



Analysis of the standards and recommendations of international, regional and European Union organisations for combating discrimination, racism and xenophobia

SUMMARY



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ACRONYMS

EFTA	European Free Trade Association
ODIHR	Office for Democratic Institutions and Human Rights within the OSCE
ACJHR	African Court of Justice and Human Rights
ACHPR	African Court of Human and Peoples' Rights
CRC	International Convention on the Rights of the Child
CFREU	The Charter of Fundamental Rights of the European Union
HRC	UN Human Rights Committee
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
CERD	International Convention on the Elimination of All Forms of Racial Discrimination
CESCR	UN Committee on Economic, Social and Cultural Rights.
IACHR	Inter-American Commission on Human Rights
CIE	Immigration Detention Centre
CJEU	Court of Justice of the European Union
CMW	International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
CNCDH	National Consultative Commission on Human Rights, French Republic
CNDH	National Human Rights Council, Kingdom of Morocco
CEDAW	Committee Committee for the Elimination of All Forms of Discrimination against Women
CERD Committee	Committee for the Elimination of Racial Discrimination
CMW Committee	Committee for the Protection of the Rights of All Migrant Workers and Members of Their Families
CRC Committee	Committee for the International Convention on the Rights of the Child



CRPD Committee	Committee of the Convention on the Rights of Persons with Disabilities
ECHR	European court of human rights
IACHR	Inter-American Commission of Human Rights
CRPD	Convention on the Rights of Persons with Disabilities
Durban Declaration	Declaration of the World Conference against Racism, Racial Discrimination, Xenophobia and Related Forms of Intolerance of 2001
New York Declaration	New York Declaration for Refugees and Migrants
DILCRAH	French Government Interministerial Delegation to Combat Racism, Antisemitism and anti-LGBT Hatred
UDHR	Universal Declaration of Human Rights
ECRI	European Commission against Racism and Intolerance
UPR	Universal periodic review
EQUINET	European Network of Equality Bodies
FRA	EU Agency for Fundamental Rights
OHCHR	Office of the United Nations High Commissioner for Human Rights
LGBTI	Lesbian, Gay, Bisexual, Transgender and Intersex People
SDGs	Sustainable Development Goals
OAS	Organisation of American States
IOM	International Organisation for Migration
ILO	International Labour Organisation
OSCE	Organisation for Security and Co-operation in Europe
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
RGPH	General Population and Housing Census, Tunisia
NANHRI	Network of African National Human Rights Institutions
ESC	European Social Charter



SRSG	Special Representative of the Secretary-General of the Council of Europe for Migration and Refugees
TEC	Treaty establishing the European Community
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
AU	African Union
EU	European Union
UNESCO	United Nations Educational, Scientific and Cultural Organisation
UNHCR	United Nations High Commissioner for Refugees



1. INTRODUCTION

Today, one of the greatest challenges facing the guarantee of human rights is the persistence of forms of racism, xenophobia and discrimination against migrant population. Therefore international law and national systems for the protection of human rights have generated instruments aimed at eliminating them. This study aims to present the framework from which human rights at the international and regional level, and at the level of the European Union, deal with racism, xenophobia and discrimination against the migrant population. This report aims to provide the tools which, in a second phase, will make it possible to structure an analysis of the regulations in this area in Morocco, Spain, France and Tunisia.

The study addresses the distinct levels of protection. In international law, an analysis is made of universal standards (which essentially include treaties and instruments of United Nations agencies) and regional standards (the European system, the inter-American system and the African system for the protection of human rights). As indicated, the study will also examine the concrete initiatives generated within the framework of the European Union.

Within each system, the information has been organised according to the different discrimination factors taken into account in each case. It was decided to present separately for each system (i) the mechanisms related to equality and non-discrimination in general, (ii) the mechanisms related to equality and non-discrimination based on racial origin or ethnicity, (iii) asylum and refugee situations and (iv) the situation of migrant workers. The reason for this choice is that the problems of discrimination against the migrant population do not always arise from racism and xenophobia, despite the fact that these are related problems. Furthermore, as will be seen, there are usually differentiated provisions regarding migrant workers, on the one hand, and with regard to asylum and refugees, on the other. Due to its impact in certain contexts, reference to the treatment of hate speech is also included.

