



**Report to the Ad Hoc Committee on the Elaboration of  
Complementary Standards to the International Convention on  
the Elimination of All Forms of Racial Discrimination<sup>1</sup> on the  
intersessional legal expert consultation considering the  
elements of a draft additional protocol to the Convention  
prepared by the Ad Hoc Committee at its tenth session**

**Intersessional Legal Expert Consultation**

**21 – 22 October 2020, Geneva (hybrid meeting)**

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<sup>1</sup> Hereinafter ICERD.

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## **I. Introduction**

### **A. Brief background**

1. In 2017, both the General Assembly in paragraph 6 of resolution 72/157 and the Human Rights Council in paragraph 1 of resolution 34/36 requested the Chairperson-Rapporteur of the Ad Hoc Committee on Complementary Standards<sup>2</sup> to commence “...negotiations on the draft additional protocol to the Convention criminalizing acts of a racist and xenophobic nature during the 10th session of the Ad Hoc Committee.” Initial discussions took place during the 10th session from 8-18 April 2019, which resulted in the Committee producing the document entitled “Summary of Issues and possible elements discussed pertaining to the implementation of General Assembly resolution 73/262 and Human Rights Council resolution 34/36 on the commencement of the negotiations on the draft additional protocol to the Convention “criminalizing acts of a racist and xenophobic nature””.

2. In 2019, the Human Rights Council in paragraph 6 of resolution A/HRC/RES/42/29 specifically requested “the Office of the United Nations High Commissioner for Human Rights to organize, before the eleventh session of the Ad Hoc Committee, a two-day expert seminar, with two legal experts from each region in the relevant areas of law, a member of the Committee on the Elimination of Racial Discrimination and the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, in order to consider the elements of a draft additional protocol to the Convention prepared by the Ad Hoc Committee at its tenth session pursuant to General Assembly resolution 73/262 and Human Rights Council resolution 34/36, and to prepare a report on the deliberations and recommendations thereon and submit it to the Ad Hoc Committee at its eleventh session”.

### **B. Consultation objective**

3. The Office of the High Commissioner for Human Rights (OHCHR), in consultation with the Chairperson-Rapporteur of the Ad Hoc Committee on the Elaboration of Complementary Standards (H.E. Taonga Mushayavanhu), extended invitations to twelve experts to consider the elements of a draft additional protocol to the Convention which was prepared by the Ad Hoc Committee at its tenth session.<sup>3</sup>

4. The aim of this meeting was to elicit thoughtful consideration of the elements which had been proposed by the Member States at that stage so that the critical thoughts and insights raised by the group of experts from all regions of the world could inform this report to the eleventh session of the Ad Hoc Committee, and the subsequent drafting work of the Committee.

### **C. Consultation modalities**

5. Due to the covid-19 pandemic, the legal expert consultation was postponed from March 2020 to 21-22 October 2020. The twelve experts met in a hybrid meeting with some attendees meeting in person in room Temps 2 at the Palais des Nations in Geneva, Switzerland, while the majority attended from their countries of residence via the United Nations remote simultaneous interpretation platform, Interprefy. The consultation was chaired by H.E. Taonga Mushayavanhu (Chairperson-Rapporteur of the Ad Hoc Committee on the Elaboration of International Complementary Standards to the ICERD).

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<sup>2</sup> The Ad Hoc Committee on the Elaboration of Complementary Standards to the International Convention on the Elimination of All Forms of Racial Discrimination was mandated by the United Nations Human Rights Council in 2006 “...to elaborate, as a matter of priority and necessity, complementary standards in the form of either a convention or additional protocol(s) to the International Convention on the Elimination of All Forms of Racial Discrimination...” (Human Rights Council decision 3/103 and resolutions 6/21 and 10/30)

<sup>3</sup> To be found at pages 18-19 of the Human Rights Council report A/HRC/RES/42/58

## D. Experts in attendance<sup>4</sup>

6. Pursuant to paragraph 6 of resolution A/HRC/RES/42/29, the consultation meeting was attended by two legal experts from each region in relevant areas of law, a member of the Committee on the Elimination of Racial Discrimination and the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance. The experts were as follows:

7. **Mohsen ABDOLLAHI**, Associate Professor of International and Environmental Law, University of Shahid Beheshti (SBU); Head of Human Rights and Environmental Law Department at SBU Faculty of Law; Head of International Law Committee of Iran Expediency Discernment Council; Legal Adviser at the Presidential Office.

8. **E. Tendayi ACHIUME**, United Nations Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance; Professor of Law, University of California Los Angeles School of Law; research associate, African Center for Migration and Society at the University of Witwatersrand, South Africa; former Faculty Director, UCLA Law School Promise Institute for Human Rights.

9. **Alexei Stanislavovich AVTONOMOV**, Practicing lawyer and Vice-Rector of the International Institute of Economics and Law named after A.S. Griboedov, Moscow; former member and Chairperson, United Nations Committee on the Elimination of Racial Discrimination; former Personal Representative of the OSCE Chairperson-in-Office on Combating Racism, Xenophobia and Discrimination; former guest professor at Carleton University (Ottawa, Canada) and Kazakh National University (Almaty, Kazakhstan); member of Editorial Board of the journal “Representative Power”; member of International Research Group “Forum Eastern Europe”; member of the Editorial Council of the Russian Edition of the Journal of “Constitutional Law, Eastern European Review”.

10. **Marc Baron BOSSUYT**, Member of, and current Vice-Chairperson of the United Nations Committee on the Elimination of Racial Discrimination; former Emeritus Professor of International Law and the Law of International Organizations at the University of Antwerp; former (honorary) Commissioner General for Refugees and Stateless Person; former Judge; former (Emeritus) President of the Constitutional Court of Belgium; former representative of Belgium in, and Chairperson of, the United Nations Commission on Human Rights; former member of the United Nations Sub-Commission on the Promotion and Protection of Human Rights; former visiting Professor in the Faculty of Law, Université du Burundi, Bujumbura and Université Nationale du Rwanda, Butare; former Chairperson/Rapporteur of the Working Group on the Draft Declaration at the World Conference on racism, racial discrimination, xenophobia and related intolerance.

