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COMPLEMENTARY INTERNATIONAL STANDARDS
COMPILATION OF CONCLUSIONS AND RECOMMENDATIONS
OF THE STUDY BY THE FIVE EXPERTS
ON THE CONTENT AND SCOPE OF SUBSTANTIVE GAPS IN THE
EXISTING INTERNATIONAL INSTRUMENTS TO COMBAT
RACISM RACIAL DISCRIMINATION, XENOPHOBIA AND
RELATED INTOLERANCE

I. CONCLUSIONS AND RECOMMENDATIONS ON THE CONTENT AND SCOPE OF SUBSTANTIVE GAPS ON COMPLEMENTARY INTERNATIONAL STANDARDS WITH REGARD TO POSITIVE OBLIGATIONS OF STATES PARTIES

Assessment and recommendations

1. The role of human rights education

29. The DDPA underlines the importance of human rights education as a key to changing attitudes and behaviour and to promoting tolerance and respect for diversity in societies¹ and, therefore as crucial in the struggle against racism, racial discrimination, xenophobia and related intolerance.² The importance of human rights education is also underlined in several other human rights documents. The Vienna Declaration and Programme of Action assert that “human rights education, training and public information are essential for the promotion and achievement of stable and harmonious relations among communities and for fostering mutual understanding, tolerance and peace.”³ The World Programme for Human Rights Education identifies the promotion of understanding, tolerance, gender equality and friendship among all nations, indigenous peoples and racial, national, ethnic, religious and linguistic groups as one of the constitutive elements of human rights education that aims at building a universal culture of human rights.⁴ The 2005 World Summit Outcome calls for the implementation of the World Programme for Human Rights Education and encourages all States to develop initiatives in this regard.⁵

30. ICERD commits States parties “to undertake to adopt immediate and effective measures, particularly in the fields of teaching, education, culture and information, with a view to combating prejudices which lead to racial discrimination and to promoting understanding, tolerance and friendship among nations and racial or ethnical groups.”⁶

31. Human rights treaty bodies dedicate much attention to the role of education in the promotion and protection of human rights. In its general recommendation No. 27 (2000)

¹ Para. 95 of the Declaration.

² See para. 97 of the Declaration; and paras. 125-139 of the Programme of Action.

³ Part I para. 33 and Part II para. 80.

⁴ General Assembly resolution 59/113B and Commission on Human Rights resolution 2005/61. See in particular the revised draft plan of action for the first phase (2005-2007) of the World Programme for Human Rights Education, A/59/525/Rev.1, para. 3.

⁵ General Assembly resolution 60/1, para. 131.

⁶ Article 7. See also ICESCR article 13, para. 1 and CRC, article 29, para. 1 (b).

on discrimination against Roma, CERD recommended that States parties take “the necessary measures, in cooperation with civil society, and initiate projects to develop the political culture and educate the population as a whole in a spirit of non-discrimination, respect for others and tolerance, in particular concerning Roma.”⁷

32. The World Programme for Human Rights Education provides a common framework for action for all relevant actors. However, it is not a legally binding document. In the view of the experts, the adoption of a comprehensive binding instrument establishing the duty to promote non-discrimination, tolerance and equality of rights irrespective of race, ethnicity, and other related grounds through human rights education has important merit. Such an instrument would essentially contribute to the promotion of tolerance and the countering of racism and xenophobia through instruction at all levels of formal and informal education, in public and private school curricula, as well as schools the ethos of which is based on religion or belief. This goal should also be pursued in other educational frameworks, such as training in detention facilities.

33. In conclusion, the experts acknowledge the existence of a normative gap in the area under discussion, the filling of which should be recognized as one of the priorities on the agenda of the international community.

2. The role of comprehensive anti-discrimination legislation

34. The DDPA identifies lack of political will, weak legislation and lack of implementation strategies and overall concrete action by States as the major obstacles to overcoming racial discrimination and achieving racial equality. The DDPA stresses unequivocally that the faithful implementation of human rights norms and obligations, including enactment of laws and political, social and economic policies are crucial in this regard.⁸ It is in light of the nature of these obstacles that States should be specifically required to adopt and implement anti-discrimination legislation and equality policies as a matter of highest priority and urgency.