Furthermore, the grounds for discrimination concern groups that encounter specific difficulties in the enforcement of their rights. These groups are sometimes known as vulnerable groups. At the distinct levels of protection, specific instruments for the guarantees of the rights of these groups have been devised. They will also be analysed insofar as people belonging to these groups can also be migrants. In this sense, the study takes a look at multiple discrimination and, in particular, disability and gender.

Moreover, as part of the development of the study, the team was faced with the challenge of determining a concept of discrimination that could be sufficient to include the extent of the guarantees established at the distinct levels of protection. It therefore drew up a proposal on the concept of discrimination to be taken as a point of reference. At each level, it will be specified to what extent this concept has been used.

For the purposes of this study, the concept of discrimination developed within the framework of the universal system of protection of human rights will be used as the starting point, so that discrimination will be a distinction, an exclusion or a restriction, by action or omission, based on one of the prohibited criteria, which is not justified in terms of its purpose, appropriateness or proportionality. Likewise, cases of direct discrimination (which refer to differential treatment based on prohibited grounds) and cases of indirect discrimination (in relation to measures that are apparently neutral, but which have a disproportionate impact on certain groups) are taken into account.

It is also necessary to clarify what is meant by multiple and intersectional discrimination. Thus, we will use the term multiple discrimination to refer to situations in which a person experiences two or more grounds



of discrimination¹. Sometimes, the grounds interact in such a way that they are inseparable. These situations are called situations of intersectional discrimination. They are particularly difficult to fit into the legal concept of discrimination². Although the concept of intersectional discrimination has not always been included in the fight against racism, xenophobia and discrimination against the migrant population, it is a particularly interesting analytical tool when, as is the case, research takes a gender-based approach.

As stated, the main initiatives to combat racism, xenophobia and discrimination against the migrant population developed in the universal system of protection of human rights, in the African system of protection and in European Union law, will be set out in the following pages.

1 Committee for the Elimination of Discrimination against Women, General Recommendation No. 25 (2004) on temporary special measures, para. 12, (CEDAW/C/GC/25). Taken from http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=INT/CEDAW/GEC/3733&Lang=e (Last accessed 14/05/2019).

2 General Recommendation No. 28 (2010), on Article 2, para. 18 CEDAW/C/GC/28 para. 18. Taken from http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CEDAW%2fC%2fGC%2f28&Lang=en (Last accessed 14/05/2019).



2. ANALYSIS OF REGULATIONS IN THE FRAMEWORK OF EQUALITY AND RACIAL OR ETHNIC NON-DISCRIMINATION AGAINST MIGRANTS IN THE UNIVERSAL SYSTEM

In this part, we will study the main standards and instruments of the universal system of protection of human rights with the aim of determining the standards that unite the States from the point of view of prevention of and reaction to racism, xenophobia and discrimination against the migrant population.

First of all, we will present the general framework in which equality and non-discrimination are addressed in the universal system and then review the instruments that deal, in a concrete way, with the aspects identified as being relevant.

2.1. THE UNIVERSAL FRAMEWORK OF THE RIGHT TO EQUALITY AND NON-DISCRIMINATION

The principles of equality and non-discrimination are based on the recognition of equality with regard to human dignity and constitute a fundamental aspect of international human rights law enshrined in the Universal Declaration of Human Rights (UDHR) and two international covenants on civil and political rights and economic, social and cultural rights, namely the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).

In the universal system of protection of human rights, discrimination means *“any distinction, exclusion, restriction or preference or any other differential treatment based directly or indirectly on the prohibited grounds for discrimination which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of recognised rights”* (General Comment No. 18 of the UN Human Rights Committee (HRC) and General Comment No. 20 of the Committee for economic, social and cultural rights (CESCR). The prohibition of discrimination applies to the action of public authorities and private powers and includes both direct and indirect discrimination. Moreover, the exercise of rights and freedoms on an equal footing does not imply equal treatment under all circumstances, but is compatible with reasonable and objective differentiations directed towards a legitimate end.