11. **Joanna BOTHA**, Associate Professor and the Head of Department of Public Law at the Faculty of Law, Nelson Mandela University, Port Elizabeth, South Africa; Attorney of the High Court of South Africa.

12. **Anna SPAIN BRADLEY**, Vice Chancellor for Equity, Diversity and Inclusion, University of California Los Angeles and a leading scholar and expert on international law and human rights; former Assistant Vice Provost for Faculty Development and Diversity; former Professor of Law, University of Colorado; former U.S. delegate to the United Nations; former Attorney-Advisor at the U.S. Department of State; member of the Council on Foreign Relations; member and former Executive Council member of the American Society of International Law; founding member of Mediators Beyond Borders International; member of the Academic Council of the Institute of Transnational Arbitration.

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<sup>4</sup> Further to a request from the Chairperson, each of the five regional groups were invited to nominate an expert from their region, who was invited by the Office of the High Commissioner for Human Rights to participate as an expert in the meeting. In consultation with the Chairperson, the remaining five regional experts were selected by the Office of the High Commissioner for Human Rights. As per the resolution, a member of the Committee on the Elimination of Racial Discrimination and the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance were also invited to participate as experts in the consultation.

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13. **Doudou DIÉNE**, 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; former member of the UNESCO secretariat, including Director of the Division of Inter-cultural Projects; former deputy representative of Senegal to UNESCO.

14. **Tanya Kateri HERNÁNDEZ**, An internationally recognized comparative race law expert, Fulbright Scholar, and the Archibald R. Murray Professor of Law at Fordham University School of Law; formerly visited at Université Paris Ouest Nanterre La Défense, Paris and University of the West Indies Law School, Trinidad; former Law and Public Policy Affairs Fellow at Princeton University; former Faculty Fellow at the Institute for Research on Women, Rutgers University; former Faculty Fellow at the Fred T. Korematsu Center for Law and Equality; former Scholar in Residence at the Schomburg Center for Research in Black Culture; Fellow of the American Bar Foundation, the American Law Institute, and the Academia Puertorriqueña de Jurisprudencia y Legislación; serves on the editorial boards of the Revista Brasileira de Direito e Justiça/Brazilian Journal of Law and Justice, and the Latino Studies Journal.

15. **Joanna KULESZA**, Tenured professor of international law at the Faculty of Law and Administration, University of Lodz, Poland; member of the Scientific Committee supporting the European Union's Fundamental Rights Agency; represents European Internet users within the At-Large Advisory Committee of the Internet Corporation for Assigned Names and Numbers; Chair of the Advisory Board for the Global Forum on Cyber Expertise; member of the Sino-European Working Group on International Law in Cyberspace; served as expert for the Council of Europe on human rights online and the Sino-European Cybersecurity Dialogue; served as Membership Committee Chair for the Global Internet Governance Academic Network (GigaNet); former visiting professor with the Oxford Internet Institute, Stanford University, Oslo University, Justus-Liebig-Universität Gießen, St. Thomas University, Miami, and Westfälische Wilhelms Universität Münster; former visiting researcher with the University of Cambridge and Ludwig-Maximilians-Universität München; former scholar of the Robert Bosch Stiftung, Polish Ministry of Foreign Affairs, and the Foundation for Polish Science.

16. **Martha Elizabeth RICO**, Colombian lawyer with a Master's Degree in Human Rights and Democratization, and over 20 years of experience working in the public sector; advisor to the Ministry of Internal Affairs.

17. **Li-ann THIO**, Provost Chair Professor at the Faculty of Law, National University of Singapore; barrister (Gray's Inn, UK); former Nominated Member of the Singapore Parliament (Eleventh Session); former Senior Advisor to the Ministry of Foreign Affairs; Chief Editor, Singapore Journal of Legal Studies; Advisory Board Member of the Max Planck Encyclopedia of Comparative Constitutional Law; Co-Editor of the Hart Series on Constitutionalism in Asia; formerly General Editor of the Asian Yearbook of International Law; former Chief Editor of the Singapore Journal of International & Comparative Law (now Asian Journal of International Law).

## **E. Discussion module topics**

### **18. *Discussion module 1: Dissemination of hate speech***

Regarding paragraph 108 (a)-(d) of the Report of the Ad Hoc Committee on the Elaboration of Complementary Standards on its tenth session.<sup>5</sup>

### **19. *Discussion module 2: Racial cybercrime (social media networks and companies)***

Regarding paragraph 108 (e)-(f) of the Report of the Ad Hoc Committee on Complementary Standards on its tenth session.

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<sup>5</sup> Report of the Ad Hoc Committee on the Elaboration of Complementary Standards, 20 August 2019, A/HRC/42/58.

20. *Discussion module 3: All contemporary forms of discrimination on the basis of religion and belief*

Regarding paragraph 108 (d) of the Report of the Ad Hoc Committee on Complementary Standards on its tenth session.

21. *Discussion module 4: Preventive measures to combat racist and xenophobic discrimination*

Regarding paragraph 108 (g) (i-xi) of the Report of the Ad Hoc Committee on Complementary Standards on its tenth session.

## II. General Discussion

22. In a preliminary general discussion to the thematic modules and individual written submissions,<sup>6</sup> a couple of experts opined that there is little need for complementary standards to the ICERD, as the combination of its breadth and CERD's expository general recommendations and concluding observations provide sufficient insight and coverage of all concerns related to racial discrimination. One expert suggested that paragraph 108(a)-(c) and (g)(iii) and (iv) are already captured by the ICERD, and thus unnecessary inclusions in an additional protocol, but that 108(e) and (f) are worthy of consideration, as cybercrime could not have been foreseen when the ICERD was drafted. The expert believes that, although further protections are necessary under international law, the ICERD is not the proper standard to address discrimination on the grounds of religion or belief (paragraph 108(d)). Further, this expert espoused, CERD does not believe there are substantive gaps to the ICERD, only procedural ones. The expert noted that CERD would like the ability to conduct investigations, for example.