35. Several treaties, including ICCPR and ICERD contain provisions with positive obligations to adopt laws against racial and related discrimination. ICCPR in article 2, paragraph 1, requires States to ensure to all persons within its jurisdiction the rights recognized in the Covenant without distinction of any kind. Article 2, paragraph 2, requires, “where not already provided for by existing legislative or other measures”, the necessary steps to be undertaken “to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.” Read together with ICCPR articles 26 and 27, this provision constitutes a positive obligation of States to put into place domestic laws as necessary to ensure freedom from discrimination on the basis of, inter alia, race, colour, national or social origin. Article 2, paragraph 1 (d) of ICERD also provides that “Each State party shall prohibit and bring to an end, by all

⁷ Paragraph 11.

⁸ Paras. 79-80 of the Declaration.

appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organization.”

36. Apart from the positive obligation of States to protect against racial discrimination the question arises as to whether ICERD and other international human rights instruments provide a sufficiently firm foundation for the positive obligation of States parties to adopt not just any general legal provisions prohibiting racial discrimination, but comprehensive anti-discrimination legislation. In addition, it is important to consider the minimum standards which are to be met for the State to have the appropriate legal regime to ensure and fulfil Convention rights regarding the equal enjoyment of all human rights by all without any discrimination on the basis of race.

37. CERD in its concluding observations frequently recommends to States parties to adopt national anti-discrimination legislation, in fulfilling their obligations under the Convention. However, the analysis of the experts as regards discriminatory practices and the situation of various categories of victims demonstrate that among the obstacles preventing the elimination of all forms of racial discrimination is the lack of comprehensive and detailed national anti-discrimination legislation in the majority of States parties to this Convention.

38. From the general comments, the case law and the concluding observations of treaty bodies we can garner the following minimum requirements which would make national legislation efficient: provide legal definitions of the concept of discrimination, including direct and indirect discrimination;⁹ set out clear and detailed provisions as to what conduct, actions, measures, policies, or criteria would be considered discriminatory; provide for a substantive, asymmetric approach to non-discrimination, as opposed to a merely formal understanding of non-discrimination as “same treatment”; prohibit discrimination in all spheres of public life whether by State or non-State actors; prohibit incitement to discrimination, harassment, and segregation; incorporate specialized bodies which would be empowered to assist victims and to promote a culture of equal rights; provide for effective judicial remedy, including as necessary through criminal, civil or administrative processes, to victims of discrimination and ensure that sanctions in place are efficient, dissuasive and proportional; allow the procedural possibility for proving discrimination through appropriate rules and criteria of evidence and burdens of proof, deriving from the understanding that the victims of discrimination are usually at a disadvantage and would not be able to defend their rights in the courts unless special care is taken as to their procedural rights; and establish clear obligations related to the duty to promote equality in a proactive way through appropriate policies.

⁹ Direct discrimination on the basis of race and related characteristics is defined as less favourable treatment based wholly or in part on the person’s race, ethnicity, colour, descent, ethnic or national origin, without objective and reasonable justification. Indirect discrimination is defined as a neutral measure, criterion or practice which would put persons of a particular race or related characteristic at a particular disadvantage, when there is no objective and reasonable justification.

39. The experts believe that there exists a gap in the sense that thin and abstract norms in international human rights instruments can perpetuate a normative vacuum at the national level, leaving certain manifestations of racism unaddressed and certain victims unprotected, especially when the lack of explicit obligatory standards is combined with weak political will of the State to ensure and fulfil Convention rights. However, the experts also believe that these problems could be addressed by rendering the positive obligations of States more explicit through means other than standard-setting.