Furthermore, it is important to take into account that States have an obligation to prevent conditions that influence the existence of de facto discrimination. De facto discrimination is closely related to the concept of systemic discrimination used by the CESCR, which occurs when the social disadvantage of certain groups is considered embedded and the discrimination experienced by those who belong to them goes unnoticed or is justified.

Equality and non-discrimination are central to the system of protection of rights and, moreover, are closely linked to development. This link is on the 2030 Agenda for Sustainable Development, goal 10 of which is to reduce inequalities and target 10.3 is to *“Ensure equal opportunity and reduce inequalities of outcome, including by eliminating discriminatory laws, policies and practices and promoting appropriate legislation, policies and action in this regard”*. The elimination of racism, xenophobia and discrimination



against the migrant population relates directly to targets 10.2 (“social, economic and political inclusion, irrespective of age, sex, disability, race, ethnicity, origin, religion or economic or other status” and 10.7 “Facilitate orderly, safe, regular and responsible migration and mobility, including through the implementation of planned and well-managed migration policies”³.

The effectiveness of the right to equality and non-discrimination requires to a large extent that diversity management models adopt a human rights approach. An intercultural orientation, an approach based on intersectionality and the gender perspective are tools through which this approach is launched.

2.2. COMPREHENSIVE STRATEGIES ON EQUALITY AND NON-DISCRIMINATION DIRECTLY RELATED TO MIGRATION STATUS OR RACIAL OR ETHNIC ORIGIN

This section will examine the universal regulations relating to discrimination on grounds of racial and ethnic origin and to the rights of refugees and asylum seekers, as well as of migrants. An analysis will be made of the treatment of hate speech and hate crimes, taking into account their impact on the aforementioned issues.

2.2.1. Discrimination on grounds of racial or ethnic origin

The prohibition of racial discrimination, contained in the International Bill of Human Rights and in other more specific instruments, is considered a peremptory norm and is therefore non-derogable. In addition, persecution on racial, national or ethnic grounds and *apartheid*, when committed as part of a widespread or systematic attack against the civilian population, may constitute a crime against humanity under Article 7 of the Rome Statute of the International Criminal Court⁴.

The most relevant international instrument pertaining to discrimination based on racial and ethnic origin is the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) of 1965. The Committee responsible for its implementation is the Committee for the Elimination of Racial Discrimination (CERD Committee). Within this framework, the Declaration of the World Conference against Racism, Racial Discrimination, Xenophobia and Related Forms of Intolerance of 2001 and the accompanying Programme of Action (Durban Declaration and Programme of Action) constitute fundamental references, since they can be considered as instruments for updating and interpreting the meaning of the CERD.

The CERD defines racial discrimination as: “any distinction, exclusion, restriction or preference or any other differential treatment based directly or indirectly on the prohibited grounds for discrimination which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life” and notes that “affirmative action policies or measures are not deemed racial discrimination”.

In addition to ‘race’, colour, descent and national or ethnic origin are included as constituent grounds of racial discrimination. It is important, in this sense, to note that within the framework of the universal system of human rights, we adopt the assumption declared in Durban, which stipulates that “any doctrine of

3 United Nations (2015). *Transforming our world: the 2030 Agenda for Sustainable Development* (A/RES/70/1). Retrieved from: https://unctad.org/meetings/es/SessionalDocuments/ares70d1_es.pdf (Last accessed 05/06/2019).

4 https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVIII-10&chapter=18&lang=en (Last accessed 05/06/2019).



racial superiority is scientifically false, morally condemnable, socially unjust and dangerous, and must be rejected, along with theories which attempt to determine the existence of separate human races”⁵. The core of the response to racial discrimination must be based on the fight against racism which encompasses “racist ideologies, prejudiced attitudes, discriminatory behaviours, structural arrangements and institutionalised practices resulting in racial inequality as well as the fallacious notion that discriminatory relations between groups are morally and scientifically justifiable”⁶.