23. A couple of experts raised concerns that the adoption of an additional protocol, and any definitions it may contain (particularly of the terms "xenophobia" and "racial profiling"), could have the unintended consequence of weakening or diminishing the flexibility of the ICERD's existing provisions and/or strengthening the argument of Member States who claim that certain norms do not currently exist under the Convention. One expert stated, further, that if an additional protocol were to be adopted, there is a long process whereby individual Member States may or may not decide to render it binding through the process of accession and ratification.

24. Conversely, some experts cited the lack of legal specificity regarding what constitutes racial discrimination as a substantive gap to the ICERD. They were concerned that this allows states too much flexibility in their interpretations of racial discrimination which, in the worst cases, can lead to states denying any problems with racial discrimination and/or xenophobia. One expert called for an additional protocol that provides a stronger definitional framework for race, racial discrimination and racism, and that accounts for multiple discrimination and intersectionality with other grounds of discrimination and recognizes the contextual nature of the meaning of race, which differs across nations and within cultures.

25. In a written submission, one expert posited that language might be considered as an additional ground of discrimination under the ICERD, as language can be connected to ethnicity but is not always an indication of ethnic origin.<sup>7</sup>

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<sup>6</sup> Some experts experienced technical difficulties during the online session, and consequently could not be heard when they attempted to contribute. As a result, all experts were granted the opportunity to make brief written submissions after the session concluded. These submissions generally contained issues discussed by the experts during the session, and are included under the appropriate thematic discussions. If an issue was raised in a written submission, but not discussed at the hybrid expert consultation, it is noted in this report, as such.

<sup>7</sup> This suggestion was shared in a written submission and was not part of the discussion between experts.

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### III. Discussion module 1: Dissemination of hate speech

#### Legal analysis of proposed elements

26. Paragraph 108 States parties undertake to criminalize the following acts of a racist and xenophobic nature perpetrated online and offline against specific persons and specific groups irrespective of the author:<sup>8</sup>

27. Experts found the phrasing of paragraph 108 problematic, particularly its vagueness and overbreadth. They noted that invoking criminal law—as the term “criminalize” indicates—necessitates precise and detailed language, concepts, and definitions. One expert explained that this is important not only under the parameters of criminal law, but also in relation to freedom of expression and opinion.

28. Experts observed that there are differences in impact and outcome between online and offline speech, with one expert suggesting that the impact of online speech can be greater because of the potential for virality. Experts agreed that the provisions of the ICERD that apply offline should also apply to the online world. They questioned whether the additional protocol would provide guidance on addressing the offline and online spheres independently.

29. Experts queried the application of paragraph 108 “irrespective of the author,” suggesting there be a distinction between the author of the speech, and a person who forwards or shares it, as people could be very careless in the material they forward online. This phrase led the experts to question the intended perpetrator of the criminal provisions. One expert noted that the words “irrespective of the author” do not correlate with previous general recommendations,<sup>9</sup> which have stressed that the identity of the author is an important consideration when determining whether hate speech should be regulated by way of criminal law. Many experts agreed that to apply paragraph 108 “irrespective of the author” complicates criminal liability. They argued that the author of the speech is important, and that care must be taken due to the vagueness of the term “hate speech” in the legal lexicon: to apply criminalization irrespective of authorship and without a precise definition of hate speech would negate the requirement for a precisely-defined crime and a strict test for criminalizing.

30. Although experts agreed there should be a distinction between the author of the speech and a person or entity forwarding or sharing it, they concurred that an additional protocol should include deterrents to broadcasting or hosting, forwarding, or sharing content that constitutes hate speech. One expert argued that the reach of the message should also be considered—that where the author is a powerful actor, the harm caused has the potential to be significantly more dangerous. Such a situation, unlike that of a less powerful actor, in this expert’s opinion, may justify a criminal law response.

(a) **Dissemination of hate speech;**<sup>10</sup>

31. Experts expressed concern at the legally undefined and/or broad nature of the term “hate speech”, particularly as there is no reference to “incitement to hatred,” which is the existing prohibition under international legal standards. This leads to questions about what constitutes “hate speech,” whether it is distinct from “incitement to hatred,” and apprehension that distinguishing between the two may weaken existing provisions under international law prohibiting “incitement to hatred.” Experts agreed that, especially in a criminal law provision, the definition of hate speech needs to be careful and precise. One expert proposed that the additional protocol should both define hate speech and update what constitutes prohibited speech beyond incitement. This expert situated the task of defining hate speech in the additional protocol as the space between freedom of expression and opinion, and the limits

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<sup>8</sup> Report of the Ad Hoc Committee on the Elaboration of Complementary Standards, 20 August 2019, A/HRC/42/58.

<sup>9</sup> Specifically General Recommendation 35 (CERD/C/GC/35) which stresses that proper attention must be paid to the author of the hate speech.

<sup>10</sup> Report of the Ad Hoc Committee on the Elaboration of Complementary Standards, 20 August 2019, A/HRC/42/58.

thereof. An expert suggested the definition include the following elements: (a) the advocacy of hatred, (b) specific designated grounds (could be more extensive than race, but should remain within the mandate of the ICERD), and (c) which incites harm. Another expert stressed the need to think about the ideas and content underpinning hate speech—notably that there are deep issues of identity and misinformed conceptions about certain identities that are educationally entrenched by the colonial lens through which history is generally taught.

32. A couple of experts opined that, while the term hate speech may not be used explicitly, the ICERD (or CERD's interpretation of it) does cover hate speech, hate crimes, racial superiority, racial profiling, and discriminatory access to human rights in articles 1, 4, and 5.