3. Recommendations

40. **The experts recommend that a convention on human rights education be adopted, to define positive obligations of States regarding the incorporation of human rights education in their educational systems, including in private, religious, and military schools.**

41. **The experts recommend that the treaty bodies consider adopting general comments which would clarify the positive obligations of States parties regarding the adoption of comprehensive anti-discrimination legislation and provide relevant guidance for States.**

II. CONCLUSIONS AND RECOMMENDATIONS ON THE CONTENT AND SCOPE OF SUBSTANTIVE GAPS ON COMPLEMENTARY INTERNATIONAL STANDARDS WITH REGARD TO GROUPS REQUIRING SPECIAL PROTECTION AGAINST RACISM, RACIAL, DISCRIMINATION, XENOPHOBIA AND RELATED INTOLERANCE

A. Religious groups

Assessment and recommendations

48. The nexus between racism and religion poses complex and sensitive issues which are not adequately addressed under international law. The experts believe that the reference to the right to freedom of religion in article 5, paragraph (d) (vii) of ICERD should be further developed to cover the complexity of the connection between religion and race, racial discrimination, xenophobia and related intolerance. In light of the increasing incidents of Islamophobia, anti-Semitism and Christianophobia in the aftermath of the events of 11 September 2001, it is necessary that human rights bodies update accordingly their general comments or recommendations, reporting guidelines, and rules of procedures.

49. **It is recommended in particular that CERD adopt a general recommendation addressing concerns which have emerged in the area of racial discrimination and religion or belief.**

50. **In addition, the experts recommend that the Human Rights Committee revise general comment No. 22 (1993) on article 18 (Freedom of thought, conscience or religion) in order to address present challenges. The experts stress that in**

addressing problems linked to the nexus between racism and religious, it is vital that human rights bodies and Governments rely on the provisions of the 1981 Declaration on the Elimination of All forms of Intolerance and of Discrimination Based on Religion and Belief.

B. Refugees, asylum-seekers, migrant workers and stateless persons

1. Refugees, asylum-seekers, migrant workers

Assessment and recommendations

58. The experts do not discern any substantive gaps as regards the protection of refugees, asylum-seekers and migrant workers from racism and racial discrimination. States parties should, however, be enjoined to take the necessary legislative and administrative measures to implement their obligations arising from ICERD with respect to these specific categories as well as from other related international instruments. The experts note the absence of an explicit incorporation of acts of xenophobia and related intolerance in international instruments and recommend that CERD adopt a general recommendation to rectify this lacuna.

2. Stateless persons

Assessment and recommendations

63. The experts recognize that fundamental human rights are guaranteed to stateless persons under international law. However, they wish to draw the attention of the international community to the uncertain status of this group of people in the context of the right to return to one's own country. It is clear that arbitrary expulsion is prohibited under international law in relation to every person, but the right to return benefits *prima facie* only citizens of a given country. The situation of stateless persons is less favourable. Indeed, their right to return to the country of residence or the country of origin is questioned and the grounds of race and/or ethnic origin play an important role. Therefore, it is important that this problem be effectively addressed primarily by the Human Rights Committee in the context of article 12, paragraph 4 of ICCPR, essentially through some supplementary inputs to general comment No. 27.

64. Most experts in the field agree that today *de jure* statelessness is overshadowed by the even greater crisis caused by *de facto* statelessness resulting from irregular migration, which contributes to the evolution of a "grey zone of *de facto* statelessness."¹⁰ The experts are of the opinion that this problem should be examined by the human rights treaty bodies, both in their general comments and concluding observations.

65. The experts are also seriously concerned by the exceptionally low rate of ratifications of the 1954 Convention relating to the Status of Stateless Persons,¹¹ and the

¹⁰ See e.g. Carol A. Batchelor, "Statelessness and the problem of resolving nationality status", *International Journal of Refugee Law*, vol. 10, Nos. 1-2 (January 1998), p. 156.

¹¹ As of 2007 the number of ratifications stands at 62.

still lower number of ratifications of the 1961 Convention on the Reduction of Statelessness.¹²

C. Internally displaced persons

Assessment and recommendations

69. Although the conventional mandate of the United Nations High Commissioner for Refugees (UNHCR) was established to deal with the situation of refugees, in practice, on the basis of relevant resolutions of the General Assembly and directives of the Executive Committee, UNHCR has extended its operational mandate and field of competence to cover IDPs as well.