Article 1.2 excludes from the scope of the CERD “distinctions, exclusions, restrictions or preferences made by a State party to this Convention between citizens and non-citizens”, so that “none of the clauses of this Convention may be interpreted as affecting in any way the legal provisions of the State Parties concerning nationality, citizenship or naturalisation, provided that such provisions do not discriminate against any particular nationality” (Article 1.3). In General Recommendation XXX (2005)⁷, the CERD Committee interprets the scope of the two paragraphs of article 1 in the light of the Durban Declaration and insists on the fact that the exclusions contained in sections 2 and 3 of article 1 cannot be understood as an exception to the prohibition of discrimination by the UDHR and the two aforementioned Covenants (ICCPR and ICESCR), so that a difference in treatment based on citizenship or migrant status will constitute discrimination, unless it is justified by the need to achieve a legitimate aim and is proportional. In accordance with this interpretation, the CERD Committee recommends to States a series of general measures which include the review of their legislation to detect possible discrimination against non-citizens, including practices such as profiling.

However, the systems of protection against racial discrimination applicable to foreigners are often different from those applicable to nationals. Furthermore, certain forms of discrimination affecting migrants do not constitute discrimination on grounds of racial or ethnic origin within the meaning of the CERD. For this reason, it seemed appropriate to present the legislation relating to the rights of migrants, refugees and asylum seekers in separate sections.

2.2.2. Migration, refuge and asylum

Migration is a phenomenon that has various causes and although many people decide to migrate voluntarily, a high number of migrants are forced to do so. Faced with the intensification of this phenomenon, “*xenophobia against non-nationals, particularly migrants, refugees and asylum seekers, constitutes one of the main sources of contemporary racism and human rights violations against members of such groups occur widely in the context of discriminatory, xenophobic and racist practices*” (Durban Declaration, paragraph 16).

The status of refugees is sustained by the Convention on the Status of Refugees of 1951 and the Protocol of 1967 which cancels the restriction of the temporal framework of the Convention initially planned until 1951. The Convention defines a refugee as any person who has obtained such status under international regulations and who has “*a well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality*”

5 Article 2.1. UNESCO (1978). *Declaration on Race and Racial Prejudice* (Session 20). http://portal.unesco.org/es/ev.php-URL_ID=13161&URL_DO=DO_TOPIC&URL_SECTION=201.html (Last accessed 05/06/2019).

6 Article 2.1. UNESCO (1978). *Declaration on Race and Racial Prejudice* (Session 20). http://portal.unesco.org/es/ev.php-URL_ID=13161&URL_DO=DO_TOPIC&URL_SECTION=201.html (Last accessed 05/06/2019).

7 CERD Committee (2005). *General Recommendation No. XXX on discrimination against non-citizens*. https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT%2fCERD%2fGEC%2f7502&Lang=en (Last accessed 05/06/2019).



and is unable or, owing to such fear, unwilling to avail himself of the protection of that country” (Article 1). Thus, the Convention prohibits the expulsion or forced return of all refugees or asylum seekers (persons claiming recognition of refugee status) under the principle of non-refoulement. This principle seeks to ensure that no person should fear for their life on the grounds listed above.

The New York Declaration for Refugees and Migrants (New York Declaration) states that, among the fundamental rights of refugees, a special guarantee of freedom of religion and movement, the right to education and the right to work must be ensured. Furthermore, the New York Declaration warns that certain manifestations of intolerance and xenophobia are the direct responsibility of national legislation which criminalises migrants who find themselves in an irregular situation. The tightening of laws on foreigners and immigration through the strengthening of border controls also leads to the social exclusion of migrants. Although it is not a legally binding instrument, the New York Declaration is a landmark in this area, since it expresses a political will in favour of the protection of people on the move as well as support for host communities. It contains commitments that apply equally to refugees and migrants – which include protection against racial discrimination and trafficking – as well as separate commitments, some applying to refugees and some to migrants. These commitments led to the adoption, at the Intergovernmental Conference in Marrakesh, of the Global Compact for Safe, Orderly and Regular Migration⁸. As for the Global Compact on Refugees, it was adopted on 17 December 2018 under General Assembly Resolution 73/151. The need to address the issue of migration and the issue of refugees separately is justified by the fact that the degree of consensus on a common framework relating to asylum and refugee issues is higher than the consensus on safe, orderly and regular migration.