**(b) Inciting, aiding and abetting the commission of racist and xenophobic hate crimes<sup>11</sup>**

33. Experts worried that the distinctions in phrasing between 108 (a) and (b) put the additional protocol at risk of conflating criminalization of hate speech with the regulation of hate crimes. Some experts noted that both of the terms “hate speech” and “hate crimes” do not appear universally in domestic legislation, nor is there a universal legal definition of either. Thus, failure to adequately define “hate speech” and “hate crimes” within the context of the additional protocol would likely lead to ambiguity and the potential for overreach (for example, failure to differentiate between “offensive” and “hate speech”). Some experts also registered concern that, as this is a criminalizing provision, there are no elements listed for what constitutes “inciting, aiding and abetting,” nor is there reference to intent.

**(c) Dissemination of ideas and materials that advocate and promote racial superiority, intolerance and violence<sup>12</sup>**

34. Experts queried the definition of “intolerance”, and did not approve of criminalizing intolerance under its current plain-language definition. To do so would be to criminalize a feeling or attitude rather than an act, which is counter to the principles of criminal law. One expert suggested that Member States should identify the ideas and material elements they wish to prevent and/or protect against prior to drafting language about criminalization. Additionally, this expert suggested introducing an item in the text before paragraph 108 that notes the importance of considering the vehicles and substance of hate speech, and noting that hate speech is an intellectual construction.

**(d) [All contemporary forms of discrimination based on religion or belief]<sup>13</sup>**

35. Experts agreed that an international legal framework addressing discrimination on the grounds of religion or belief is necessary, but questioned whether it fits within the mandate of an additional protocol to the ICERD. They generally drew a hard distinction between racial discrimination and discrimination based on religion and belief. One expert argued that different levels of protection were necessary because race/racial identity cannot be opted into or out of, but opined that religion is chosen. This expert further posited that certain distinctions based on religious grounds (giving the example of schools) are allowed, whereas the same distinctions are not allowed on the basis of race or racial origin. Another expert raised an issue about how the additional protocol might resolve cases where religion or belief might ostensibly promote discrimination on other grounds, citing the example of sexual orientation.

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<sup>11</sup> Report of the Ad Hoc Committee on the Elaboration of Complementary Standards, 20 August 2019, A/HRC/42/58.

<sup>12</sup> Report of the Ad Hoc Committee on the Elaboration of Complementary Standards, 20 August 2019, A/HRC/42/58.

<sup>13</sup> Report of the Ad Hoc Committee on the Elaboration of Complementary Standards, 20 August 2019, A/HRC/42/58.



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## **Thematic discussion**

### **Effective legislative approaches: criminal law versus civil law**

36. Several experts were generally uncomfortable with the criminal law framework of the proposed elements for the additional protocol, and agreed with one expert who reasoned that a purely regulatory framework as a means to eliminate hate and discrimination in society would be insufficient. These experts noted that law is only one potential solution, and rarely the most efficacious for victim protection. According to these experts, legal measures should play a supporting role alongside practical measures that promote diversity, inclusion, and social cohesion through cultural activities, awareness raising, internet and media broadcasts, and experiential education. One expert noted that CERD has already called for these measures.

37. Experts stated that criminal law should be a last resort, utilized in only the most serious cases, and had not always proven effective as a preventative measure. One expert noted that it is already the practice of CERD to recommend that racial discrimination only be criminalized in serious cases, while less serious cases should be addressed by non-criminal measures, taking into account the nature and extent of the impact on the targeted persons and groups. Another expert suggested that the principles justifying the intervention of criminal law, including retribution, symbolism, deterrence, and utility, should be used to determine whether and how hate should be criminalized.

38. Experts noted that criminal law requires a higher level of specificity—precise definitions of terminology, elements of intent, strict legal tests, and discussions of burdens of proof and sentencing options—whereas a civil law approach allows for greater nuance and flexibility. A couple of experts stressed the need to think carefully about the scope of criminal liability and sentencing that may be necessary with a criminal law response. These experts suggested that a different approach could enable restorative justice and greater victim empowerment.

39. Experts expressed concern that criminal law provisions may not always serve the best interests of victims. Some explained that victims often find greater relief and more satisfactory outcomes through civil law. As such, forms of regulation other than criminal law should be considered. One expert suggested these could include self-regulation, human rights interventions, and restorative justice. This expert also noted the importance of the victim, their vulnerability in society, and evaluating whether the speech in question has the effect of further marginalising the victim(s) and perpetuating their out-group status.

### **Co-regulation/collaboration with private sector**

40. Experts contemplated whether there would be an emphasis on working with the private sector to accomplish the goals of the additional protocol, and examining the nexus between business and human rights when it comes to the additional protocol's reach.

### **Balancing of rights and freedoms**

41. Experts discussed how the additional protocol might strike the correct balance between upholding freedom of expression and opinion and limiting hate speech. One expert was concerned about the impact of criminalizing hate speech on social protest but suggested that a precise definition of hate speech may address this concern. Another expert mentioned that CERD has stated that measures to monitor and combat racist speech should not be used as a pretext to curtail protest, social discontent, or oppression, and that provisions curtailing racist hate speech do not diminish freedom of expression and opinion but are instead complementary.

42. An expert questioned if there are existing restrictions on hate speech outside of article 20 of the International Covenant on Civil and Political Rights, while another asked where the threshold of hate speech would lie (e.g.: is there a right not to be insulted?). An expert suggested that, because anti-hate speech provisions are limitations to freedom of expression and opinion, it might be useful to question what is being balanced; for example protection of public order and harmony or preserving the dignity of an individual or group? Another expert

suggested that hate speech as a qualification on the scope of freedom of expression and opinion must be balanced not only against competing rights, but also duties and conceptions of the common good.