70. Normatively, the Guiding Principles have been accepted as a set of standards by an increasing number of States, United Nations agencies, as well as regional organization, and are applied as such. This and the interpretation by CERD of its mandate as also covering the situation of IDPs prompt the experts to the conclusion that for the time being there is no need for further standard setting in this regard. However, with a view to strengthening the protection of IDPs, the experts recommend the General Assembly to uphold the call of the Commission on Human Rights for the observance and implementation of the Guiding Principles as standards. In such a resolution, the General Assembly may wish to stress the importance of the protection of IDPs against racism and xenophobia.

D. Descent-based communities

Assessment and recommendations

76. The experts share the cohesive view of international bodies that descent-based discrimination constitutes one of the greatest challenges to the efforts aimed at countering racism and xenophobia. Considering, however, the steps taken by CERD to extend the applicability of ICERD to descent-based communities, and in particular its general recommendation No. 29, the experts discern no substantive gaps as regards the protection of members of descent-based communities from racism, racial discrimination, xenophobia and related intolerance. Similarly to other forms of discrimination, inadequate implementation and lack of political will remain among the basic barriers impeding the elimination of this form of discrimination. It would be equally important if other human rights treaty monitoring bodies paid appropriate attention to problems faced by descent-based communities during the examinations of States parties' reports and individual communications.

¹² As of 2007 the number of ratifications stands at 30.

E. Indigenous peoples

Assessment and recommendations

83. The experts share the opinion expressed by CERD in its general recommendation No. 23 and consider that ICERD covers protection against racially motivated discrimination towards indigenous peoples. They are of the opinion that an effective countering of racism affecting indigenous peoples requires a strengthening of the overall protection of their human rights. In this context, the experts support a swift approval of the aforementioned declaration on the rights of indigenous peoples.

84. In addition, the experts believe that the universal ratification of ILO Convention No. 169 can also be a significant step towards the protection of the human rights of indigenous peoples. Therefore, the experts wish to encourage Member States to consider this step as a matter of priority.

F. Minorities

Assessment and recommendations

89. The Working Group on Minorities of the Sub-Commission in its recent report indicated “that addressing the rights of minorities remains one of the most marginalized issues within the human rights mechanisms in the United Nations.”¹³ In this context, the experts welcome the establishment of the mandate of the Independent expert on minority issues¹⁴ and call on the United Nations mechanisms to address minority issues, always when appropriate.

90. The experts have found no substantive normative gaps in the protection of persons belonging to cultural or ethnic, religious, or linguistic minorities from racism, racial discrimination, xenophobia and related intolerance. However, in this context, comments made in the section on religious groups in chapter II should also be taken into account.

91. This assessment in no way contradicts the need for further determined efforts at the national and international levels to fully implement the relevant standards.

G. People under foreign occupation

Assessment and recommendations

97. The experts agree, of course, that foreign occupation significantly heightens the risk of racial and xenophobic discrimination against the affected population. While examining the modalities of an appropriate response to such a situation, the experts arrived at the conclusion that normatively it is covered by both international humanitarian and human rights law. The problem is, however, that it is precisely under foreign

¹³ A/HRC/Sub.1/58/19.

¹⁴ In accordance with Commission on Human Rights resolution 2005/79, Ms. Gay McDougall was appointed by the United Nations High Commissioner for Human Rights on 29 July 2005 for an initial period of two years.

occupation that international mechanisms, as experience shows, have limited impact, if any, and thus, an effective protection against racism and xenophobia is particularly problematic.

98. The experts hope that the proclamation of the responsibility to protect in the 2005 World Summit Outcome, reiterated by the Security Council, opens a new avenue to combat the most severe human rights violations, including under foreign occupation. This approach can contribute to countering racism and xenophobia and ensure the accountability of perpetrators of related crimes include those involving genocide and ethnic cleansing.

