

**13th SESSION OF THE AD HOC COMMITTEE ON THE ELABORATION OF
COMPLEMENTARY STANDARDS (24.05.2023)**

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

FOR DISCUSSION PURPOSES ONLY

Introduction

1. Criminalization conventions are generally drafted along a similar structure that reflects the main aspects that need to be defined when States undertake to prohibit and prosecute offences commonly defined in the international instrument (see Annex 1). The clauses of criminalization conventions can be divided into two main groups: 1) clauses that are necessary to define the offence and the obligations that States assume concerning its insertion in national criminal codes, investigation, prosecution, legal assistance, etc., and 2) clauses that are accessory to that end and that can vary according to the specific needs of each drafting process.
2. The report on the work of the Ad Hoc Committee at its 10th session mentions in paragraph 108 some core aspects of the criminalization of racist and xenophobic acts that are proposed to be included in the future “complementary standard” (see Annex 2)¹. These aspects cover the future content of both necessary criminalization clauses and accessory clauses that have been elaborated having especially in mind the context of the fight against “racism, racial discrimination, xenophobia and related forms of intolerance”.
3. The following document attempts to re-organize the aspects listed in paragraph 108 along the lines of the classical structure of criminalization conventions, to provide insights into some additional aspects that should be included in the possible future “complementary standard”, and to highlight some drafting options that may be considered. Annex 3 is a first tentative re-organization of Paragraph 108. Further details are provided in the following comments.
4. It is to be noted that criminal sanctions should be reserved for the most egregious forms of conduct based on racial discrimination; further, non-punitive measures or civil remedies, as part of a multi-pronged approach, could be considered for less serious types of conduct, consistent with articles 6 and 7 of ICERD. With respect to less egregious forms of conduct, civil remedies, rehabilitation, reconciliation and non-penal measures (especially for children and youth) may be appropriate consequences of responsibility regimes.

N. 1 - Preamble

5. Criminalization conventions, as international treaties more generally, use the Preamble to make reference to the broad objectives they pursue, the general principles that have inspired the drafting process and the legal instruments that constitute the legal framework for the

¹ Pages 18 – 18 of A/HRC/42/58 “Summary of Issues and possible elements discussed pertaining to the implementation of General Assembly resolution 73/262 and Human Rights Council resolution 34/36 on the commencement of the negotiations on the draft additional protocol to the Convention “criminalizing acts of a racist and xenophobic nature”.

application of the convention or protocol (there is no substantive difference between the two), first and foremost – in our case – the Convention on the elimination of all forms of racial discrimination (CERD).

6. The Preamble is the ideal location for references to soft law instruments. In the specific field under review, there are many soft law instruments that may be recalled such as UN General Assembly resolutions, Declarations and Programmes of Action, General recommendations of the CERD Committee. The Preamble seems to be the appropriate location for the inclusion of the instruments mentioned in Paragraph 108 (i).

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

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

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

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

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

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

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

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

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

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

N. 2 - Relation with “main convention”

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

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

Article 1. Relation with the United Nations Convention against Transnational Organized Crime

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

N. 3 - Purposes

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

N. 4 - Use of terms

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

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

12. These clauses are among the most important clauses in criminalization conventions. According to the principle of legality that is recognized under both international and national criminal law, the conduct to be criminalized must be precisely defined so as to be known to the future authors. The **principle of legality** provides, inter alia, that criminal responsibility cannot be engaged for conduct that was not prohibited by the law before its commission (*nullum crimen sine lege*). The same is true for penalties (*nulla poena sine lege*). As to the latter, international criminalization conventions generally leave States the freedom to establish appropriate penalties and do not go beyond requiring “appropriate/serious” penalties under implementing national criminal legislation.

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

- dissemination of ideas based on racial superiority or hatred;
- incitement to racial discrimination;

- acts of violence against any race or group of persons of another colour or ethnic origin;
- incitement to such acts; and
- the provision of any assistance to racist activities, including the financing thereof
- participation in organizations

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

a) Subjects

13. The issue of the “authors” of racist conduct to be criminalized under the complementary standard requires some preliminary remarks. Paragraph 108 expresses the intention (in its very first lines) to criminalize certain racist conducts “irrespective of the author”. The meaning of this intention should be clarified because different regimes of responsibility apply to different “authors” (States, natural persons, legal persons) and the criminalization of the conduct of legal persons (to be found also in (f) of Paragraph 108) might be more demanding for certain States.