## **IV. Discussion module 2: Racial Cybercrime (social media networks and companies)**

### **Legal analysis of proposed elements**

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

(e) Compel social media networks to remove expediently, in accordance with national legislation, racist and xenophobic content from online media platforms, including social media;

(f) Hold accountable or liable persons and companies in the information and communications technology sector who broadcast racist and xenophobic content or material;<sup>14</sup>

44. Experts highlighted the need for clarity regarding the scope and meaning of the proposed texts in paragraph 108 sections (e) and (f). An expert sought further definition of the term “media.” Many suggested clarification of the distinctions in meaning between “racist and xenophobic content” in sections (e) and (f) in contrast to “hate speech” in section (a), adding that if “racist and xenophobic content” is not covered under “hate speech,” it is imperative that both terms “hate speech” and “racist and xenophobic content” be precisely defined to prevent overbreadth and the potential to diminish the effectiveness of either term.

45. To assist in defining the terms, an expert recommended seeking out illustrations of what this could look like in practice from jurisdictions with relevant case law. It was further suggested that ICERD article 4 and language from the Council of Europe Convention could provide examples of language for relevant definitions. However, experts stressed that, in this regard, definitions—and the additional protocol itself—should be guided by ICCPR article 20, which outlines the only existing limitation to freedom of expression and opinion: prohibition of incitement to racial, national, and religious hatred. An expert also advised including the concept of subordination to add precision to the definition, noting that speech becomes problematic when utilized to oppress and/or victimize an individual or group.

46. An expert highlighted the need to clarify what constitutes racism and xenophobia in an online space in a manner which would rise to criminal prohibition, and proposed two frameworks that might assist in this determination: (i) where the speech is against another individual/group and their identity (ex.: racial slurs) and (ii) where the speech is advocating the supremacy of the speaker’s own identity (ex.: racial supremacy). Experts sought clarification about whether immigration, citizenship, and/or refugee status would be considered as grounds of discrimination in the additional protocol. One expert noted that, as national origin is a contested ground of discrimination by some states that the additional protocol should therefore clarify that immigration and/or citizenship status is a ground of discrimination. As with all definitions, experts urged precautions be taken to prevent any text from the additional protocol that could allow the potential for criminalization of legitimate exercises of speech.

47. Experts also discussed that the text of the additional protocol should outline how to address conduct perpetrated by artificial intelligence and/or bots.

48. Experts expressed that the territorial nature of traditional crimes offline distinguish them from offences committed online. It is thus more complex to delineate jurisdiction for

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<sup>14</sup> Report of the Ad Hoc Committee on the Elaboration of Complementary Standards, 20 August 2019, A/HRC/42/58

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crimes committed online, so experts recommended that the framing of the additional protocol attempt to address the question of jurisdiction.

## **Thematic discussion**

### **Power imbalance between public and private actors**

49. Experts discussed the power imbalance between public and private actors when it comes to cybercrime. They noted that not only do some technology companies hold as much, or more, economic power as state actors, they also have equal or greater means to influence public opinion. In some cases, e.g. the sale of technologies, some technology companies were very powerful vis-a-vis national governments. Consequently, experts questioned whether state actors would be capable of holding such private actors accountable. Experts further noted that the additional protocol would have questionable efficacy over the actions of private actors, as traditionally, international legal standards apply only to state actors.

### **Prevention and accountability**

50. Experts generally agreed that hard law may not be the optimal approach to address discrimination online. Instead, they pointed to co-regulation models and corporate social responsibility structures as key elements. Some experts posited that private actors are best suited to address cybercrime issues, in consultation with states. One expert raised the example of powerful technology companies partnering and collaborating with governments to counter negative content online. This expert also noted, however, that relying on technology companies to monitor and account for online discrimination requires trusting them to adhere to a code of corporate social responsibility. The danger in this is that these companies are not neutral actors and could become politicized in a manner that skews power in favour of one ideology over another, which raises concerns for viewpoint diversity and fair play.

### **Balance between ICCPR articles 19 and 20**

51. Experts discussed how articles 19 and 20 of the ICCPR currently operate to balance the scope of restriction on freedom of expression and opinion. They recommended these articles be taken into consideration in the drafting of the additional protocol as, read together, they outline the limitations on freedom of expression and opinion currently operating under international law.

### **Protection for whistleblowers**

52. Some experts suggested that the additional protocol should consider including protections for whistle-blowers—that is, individuals who criticize and/or reveal the sources of hate speech—as, according to one expert, such a phenomenon did not exist when the text of the ICERD was drafted.

## **V. Discussion module 3: All contemporary forms of discrimination based on religion or belief**

### **Legal analysis of proposed elements**

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

- (d) [All contemporary forms of discrimination based on religion or belief]<sup>15</sup>

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<sup>15</sup> Reference to footnotes 1 and 2 in the report of the Ad Hoc Committee on the Elaboration of Complementary Standards, 20 August 2019, A/HRC/42/58.

54. The experts engaged with regard to paragraph 108(d) primarily at the thematic level rather than at the practical level, as the draft elements do not contain precise enough provisions to allow for a legal analysis. Specifically, experts were uncertain of what is intended to be captured by the phrase “contemporary forms of discrimination.” Their thematic debate concerned the normative basis for addressing religious intolerance, or not, in international law, and in the context of an optional protocol. Generally, a measure of greater specificity with regard to this element will be required in order to undertake any legal consideration of contemporary forms of discrimination based on religion or belief in view of the proposed draft additional protocol.

## **Thematic discussion**

### **Does/should the ICERD address religion or belief?**

55. Experts agreed that a substantive gap exists in international legal standards for protection against discrimination on the grounds of religion or belief.<sup>16</sup> They also agreed that the ICERD does not currently address discrimination on the grounds of religion or belief. The majority suggested that it would be best to address discrimination on the grounds of religion or belief in a separate convention instead of an additional protocol to the ICERD. The rationale for this recommendation was concern that combining religion and belief in the proposed protocol alongside racial discrimination could weaken existing ICERD provisions. A couple experts stated that, in many cases, discrimination on the grounds of religion or belief has no nexus to race. Another expert noted that it is still a struggle convince remaining states to accede to and ratify the ICERD, and adding religion and belief could possibly delay this further. Experts observed that the Declaration on the Elimination of all forms of Intolerance and of Discrimination Based on Religion or Belief offers a starting point for protecting religion or belief, but agreed that a declaration does not offer the same level of protection as a legally-binding treaty.