99. The experts consider it appropriate that CERD assess the need for recommendations concerning the issue of racial and xenophobic discrimination under foreign occupation.

III. CONCLUSIONS AND RECOMMENDATIONS ON THE CONTENT AND SCOPE OF SUBSTANTIVE GAPS ON COMPLEMENTARY INTERNATIONAL STANDARDS WITH REGARD TO MANIFESTATIONS OF RACISM, RACIAL DISCRIMINATION, XENOPHOBIA AND RELATED INTOLERANCE

A. Multiple discrimination or aggravated forms of racial discrimination

Assessment and recommendations

107. Numerous studies and publications establish that the diversity in manifestations of multiple discrimination seems to demand a further elaboration. The purpose of this endeavour should be to address the phenomenon under discussion from different angles because its complex nature requires diversified and complementary approaches. In this context, there is no justification for restricting protection against multiple discrimination to the grounds that are explicitly mentioned in the DDPA. Here, as in the case of international human rights treaties, the list of prohibited grounds of discrimination is open-ended. Despite the fact that some characteristics, including nationality, age, health status, HIV-positive status, marital status, sexual orientation and gender identity when combined with race render certain categories of persons particularly vulnerable to discriminatory practices, they have not been to date universally recognized as factors aggravating racial discrimination. It is important that international protection against racism embraces these factors which create the phenomenon of multiple discrimination and result in the exclusion of people falling into the combined categories.

108. The underlying question is whether the existing legal standards sufficiently counter these phenomena. It is clear that the prohibition of multiple discrimination is already well established in law since various forms of discrimination are prohibited. The existing standards provide sufficient basis for protection against multiple discrimination at the national level in terms of responsibility and remedies. However, multiple discrimination is not only a sum of specific manifestations of discrimination, but it creates a new class of discrimination, whereby discrimination on the basis of several grounds creates a new form.

109. It is this phenomenon which amounts to aggravated victimization and marginalization of large groups of people. In order to combat this phenomenon, it is important to capture its contours through a definition which would take into account its complex nature.

110. The experts believe that a methodology of diagnosis of the phenomenon under discussions is still missing. While some of the well-recognised grounds of discrimination are extensively addressed and developed through law and jurisprudence others have only recently been recognised. The assessment of multiple discrimination is lacking a coherent and integrated approach. This leads to accountability gaps, since the legal basis is missing that would enable competent organs, in particular domestic courts, tribunals and commissions, to draw consequences adequate to the severity of multiple discrimination. Finally, the available tools to react effectively to multiple discrimination, including early warning mechanisms, seem to be inadequate.

111. Therefore, the experts are inclined to conclude that the phenomenon of multiple discrimination needs to be addressed, with a particular focus on: the recognition of its diversified characteristics; definition of linkages between different grounds of discrimination; and an understanding of the consequences of their combined manifestations. To that end, it would be most appropriate for the treaty bodies, in particular CERD, to analyse the issue of multiple discrimination and aggravated forms of discrimination with racial aspects and adopt general comments on the methodology for countering this phenomena.

B. Ethnic cleansing

Assessment and recommendations

116. The underlying question is whether ethnic cleansing as a manifestation of racism is adequately countered and persecuted persons or groups are sufficiently protected by existing legal standards. Despite the lack of a legal definition of ethnic cleansing under international law, the experts are of the opinion that it is sufficiently covered by human rights treaties on the one hand, and the stipulations of international criminal law concerning crimes against humanity on the other. Nevertheless, the experts would welcome efforts towards the development of a legal definition for ethnic cleansing. Such a definition would be helpful in developing a more targeted approach to this particular manifestation of racism and pave the way to more resolute preventive action.

117. At present, special emphasis should be placed in this respect on CERD early warning measures and urgent procedures and United Nations early warning mechanisms, including interaction between the Department of Peacekeeping Operations and other concerned United Nations agencies.¹⁵

¹⁵ See para. 153 of the Durban Programme of Action, which calls for strengthening coordination between DPKO and other United Nations agencies.

