opening of the Session Mr. Yury Boychenko, Chief, Anti-Discrimination Section ACNUDH Item 2 Election of the Chairperson Item 3 Adoption of the Agenda and Programme of Work -- General statements	Item 4 continued General presentation and overview of the intersessional expert consultation report	Item 5 continued Dissemination of hate speech Discussion	Item 6 All contemporary forms of discrimination based on religion or belief Expert introduction by Doudou DIÉNE, United Nations Independent Expert on the situation of human rights in Côte d'Ivoire; former United Nations Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance; former UNESCO official	Item 7 Racial cybercrime Expert introduction by Joanna KULESZA, Professor of international law, Faculty of Law & Administration, University of Lodz, Poland; member Scientific Committee of the European Union Fundamental Rights Agency; Chair of the Advisory Board, Global Forum on Cyber Expertise
15:00 – 17:00	Item 4 Updates on the Ad Hoc Committee	Item 5 Dissemination of hate speech Expert introduction by Joanna BOTHA, Associate Professor and the Head of Department of Public Law, Faculty of Law, Nelson Mandela University, South Africa; Attorney of the High Court of South Africa	Item 5 continued Dissemination of hate speech Discussion	Item 6 continued All contemporary forms of discrimination based on religion or belief Discussion	Item 7 continued Racial cybercrime Discussion

	2nd week				
	Monday 13.12	*Tuesday 14.12*	*Wednesday 15.12*	*Thursday 16.12*	*Friday 17.12*
10:00 – 12:00	Item 7 continued Racial cybercrime Discussion	Item 8 continued Preventive measures to combat racist and xenophobic discrimination Discussion	Item 6 continued All contemporary forms of discrimination based on religion or belief Discussion	Item 9 continued General discussion and exchange of views Item 10 Conclusions and recommendations of the session	Item 10 continued Conclusions and recommendations of the session
15:00 – 17:00	Item 8 Preventive measures to combat racist and xenophobic discrimination Expert introduction by Anna SPAIN BRADLEY, Vice Chancellor for Equity, Diversity and Inclusion, University of California Los Angeles, Scholar and expert on international law and human rights; former Professor of Law, University of Colorado	Item 8 continued Preventive measures to combat racist and xenophobic discrimination Discussion	Item 9 General discussion and exchange of views	Item 10 continued Conclusions and recommendations of the session	Item 11 Adoption of the conclusions and recommendations of the 11th session

Annex III

List of attendance

Member States

Algeria, Angola, Armenia, Australia, Azerbaijan, Bangladesh, Bolivia (Plurinational State of), Brazil, Cameroon, China, Cuba, Djibouti, Egypt, Finland, Germany, Haiti, Indonesia, Iraq, Libya, Luxembourg, Mexico, Namibia, Nepal, Nigeria, Pakistan, Panama, Paraguay, Poland, Romania, Russian Federation, Saudi Arabia, Slovakia, South Africa, Sri Lanka, Switzerland, Tunisia, United Kingdom of Great Britain and Northern Ireland, Venezuela (Bolivarian Republic of), 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

International Human Rights Association of American Minorities (IHRAAM), International Human Rights Council, Human Rights Association for Community Development in Assiut, International Youth and Student Movement for the United Nations (ISMUN), Maat for Peace, Development and Human Rights Association.

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

ISMTS, UN Diplomatic Committee International Organization, Regional Court in Kielce/Poland.