56. Conversely, one expert expressed strong support for a complementary standard including religion and belief. Others noted that separate standards addressing race and religion or belief could lead to a protection gap, as individuals experiencing multiple and compounding forms of discrimination concurrently would not be covered by distinct treaties, which could weaken the strength of their claims. These experts noted that CERD already applies the concept of multiple discrimination in its general comments, but some found that general comments by the Committee is insufficient to provide adequate protection.

### **Distinguishing between race and religion**

57. Experts discussed whether a precise definition of what constitutes a religion would assist in answering whether there is a place for religion and belief in an additional protocol to the ICERD. From one perspective, a definition would be helpful to prevent overbreadth, but another expert cautioned that doing so could create limitations and confusion, rather than clarity.

58. Some experts argued that race and religion or belief are too distinct from one another to be captured in the same legal standard, as race is immutable, whereas religion or belief, in principle could alter or change throughout the life of an individual. Some experts also noted that there could be good faith critiques of religion, where the same is not true of “race.” Some experts also expressed concern that the conflation of religion or belief and race in the same standard could possibly bring about complications in practice of legal protections for both grounds of discrimination.

59. Other experts argued that both race and religion are core to identity and constitute multiple or intersectional grounds on which individuals face discrimination. These experts noted the phenomenon of increased racialization of the religious identities of individuals or groups, citing examples of people of certain racial backgrounds or origins as being perceived to be a certain religion, regardless of their actual religion or beliefs, or even lack thereof. In

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<sup>16</sup> One expert noted in written submissions that the ICCPR and ILO Convention No. 111 provide protections against discrimination based on religion or belief.

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such circumstances, discrimination would be difficult to address through current legal standards as the trigger for discrimination is primarily visual and based on racial identity, however the content of the discrimination is religious. Thus, any resulting legal claim or case would be based or built upon religious discrimination, rendering such a challenge unlikely to succeed when the victim is not an adherent to the religion that was the content of the discrimination.

**Can discrimination on the grounds of religion or belief be encapsulated by the term xenophobia?**

60. Experts were divided on whether the term xenophobia is broad enough to capture discrimination on the grounds of religion or belief. One expert indicated it may be, while another was unconvinced. It was noted that a complete legal definition of xenophobia would assist in such a determination.

## **VI. Discussion module 4: preventive measures to combat racist and xenophobic discrimination**

### **Legal analysis of proposed elements**

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

62. States parties commit themselves to adopt the following preventive measures to combat racist and xenophobic discrimination:<sup>17</sup>

63. Experts suggested that “undertake” would be stronger framing than “commit,” which is too vague. One expert questioned if paragraph 108 section (g) should also include corporations and private actors, as present in sections (e) and (f) of the paragraph.

(i) Promote cultural diversity through education and awareness;<sup>18</sup>

64. Experts questioned the efficacy of this subsection, noting that “cultural diversity” may be too narrowly constricted, and “education and awareness” is overbroad. Regarding the latter, one expert relayed that scientific evidence has shown that traditional anti-discrimination training has a low success rate for altering participant behaviour. It would, therefore, be stronger to mandate states and other appropriate actors to take measures such as experiential education that are proven to reduce, if not eliminate, racial discrimination. This expert also suggested incentivizing actors who succeed in dismantling racist institutions, structures, and histories through acknowledgement or other reward.

65. Another expert proposed additional language be added to discourage economic and political scapegoating of individuals or groups based on racial, ethnic, religious and national origin.

(ii) Counter proliferation of contemporary forms of supremacist ideologies, including by awareness-raising about the horrific consequences of such ideologies in the past;<sup>19</sup>

66. An expert suggested strengthening the language to “Combat supremacist ideologies” rather than “Counter proliferation...of supremacist ideologies.” Experts noted the specific need to teach these histories, as prejudice can be internalized in the educational system, but stressed that supremacist ideologies should not be the only focus of historical education: topics such as slavery and colonialism should also be included. Experts suggested that

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<sup>17</sup> Report of the Ad Hoc Committee on the Elaboration of Complementary Standards, 20 August 2019, A/HRC/42/58.

<sup>18</sup> Report of the Ad Hoc Committee on the Elaboration of Complementary Standards, 20 August 2019, A/HRC/42/58.

<sup>19</sup> Report of the Ad Hoc Committee on the Elaboration of Complementary Standards, 20 August 2019, A/HRC/42/58.

cinematic and television programs, as well as crowd-sourced media platforms, focused on this subject matter should be included. One expert proposed that this subsection read “combating supremacist ideologies in the writing and teaching of history, and promote inclusive, representative histories of racial, ethnic, national origin minorities; promote tolerance; include media; and in the teaching of history recall the need for visibility of those who resisted historical racist projects.”

(iii) Put an end to discriminatory racial and ethnic profiling and derogatory stereotypes in all their forms;<sup>20</sup>

67. One expert suggested this section not be included, as it is already covered by the ICERD, expressing concern that its inclusion here would imply that it is not already covered by the existing convention. While understanding this concern, other experts indicated a need to connect these measures with preventing and combating acts of a racist and xenophobic nature. One recommended clarifying that this is a reiteration of the ICERD obligations, rather than new or additional obligations.