2.2.3. Discrimination against migrant workers

Although there is no international definition of the term “migrant”, the International Organisation for Migration (IOM) considers that it means “any person who leaves his place of usual residence to settle temporarily or permanently and for various reasons, either in another region within the same country, or in another country, thus crossing an international border”. When such people cross a border and carry out a paid activity, they are migrant workers. In 2017, there were nearly 258 million migrant people in the world, including 150 million migrant workers⁹.

International migration leads to an increase in the wealth of the country of destination and implies an important contribution in the demographic balance. Its regulation is closely linked to Goal 10.7 of the Sustainable Development Goals (SDGs) relating to the reduction of inequality in countries, under which States must “facilitate orderly, safe, regular and responsible migration and mobility, including through the implementation of planned and well-managed migration policies”. The New York Declaration proposes to take advantage of the commitments of the Agenda in favour of refugees and Migrants and reaffirms the principles of the International Bill of Human Rights. The New York Declaration programme in relation to migration materialised in December 2018 in Marrakesh with the Global Compact for Safe, Orderly and Regular Migration, which attempts to provide a common approach on international migration. The principles that guide the Pact are the following: people-centredness, international cooperation, national sovereignty, rule of law and due process, sustainable development, human rights, gender-responsiveness, child-sensitivity, an all-government and whole-of-society approach.

⁸ *Global Compact for Safe, Orderly and Regular Migration (A/CONF.231/3)*. Retrieved from: <https://undocs.org/es/A/CONF.231/3> (Last accessed 05/06/2019).

⁹ Department of Economic and Social Affairs. United Nations (2018). Taken from: <https://www.un.org/en/development/desa/population/migration/data/estimates2/estimates17.asp> (Last accessed 12/06/2019).



The purpose of the Compact is “to mitigate the adverse drivers and structural factors that hinder people from building and maintaining sustainable livelihoods in their countries of origin” (paragraph 12). A list of 23 objectives¹⁰ is set out in paragraph 16. With regard to migrant persons, States have the responsibility to “reduce the risks and vulnerabilities migrants faced at different stages of migration by respecting them, protecting them and respecting their fundamental rights and providing them with care and assistance”.

The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW), to which Morocco is party, is a milestone in the history of migrant workers’ rights. This is the regulation with the most comprehensive approach to the matter and its importance lies in the fact that it has established a series of definitions for the different categories of migrant workers, as well as in the fact that it is a binding instrument (although it leaves states a wide margin of discretion with regard to the commitments they acquire). The Convention invites States to cooperate in mobility programmes that facilitate migration and the movement of labour, migrant integration programmes, the encouragement of family reunification and cooperation for return and readmission. In addition, a reporting cycle is established to ensure monitoring of rights under international obligations by signatory States. The individual assessment of States is one of the most effective systems when it comes to considering the effective implementation of rights and ensuring non-discrimination and the recognition of these rights¹¹. However, the CMW came into force on 1 July 2003 without any state receiving migrants in Western Europe, Canada or the United States having ratified it.

The International Labour Organisation (ILO) has been one of the main bodies in the development of documents relating to the protection of migrant workers. Convention No. 97 of 1949, relating to Migrant Workers, promoted the establishment of minimum standards in working conditions, recognising the equal treatment of migrant and national workers through systems that control employment contracts at the level of specialist immigration bodies in order to facilitate the process of recruitment, introduction and placement. For its part, Convention No. 143 concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers (1975) recognised the equality of migrant workers and members of their family in terms of the enjoyment of employment rights, such as unionisation, as well as cultural or social rights.

ILO Convention No. 143 was also one of the first international instruments to address the issue of irregular immigration on the basis of the criminalisation of traffickers in human beings. Trafficking is also a subject addressed by the United Nations Resolution on International Migration and Development (2016), which recalls the responsibility of States to “prevent and combat trafficking in persons, detect and protect its victims, prevent and combat the smuggling of migrants and the activities of transnational and national criminal organisations”. Furthermore, this Resolution invites States to protect migrants from abuse and exploitation and improve their perception by society in order to counteract xenophobia.