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

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

16. The drafting of the provision concerning the criminal responsibility of **private legal entities** might be more delicate. First, there is the need to define precisely the conduct that would entail the **criminal responsibility** of legal persons. There are two references that should be coordinated in Paragraph 108: responsibility for “broadcasting” under letter (f) and more generally responsibility for “disseminating” under letters (a) and (c) that is meant to refer to all authors (“irrespective of the authors”). Second, different theories and approaches are adopted by national legal orders to attach criminal liability to fictitious legal entities (for instance, via the governing bodies or through the policies of the entity). These forms of criminal liability of legal persons may be unknown to some national legal orders and therefore need clear indications in the future protocol concerning attribution of responsibility and its establishment.

17. A possible future protocol may finally also include provisions on the **civil responsibility** under national law of private persons or private legal entities. Paragraph 108 letter (e) seems to rely on this different logic. The content of Paragraph 108 letter (e) might be separated from this first part dedicated to criminalization so to be included (below) in the part dedicated to

additional State obligations (e.g. under n. 19). Inspiration can be drawn from the draft convention currently negotiated by a working group of the Human Rights Council concerning human rights and business enterprises (see relevant conventions in Annex 4).

b) Racist offences

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

19. In paragraph 108 (d), to the issue of “contemporary forms of discrimination based on religion or belief”, is mentioned in square brackets. Apart from the decision concerning their inclusion, from the standpoint of criminalization the draft may opt between two alternatives: a) provide for a separate main offence; or, b) treat them as aggravating factors of criminal responsibility, where they operate in tandem with one of the five enumerated prohibited grounds of discrimination (race, colour, descent or national or ethnic origin) under article 1(1), ICERD. For this reason, the expression has been included in both n. 5 and n. 6 (highlighted in red later in this document).

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

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

1) Hate speech²

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

The **hate speech offence** has the following elements:

Any person commits an offence if he or she advocates hatred on the ground of race and incites harm.

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

² “Speech” has developed in some jurisdictions to include a wide range of expressive acts, including speech, written words, symbols, gestures, cartoons, flags, songs, chants, posts on social media, broadcasts and images.

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

a) **Expressive conduct**

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

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

d) **On a prohibited ground** - an identified group of persons on the grounds of race, colour, descent, and national or ethnic origin.

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

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

25. The factors that should be considered for prosecutorial, judicial, and sentencing discretion are listed below (para. 43)

26. States parties should include in their legislative framework **defences** such as the bona fide engagement in artistic creativity, academic discourse, scientific research, and necessity in the public interest, which would include the standard whistle-blower and journalistic privileges.

26b. The onus of proving the elements of the offence rests on the prosecution, whereas the onus of proving a defence rests on the accused.

2) Hate crimes

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

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

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

of group-based hatred in their commission. Depending on national criminal legislation, there would be no need to introduce new, substantive hate crime offences.

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

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

32. The animus and hybrid models symbolize the community's rejection of acts that are committed with a discriminatory motive and demonstrates to the victim(s) and society at large that the values of communal pluralism and mutual respect for all people, regardless of their race, colour, descent, national or ethnic origin(ICERD), is valued.

32a. The hate threshold in the offence can vary along a spectrum, from prejudice or intolerance to hate because the base crime is a recognized criminal offence.

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

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

3) Participation in racist organizations

34. This "crime", as per the ICERD's original text, is too vague in its current form and should not be confused with participation in an existing crime, i.e. as part of aiding and abetting and so on.

35. Further work is needed to explore what level of participation in a racist organisation is needed for criminal responsibility – i.e. mere membership vs active membership, approaching the organisation for assistance in a personal matter involving a racial incident, sharing a message from an organisation on an online forum and so on.