C. Genocide

Assessment and recommendations

121. The experts have concluded that no normative substantive gap exists in protection against racism and racial discrimination when these escalate to the level of genocide.

122. **However, the experts would like to reiterate the recommendation made in the section of the report which addresses ethnic cleansing, that emphasis be placed on CERD early warning measures and urgent procedures and United Nations early warning mechanisms, including interaction between the Department of Peacekeeping Operations and other concerned United Nations agencies. While re-emphasizing the need for the ratification of human rights and other relevant international treaties, the experts would also like to stress the importance of a prompt universal ratification of the Rome Statute in this context.**

D. Religious intolerance and defamation of religious symbols

Assessment and recommendations

130. The experts are of the view that there is an increase in religious intolerance, and incitement to religious hatred. Equally well-founded is the observation that religious intolerance and violations of the right to freedom of religion have increased substantially in the aftermath of 11 September 2001. These developments give rise to serious concerns, which need to be addressed in a thoughtful and effective way. From the perspective of their mandate, however, the experts are of the opinion that religious intolerance combined with racial and xenophobic prejudices is adequately covered under international human rights instruments. Yet, it is in light of the concerns of the international community regarding the rise in religious intolerance that CERD may wish to consider adopting a recommendation stating explicitly the advantages of multicultural education in combating religious intolerance.

E. Racial discrimination in the private sphere

Assessment and recommendations

139. The question arises as to whether by taking into account the aforementioned comments concerning the applicability of international human rights treaties, in particular ICERD and ICCPR, to the private sphere, there is in this regard a need for complementary human rights standards. The experts are not convinced and consider that there is rather an application gap in the effective protection against discrimination by private actors. However, since the wording of article 1 of ICERD has given rise in the past to some contradictory interpretations concerning the scope of protection granted by this Convention, in the interest of clarity the States parties may wish to consider adding the words “or private” after “public” in the definition in article 1, paragraph 1 of the Convention in an effort to help eliminate ambiguity in this regard.

140. The experts consider that general comment No. 31 of the Human Rights Committee provides a good starting point for addressing the problems of racism and xenophobia in the private sphere. Hence, CERD may wish to further elaborate on this

issue specifically in the field of racial discrimination. The experts suggest that other treaty bodies examine the problem under discussion and provide some clarity on the theme through their recommendations and comments. An important step would also be to include the topic in reporting guidelines adopted by human rights treaty bodies.

F. Incitement to racial hatred and dissemination of hate speech and xenophobic and caricatural pictures, through traditional mass media and information technology, including the Internet

Assessment and recommendations

150. The experts are convinced that the implementation of national legislation harmonised with human rights treaty obligations could serve effectively to prevent, monitor and sanction acts of incitement to racial and religious hatred and the dissemination of hate speech. Effective cooperation between Governments, NGOs and civil society-based organizations in the identification of good practices could help curb both incitement and dissemination. Practical initiatives could include the creation of a model anti-racism network for educational institutions; the inclusion of anti-racism messages on websites accessed by young people; training courses for teachers on the use of the Internet; the sharing of good practices; the promotion of digital inclusion; the ethical use of the Internet; and the development of critical thinking skills for children.

151. It goes without saying that particular attention should be paid to the Internet because of its outreach and the decentralized nature of its architecture. The emerging approach of self-regulatory governance of the Internet offers an important opportunity that needs to be further explored. This could prove to be most effective in tackling incitement to racial and religious hatred and the dissemination of hate speech through this medium. States should continue the dialogue on this subject as it will lead to political agreement on how to prevent the Internet from being used for racist purposes and how to promote its use to combat racism.

152. In addressing the underlying question as to whether there is a gap in international human rights law pertaining to combating incitement to racial and religious hatred and the dissemination of hate speech, the experts discern a gap in application and consider that while there are provisions from various treaties addressing the issue, further guidance from treaty bodies as to the interpretative scope of these provisions and their threshold of application would be most useful.

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