In the area of equality and non-discrimination, it is worth mentioning Convention No. 100 and Convention No. 111 of the ILO, which comprise the core of universal labour standards. On the one hand, Convention No. 100 concerns equal pay and stipulates the application of the principle of equal pay for work of

¹⁰ Para. 16 and following. United Nations (2018). *Global compact for safe, orderly and regular migration* (A/CONF.231/3). Taken from: <https://undocs.org/fr/A/CONF.231/3> (Last accessed 12/06/2019).

¹¹ ILO (1990). *The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families* (RES/45/158). Retrieved from: <https://www.ohchr.org/sp/professionalinterest/pages/cmw.aspx> (Last accessed 05/06/2019).



equal value without discrimination on grounds of gender¹². On the other hand, Convention No. 111 concerns the prohibition of discrimination in the field of employment and occupation¹³.

2.3.4. Prohibition of hate speech

There is a growing concern in the international and European context and in some States regarding the rise in discriminatory discourse. This concern has led to the promotion of national, racial or religious hatred constituting incitement to discrimination being considered by the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression of the United Nations¹⁴ as a public expression that should be banned by States.

In these cases, the term hate speech is used, although there is no generally accepted definition of this category due to the multiplicity of its manifestations and the complexity of its weighting in relation to freedom of opinion and expression. At the national level, it is possible to find a great diversity of regulations on the prohibition of discrimination and incitement to hatred, which highlights the lack of a unitary universal framework. Some United Nations instruments have advanced accord on this issue in order to guarantee a universal legislative and regulatory space for combating hate speech. Article 4 of the CERD condemns “*all propaganda and all organisations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form*”. The document obliges State parties to prohibit racist speech, to define hate crimes and to adopt measures in the cultural, educational and information fields intended to combat the prejudices which serve as a basis for racial discrimination and to promote understanding between nations and racial and ethnic groups.

2.3. STRATEGIES TO COMBAT DISCRIMINATION BASED ON OTHER SITUATIONS IN WHICH MIGRANTS MAY FIND THEMSELVES

The framework of the universal human rights protection system, General Recommendations numbers 25 (2004)¹⁵ and 28 (2010)¹⁶ of the Committee for the Elimination of All Forms of Discrimination against Women on temporary special measures (CEDAW Committee) relating to article 2 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), as well as General Comment 3 on Women and Girls with Disabilities (2016)¹⁷ and General Comment 6 on Equality and Non-Discrimination (2018)¹⁸ of the Committee on the Rights of Persons with Disabilities (CRPD Committee), focus on the

12 Articles 2 and 3. ILO (1951). *Convention 100 on equal pay*. https://www.ilo.org/dyn/normlex/es/f?p=1000:12100:0::NO::P12100_ILO_CODE:C100 (Last accessed 05/06/2019).

13 Article 1. ILO (1958). *Convention 111 on Discrimination in Work and Occupation*. https://www.ilo.org/dyn/normlex/es/f?p=NORMLEXPUB:12100:0::NO::P12100_Ilo_Code:C111 (Last accessed 05/06/2019).

14 Paragraph 80. United Nations (2012). *Report by the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue (A/HRC/20/17)*. Retrieved from: <https://www.acnur.org/fileadmin/Documentos/BDL/2014/9691.pdf> (Last accessed 05/06/2019).

15 CEDAW (2004). *General Recommendation No. 25 (C/GC/25)*. https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/1_Global/INT_CEDAW_GEC_3733_S.pdf (Last accessed 25/06/2019).

16 CEDAW (2010). *General Recommendation No. 28 (C/GC/28)*. <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G10/472/63/PDF/G1047263.pdf?OpenElement> (Last accessed 25/06/2019).

17 CRPD (2016). *General Recommendation No. 3 on women and girls with disabilities (C/GC/3)*. <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G10/472/63/PDF/G1047263.pdf?OpenElement> (Last accessed 25/06/2019).