N. 6 - Definition of accessory conducts to be criminalized

36. Technically speaking, Paragraph 108 letter (b) refers to two aspects that can be kept separate from criminalization in the strict sense, that is from the obligations under n. 5. Reference to "inciting", evokes an accessory crime that can be criminalized independently of the commission of the main offence defined in n. 5. The definition of incitement should be provided separately. On the other hand, the reference to "aiding and abetting", i.e. complicity, does not represent an autonomous crime but a mode of liability. It is possible to envisage a

separate clause in this regard. Other modes of liability could be taken into account, such as joint perpetration and superior responsibility, just as other autonomous crimes could be envisaged. Notably, the “participation” in organizations which promote and incite racial discrimination under article 4(b) ICERD is not a technical legal term and would require careful definition to be criminalized.

N. 7 - Consistency clauses

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

As an example, Art. 4 (para.1) of the Palermo convention on transnational crime can be recalled: “*States Parties shall carry out their obligations under this Convention in a manner consistent with the principles of sovereign equality and territorial integrity of States and that of non-intervention in the domestic affairs of other States.*”

N. 8 - Inter-State obligations

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

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

N. 9 - Duty to criminalize

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

N. 10 - Duty to establish criminal jurisdiction

41. The second, more specific obligation concerns the **duty to establish** criminal jurisdiction, namely, to modify the procedural criminal code so that national criminal courts have the power

to prosecute those that will be accused of committing the covered offence. There are different options in that regard especially as regards the criteria that would establish a link between the offence and the national legal order entailing the duty to establish criminal jurisdiction, such as the commission of the offence on the territory of the State (territorial criterion of criminal jurisdiction), the commission of the offence by nationals of the State (active personality criterion of criminal jurisdiction), and the commission of the offence against the nationals of the State (passive personality criterion of criminal jurisdiction).

N. 11 - Duty to exercise criminal jurisdiction

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

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

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

N. 12 - Extradition

44. Clauses that make extradition possible are among the most common clauses in criminalization conventions. Their purpose is to make extradition possible by excluding that the covered offence is not considered by the member States as a political offence (for which extradition is not possible). The other principal content of extradition clauses concerns the requirements for granting the extradition request (such as “dual criminality”).

N. 13 - Duty of mutual assistance

45. The fact that many State could possibly be involved in the prosecution of the covered offence renders it necessary to envisage some forms of legal assistance at different stages of

the criminal procedure. The clause may especially regard legal assistance in collecting evidence or testimony.

N. 14 - Cooperation

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

N. 15 - Fair trial rights

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

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

N. 16 - Victims' rights

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

N. 17 - State responsibility

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

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

N. 18 - Preventive/promotion measures [n. 18]

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

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

N. 19 - Additional State obligations

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

N. 20 - Institutional arrangements

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

N. 21 - Empowerment of existing bodies

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

N. 22 - Dispute settlement

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

N. 23 - Final clauses

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

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

ANNEX 1 – The structure of criminalization conventions

1. Preamble	Preambular clauses mention general principles, relevant legal documents (including soft law), the reasons for the elaboration of the “instrument”
2. Relation with “main convention”	Typical clause to be found in a protocol that states the relationship with the “main convention”
3. Purposes	Clause stating the main purposes of the “instrument”
4. Use of terms	Definitions of the terms in use in the “instrument”
5. Definition of the conduct to be criminalized (main crime)	Definition of the main conduct being the object of the criminalization obligations (eg slavery)
6. Definition of the conduct to be criminalized (inchoate crimes and modes of liability)	Definition of additional conduct to be criminalized (eg forced marriage) and the types of participation to the crime that must be criminalized (eg attempt or conspiracy) → aggravating factors may be included here
7. Consistency clauses	Clauses expressing the need for consistency with certain international law rules
8. Inter-State obligations not to commit, to prevent, to punish ... the underlying crime	Main obligations having an inter-State character and entailing international State responsibility as opposed to the criminalization obligations concerning private conduct (eg State terrorism as opposed to private actors terrorism under national law)
9. Duty to criminalize under national law	Obligation to introduce in the national criminal code the crimes defined in 5. and 6.
10. Duty to establish national criminal jurisdiction (connection and criteria)	Obligation to provide national legislation establishing domestic jurisdiction over the covered crimes
11. Duty to exercise of adjudicative jurisdiction (mostly <i>aut dedere aut judicare</i>)	Obligations to exercise jurisdiction (in broad sense: investigation, trial ...) for the covered crimes especially in relation to other States Parties that may also exercise jurisdiction
12. Extradition	Clause providing for extradition and excluding that the covered crime be considered as a political offence
13. Duty of mutual legal assistance	Obligation to provide reciprocal assistance especially in criminal judicial matters (eg collection of evidence); it may take a variety of forms
14. Cooperation obligations	Obligation to cooperate in the fight against the covered crime; it may take a variety of forms
15. Fair trial rights	Obligation to respect fair trial rights of the accused of the covered crime before domestic courts exercising jurisdiction
16. Victims’ rights	Obligation to protect the victims (mainly as witnesses) of the covered crimes
17. State responsibility	Explicit recognition of State responsibility (duty to make reparation <i>latu sensu</i>), which is otherwise implicit in 8.
18. Preventive/promotion obligations	More specific obligations concerning the prevention of the covered crime or the adoption of complementary measures (cultural, educational, communication... measures)
19. Additional State obligations	Additional State obligations concerning eg the implementation of the convention, the sharing of implementing legislation, the duty to notify situations that may lead to the commission of the covered crimes, etc.
20. Institutional arrangements	Provisions concerning the creation of the institutional framework (new international bodies) for the