(iv) Ensure non-discriminatory access to the enjoyment of all human rights, such as birth registration, access to health, education, employment and housing;<sup>21</sup>

68. As with subsection (iii), one expert suggested this section not be included, as it is already covered by the ICERD, and expressed concern that its inclusion here would insinuate it is not already covered by the Convention. Other experts indicated a need to connect these measures with preventing and combating acts of a racist and xenophobic nature. One recommended clarifying that this is a reiteration of the ICERD obligations, rather than new or additional obligations.

69. Alternately, some experts view this subsection as necessary to protect migrants since the status of non-citizens within the ICERD is contested, their recognition in the additional protocol is urgent. A suggestion was also made to introduce alternative phrasing, stating “ensure non-discriminatory access guaranteed by international human rights law,” to avoid entering into conflict with any existing legal standards. Another expert proposed including the grounds of discrimination for greater clarity.

(v) Provide human rights education and training to civil servants working in the areas of justice, civil service, immigration, customs, law enforcement and social services;<sup>22</sup>

70. Experts suggested reframing this section with language specific relating to the aims of the additional protocol, and further extending the subjects of training to government and public officials generally. An expert suggested the following language: “Provide human rights education and training on racism and xenophobia based on evidence-based best practices, including procedural training on technology and evidence collection for all government officials; capacity building for experiential training, including groups affected by racist and xenophobic conduct.”

(vi) Provide guidance on appropriate conduct by law enforcement officials;<sup>23</sup>

71. Experts suggested that the language of “provide guidance” be substantially enhanced to increase the efficacy of this provision. One expert suggested possible further reference to state responsibility for policing and law enforcement elsewhere throughout the additional protocol.

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<sup>20</sup> Report of the Ad Hoc Committee on the Elaboration of Complementary Standards, 20 August 2019, A/HRC/42/58.

<sup>21</sup> Report of the Ad Hoc Committee on the Elaboration of Complementary Standards, 20 August 2019, A/HRC/42/58.

<sup>22</sup> Report of the Ad Hoc Committee on the Elaboration of Complementary Standards, 20 August 2019, A/HRC/42/58.

<sup>23</sup> Report of the Ad Hoc Committee on the Elaboration of Complementary Standards, 20 August 2019, A/HRC/42/58.

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(vii) Put in place systems of data collection, monitoring and tracking law enforcement and police activities;<sup>24</sup>

72. Experts stressed the necessity for both privacy protection in data collection and ensuring individuals whose data is collected understand how it will be used. Experts discussed questions about the breadth of this provision: is data to be collected on all individuals, or specific perpetrators and/or victims? What is the purpose of this data collection? Experts noted it should be disaggregated data, tracking racist, xenophobic criminal conduct. They stated that whistle-blower protections are also essential. One expert wondered if this subsection could be combined with paragraph 108(g)(xi).

(viii) Put in place mechanisms for the internal and external accountability of law enforcement personnel;<sup>25</sup>

73. Experts suggested that this may be a good place for a whistle-blower provision to be inserted. One expert advised inserting “independent” before mechanisms, and another recommended extending this requirement to all levels and sectors of government.

(ix) Ensure greater community involvement in the development of law enforcement policies and practices;<sup>26</sup>

74. An expert suggested adding to this “including ensuring greater participation of racial, ethnic, national origin, and religious groups, and their participation at all levels of government policy and law-making.”

(x) Make improvements to the training and recruitment of law enforcement personnel;<sup>27</sup>

75. Experts recommended this provision be revised to be more specific in its reference to human rights, diversity, racism and xenophobia training as the subjects requiring improvement. An expert suggested the provision be phrased as “ongoing training and sensitisation.” Furthermore, the additional protocol should require that states ensure diversity in law enforcement recruitment as well as training. Experts noted improved training on these topics should be for all public officials and civil servants, not only law enforcement.

(xi) Envisage setting up a data-collection system to better combat racist and xenophobic acts in accordance with national legislation, collected appropriately with the explicit consent of the victims, based on their self-identification and in accordance with provisions on human rights and fundamental freedoms, such as data protection regulations and privacy guarantees. That information cannot be misused.<sup>28</sup>

76. Experts questioned how this subsection relates to paragraph 108(g)(vii), and suggested combining them to provide greater clarity about human rights constraints. An expert mentioned that disaggregated data is essential, including using proxies for race or ethnicity where those grounds are prohibited. They also discussed how to ensure data collection is taken seriously by social media platforms.

## **Thematic discussion**

### **Should the additional protocol contain only legally-binding language?**

77. One expert argued for caution and not to include in a legally-binding document items that are recommendations, and not legally enforceable. This expert was concerned such

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<sup>24</sup> Report of the Ad Hoc Committee on the Elaboration of Complementary Standards, 20 August 2019, A/HRC/42/58.

<sup>25</sup> Report of the Ad Hoc Committee on the Elaboration of Complementary Standards, 20 August 2019, A/HRC/42/58.

<sup>26</sup> Report of the Ad Hoc Committee on the Elaboration of Complementary Standards, 20 August 2019, A/HRC/42/58.

<sup>27</sup> Report of the Ad Hoc Committee on the Elaboration of Complementary Standards, 20 August 2019, A/HRC/42/58.

<sup>28</sup> Report of the Ad Hoc Committee on the Elaboration of Complementary Standards, 20 August 2019, A/HRC/42/58.

provisions would weaken the ICERD. Other experts supported inclusion of items such as training, education, and capacity-building—with a question raised about whether more precise language could be included to ensure these items combat the specific problem.

#### **Expert suggestions of items to include in paragraph 108(g)**

78. Experts proposed that preventative measures—such as requiring social media platforms to ensure that algorithmic and other factors do not promote racist and xenophobic conduct online, including requiring impact assessments or algorithmic audits—also apply to corporate/private actors.

79. Experts emphasized that the time is ripe for complementary standards to take action on whistle blower protections.

80. Experts recommended that the additional protocol should require a guarantee of timely and effective investigation of allegations of acts of a racist and xenophobic nature; access to effective remedies for victims; and legal and administrative assistance for victims to ensure their access to effective remedies. Some experts also suggested promoting alternative restorative justice measures such as conflict resolution, reconciliation and other measures for non-punitive resolutions in cases of non-violent crime.