	supervision, application, enforcement of the convention
21. Empowerment of existing bodies	Delegation of powers to existing international bodies in connection with the application and supervision of the implementation of the convention
22. Dispute settlement	Clauses for the diplomatic and/or judicial settlement of the disputes concerning the interpretation or the application of the convention
23. Final clauses	Signature, ratification, acceptance, approval and accession; reservations; entry into force; amendment; denunciation; deposit; languages

DRAFT

ANNEX 2 - Summary of issues and possible elements discussed pertaining to the implementation of General Assembly resolution 73/262 and Human Rights Council resolution 34/36 on “the commencement of the negotiations on the draft additional protocol to the Convention criminalizing acts of a racist and xenophobic nature” (agenda item 8) [footnotes omitted]

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

- (a) Dissemination of hate speech;
- (b) Inciting, aiding and abetting the commission of racist and xenophobic hate crimes;
- (c) Dissemination of ideas and materials that advocate and promote racial superiority, intolerance and violence;
- (d) [All contemporary forms of discrimination based on religion or belief].
- (e) Compel social media networks to remove expediently, in accordance with national legislation, racist and xenophobic content from online media platforms, including social media;
- (f) Hold accountable or liable persons and companies in the information and communications technology sector who broadcast racist and xenophobic content or material;
- (g) States parties commit themselves to adopt the following preventive measures to combat racist and xenophobic discrimination:
 - (i) Promote cultural diversity through education and awareness;
 - (ii) Counter proliferation of contemporary forms of supremacist ideologies, including by awareness-raising about the horrific consequences of such ideologies in the past;
 - (iii) Put an end to discriminatory racial and ethnic profiling and derogatory stereotypes in all their forms;
 - (iv) Ensure non-discriminatory access to the enjoyment of all human rights, such as birth registration, access to health, education, employment and housing;
 - (v) Provide human rights education and training to civil servants working in the areas of justice, civil service, immigration, customs, law enforcement and social services;
 - (vi) Provide guidance on appropriate conduct by law enforcement officials;
 - (vii) Put in place systems of data collection, monitoring and tracking law enforcement and police activities;
 - (viii) Put in place mechanisms for the internal and external accountability of law enforcement personnel;
 - (ix) Ensure greater community involvement in the development of law enforcement policies and practices;
 - (x) Make improvements to the training and recruitment of law enforcement personnel;
 - (xi) Envisage setting up a data-collection system to better combat racist and xenophobic acts in accordance with national legislation, collected appropriately with the explicit consent of the victims, based on their self-identification and in accordance with provisions on human rights and fundamental freedoms, such as data protection regulations and privacy guarantees. That information cannot be misused.
- (h) The additional protocol shall call upon States to increase international cooperation, including harmonization of legal norms and regulations in the field of fighting racism;
- (i) The preamble will make reference to relevant existing frameworks that cover racist and xenophobic discrimination.

ANNEX 3 – Tentative reorganization of Paragraph 108

STANDARD STRUCTURE	KEY ELEMENTS OF PARA. 108
1. Preamble	(i) The preamble will make reference to relevant existing frameworks that cover racist and xenophobic discrimination
2. Relation with “main convention”	Reference to art. 4 CERD
3. Purposes	
4. Use of terms	
5. Definition of the conduct to be criminalized (main crime)	(a) Dissemination of hate speech; (c) Dissemination of ideas and materials that advocate and promote racial superiority, intolerance and violence; (d) [All contemporary forms of discrimination based on religion or belief]
6. Definition of the conduct to be criminalized (inchoate crimes and modes of liability)	(b) Inciting, aiding and abetting the commission of racist and xenophobic hate crimes; (d) [All contemporary forms of discrimination based on religion or belief]
7. Consistency clauses	
8. Inter-State obligations not to commit, to prevent, to punish ... the underlying crime	States parties obligation to adopt national measures/legislation in order to (e) Compel social media networks to remove expediently, in accordance with national legislation, racist and xenophobic content from online media platforms, including social media;
9. Duty to criminalize under national law	States parties obligation to criminalize conduct under a), b), c) and d) States parties obligation to criminalize → (f) Hold accountable or liable persons and companies in the information and communications technology sector who broadcast racist and xenophobic content or material [specific clauses providing for legal persons' criminal responsibility]
10. Duty to establish national criminal jurisdiction (connection and criteria)	
11. Duty to exercise of adjudicative jurisdiction (mostly <i>aut dedere aut judicare</i>)	
12. Extradition	
13. Duty of mutual legal assistance	
14. Cooperation obligations	(h) The additional protocol shall call upon States to increase international cooperation, including harmonization of legal norms and regulations in the field of fighting racism;
15. Fair trial rights	
16. Victims' rights	
17. State responsibility	
18. Preventive/promotion obligations	(g) States parties commit themselves to adopt the following preventive measures to combat racist and xenophobic discrimination: (i) Promote cultural diversity through education and awareness; (ii) Counter proliferation of contemporary forms of supremacist ideologies, including by awareness-raising about the horrific consequences of such ideologies in the past;

	<p>(iii) Put an end to discriminatory racial and ethnic profiling and derogatory stereotypes in all their forms;</p> <p>(iv) Ensure non-discriminatory access to the enjoyment of all human rights, such as birth registration, access to health, education, employment and housing;</p> <p>(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;</p> <p>(vi) Provide guidance on appropriate conduct by law enforcement officials;</p> <p>(vii) Put in place systems of data collection, monitoring and tracking law enforcement and police activities;</p> <p>(viii) Put in place mechanisms for the internal and external accountability of law enforcement personnel;</p> <p>(ix) Ensure greater community involvement in the development of law enforcement policies and practices;</p> <p>(x) Make improvements to the training and recruitment of law enforcement personnel;</p> <p>(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.</p> <p>→ To facilitate conciliatory processes in appropriate cases with a view to promoting relational welfare, racial harmony and social cohesion</p>
19. Additional State obligations	
20. Institutional arrangements	
21. Empowerment of existing bodies	→ CERD C'ee: Monitoring implementation of criminalization obligations and preventive obligations
22. Dispute settlement	
23. Final clauses	

ANNEX 4 – CRIMINALIZATION CONVENTIONS

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

1) Core crimes

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

2) Human rights

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

3) Transnational crimes

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

4) Terrorism conventions

- 1963 Offences on board convention
- 1970 Unlawful Seizure convention
- 1971 Montreal convention#
- 1973 Crimes against Internationally Protected Persons convention
- 1979 Hostages convention
- 1980 Nuclear Material convention
- 1988 Violence at Airports convention
- 1988 Protocol SUA on Fixed Platforms
- 1991 Plastic Explosives convention
- 1997 Terrorist Bombings convention
- 1999 Financing of Terrorism convention
- 2005 Nuclear Terrorism convention
- 2005 Amendment 1980 Nuclear Material convention
- 2005 Protocol SUA Maritime Navigation
- 2005 Protocol SUA on Fixed Platforms
- 2010 Unlawful Acts Relating to International Civil Aviation convention
- 2010 Protocol 1970 Unlawful Seizure convention
- 2014 Protocol 1963 on Board Aircraft convention

Other possibly relevant conventions

- Drug conventions
- 2001 Council of Europe convention on cybercrime