## **VII. Compilation of advice and further suggestions**

81. There is a need to effectively compare and evaluate the proposed text of the additional protocol against existing provisions of the ICERD and other international human rights standards to ensure there are no redundancies or unintended consequences that would lead to a possible weakening of existing protections.

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82. It would be important to elaborate precise definitions for terminology in the proposed elements text that do not yet have a universal legal definition—including, but not limited to, racism, xenophobia, hate speech, hate crimes, racial profiling, intolerance,<sup>29</sup> racist and xenophobic content<sup>30</sup>—to ensure the additional protocol enhances existing international human rights standards, rather than unintentionally weakening or diminishing their efficacy. Similarly, it will also be necessary to consider how these yet-to-be-defined terms are distinguishable from the content of “incitement to hatred” in article 20 of the International Covenant on Civil and Political Rights.

83. It will be important to identify the delineation between the regulation of hate speech and freedom of expression and opinion to better inform the elaboration of an optional protocol.

84. The proposed elements text should be reviewed for overbreadth and vagueness to satisfy the precise and detailed language, concepts, and definitions required by the principles of criminal law.

85. The phrase “irrespective of the author” in the umbrella provision of paragraph 108—particularly its impact on criminal liability should be reconsidered and evaluated, ensure correlation with CERD general comments.

86. The elements of the crime for “inciting, aiding and abetting” should be determined.

87. The ideas, acts, and material elements that the additional protocol aims to prevent and/or protect against should be identified, and specific consultation with experts in criminal law on how best to draft criminal provisions in accordance with existing human rights principles and standards should take place.

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<sup>29</sup> In the context of paragraph 108 (c).

<sup>30</sup> In the context of paragraph 108 (f).



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88. Detailed and comprehensive provisions relating to the criminalization of all contemporary forms of discrimination based on religion or belief require further elaboration.

89. A further discussion or debate—in consultation with relevant experts—on the benefits of a criminal law versus civil law approach should be held.

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90. The scope and meaning of paragraph 108 (e) and (f) including, but not limited to, defining “media” should be clarified, and the distinctions between “racist and xenophobic content” and “hate speech”, ensuring all definitions are guided by ICCPR articles 19 and 20 should be elaborated.

91. There is a need for clarification about what constitutes racism and xenophobia in an online space that would give rise to criminal prohibition, and how that is distinguishable from offline spaces, or not.

92. In elaborating the protocol, immigration, citizenship, and/or refugee status should be included as additional grounds of discrimination.

93. It will be important to consider how the additional protocol may address conduct perpetrated by artificial intelligence and/or bots.

94. A provision addressing the question of jurisdiction for crimes committed online would need to be included in the optional protocol.

95. It will be important to consider how states may be able to hold non-state actors—who may hold more power than states in the online sphere—could be held accountable for discriminatory conduct.

96. The elaboration of the optional protocol should include additional provisions addressing protection for whistle-blowers.

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97. It will be important to revisit paragraph 108 (d) in order to elaborate actionable provisions, including a complete and precise definition of what constitutes “contemporary forms of discrimination on the grounds of religion or belief” that give rise to criminal sanction and prosecution. There should be a (re)consideration of whether an additional protocol to the ICERD is the proper venue for addressing discrimination on the grounds of religion or belief. In so doing, it will be important to discuss whether and/or how there is a nexus between race/racial identity and religion or belief; and a reflection on the merits of limiting the additional protocol to instances where there is a clear confluence or intersection between race/racial identity and religion or belief should be undertaken.

98. In this connection, further consideration of the criminalization of “all contemporary forms of discrimination based on religion or belief” should also be undertaken.

99. There should be a determination about whether the term “xenophobia” is broad enough to capture discrimination on the grounds of religion or belief.

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100. The Committee could consider including reference to corporations and private actors in paragraph 108 (g), as they are in (e) and (f).

101. The language of paragraph 108 (g) could be revised to read “States parties undertake to adopt the following measures to combat racist and xenophobic discrimination”.

102. The phrasing of 108(g)(i), as “cultural diversity” may be too narrowly constricted, whereas “education and awareness” is overbroad. This should be reconsidered.

103. The language of 108(g)(ii) to “combat supremacist ideologies...” should be strengthened, and the focus of historical education to topics such as slavery and colonialism in addition to supremacist ideologies should be broadened.

104. The Committee could reconsider the inclusion of 108(g)(iii) and (iv), as they may already be addressed in the ICERD. If these subsections are retained, the Committee could consider additional language clarifying that this is a reiteration of ICERD obligations, and not new obligations, to eliminate the possibility that their inclusion could imply that these issues are not addressed by the ICERD Convention.

105. In addition, consideration should be given to alternative language in paragraph 108(g)(iv) to avoid conflict with existing legal standards: such as “ensure non-discriminatory access guaranteed by international human rights law”.

106. Paragraph 108(g)(v) should be reframed with language specific to the aims of the additional protocol, and the subjects of the provision to all government employees/civil servants/public officials should be extended.

107. Paragraph 108(g)(vi) could be revised to be more precise, as it is currently too vague to be effective.

108. The Committee could reconsider the breadth of paragraph 108 (g)(vii), and include reference to the necessity for privacy protection in data collection, and that individuals whose data is collected understand how it will be used.

109. A more specific reference to human rights, diversity, racism and xenophobia training in paragraph 108(g)(x) should be included, and the subjects of training should be extended to all civil servants, public officials and government authorities.

110. The Committee could consider whether this additional protocol is the proper place for non-legally-binding (or non-legally enforceable) provisions.

111. The Committee could consider a provision requiring a guarantee of timely and effective investigation of allegations of acts of a racist and xenophobic nature; as well as access to effective remedies for victims; and legal and administrative assistance for victims to ensure their access to effective remedies.

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