18 CRPD (2018). *General Recommendation No. 6 on equality and non-discrimination (C/GC/6)*. https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRPD/C/GC/6&Lang=en (Last accessed 25/06/2019).



importance of caution in approaching situations of multiple and intersectional discrimination and the differences between the two.

It is possible that people who may be victims of racism, xenophobia and discrimination against the migrant population are members of another disadvantaged group. However, the instruments developed in international law to protect people from discrimination do not always take this circumstance into account.



3. REGIONAL CONTEXTS OF THE RIGHT TO EQUALITY AND NON-DISCRIMINATION

The principle of equality and non-discrimination is part of a system of values shared in each of the different regional human rights protection systems. We will present below the standards that have been devised in each of the systems (European, Inter-American and African), which are binding on the Member States belonging to these regional systems and can serve as a model when offering a rights-based response to the prohibition of racism, xenophobia and discrimination against the migrant population.

3.1. THE EUROPEAN REGIONAL SYSTEM

With regard to the European regional system, the Council of Europe¹⁹ is the organisation that aims to protect human rights. This section of Chapter 3 differs from Chapter 4 in that Chapter 4 is limited to the European Union, while this section covers the countries of the wider Council of Europe, which includes 47 member states and whose headquarters are in Strasbourg.

The European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 (ECHR)²⁰, approved in this context, formulates the prohibition of discrimination in its article 14²¹. The discrimination that is prohibited under the convention is that which affects the rights recognised by the ECHR. However, Protocol number 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms (2000) incorporates equal rights into the system by emphasising that “*enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status*” (Article 1)²².

The rejection of discrimination on grounds of racial or ethnic origin can be considered as a European value since it goes beyond the regional system of protection of rights and is also shared by the Organisation for Security and Cooperation in Europe (OSCE)²³, which strives to unite efforts to build a society in which all people, regardless of their ethnic origin, enjoy full equality of opportunity. Not only that, but this organisation also combats discrimination by committing to “*counter all threats arising from manifestations of intolerance, aggressive nationalism, racism, chauvinism, xenophobia and anti-Semitism*”, on the one hand, and condemning “*violence against any minority*”, on the other²⁴.

19 The Council of Europe: intergovernmental organisation founded in 1949 formed by 47 European States with headquarters in Strasbourg.

20 Council of Europe (1950). *European Convention for the Protection of Human Rights and Fundamental Freedoms*. Retrieved from: https://www.echr.coe.int/Documents/Convention_SPA.pdf (Last accessed 13 April 2019).

21 Article 14. The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

22 Ibidem, p. 51.

23 The OSCE is the largest regional security organisation in the world, with 57 participants. It was founded in 1973 and adopts a comprehensive approach to security that encompasses the political-military, economic and environmental, and human dimension, and based on its inclusive character, the OSCE helps to mitigate differences and promote trust between States through cooperation in conflict prevention, crisis management and post-conflict rehabilitation.

24 OSCE (1999). *Istanbul Document*. <https://www.osce.org/es/mc/39574?download=true> (Last accessed 15 April).



In the European context, several instruments have been adopted for combating racism, xenophobia and discrimination against the migrant population, aimed at guaranteeing equality and non-discrimination on grounds of racial and ethnic origin, at protecting migrants from discrimination and at establishing safeguards against hate speech. Furthermore, there are some instruments that establish safeguards against discrimination when migrants find themselves in other situations.

Thus, the Ministries of External Relations and the Parliamentary Assembly of the Council of Europe, the Commissioner for Human Rights and the European Commission against Racism and Intolerance (ECRI) have made proposals on the elimination of discrimination on grounds of racial or ethnic origin which include the rejection and prohibition of public manifestations of racism, xenophobia and any other form of intolerance, as well as the adoption of strict legislation against hate speech. In the European context, there is a growing concern about hate speech because of the presence of racist manifestations in public and political discourse. This concern is shared by the various bodies of the Council of Europe and by the OSCE. Legislative proposals have been made regarding hate speech (they include the prohibition and even the criminalisation of certain behaviours and expressions), more specifically in the context of education and training, which contemplate the involvement of communication media.

With regard to equality and non-discrimination for migrants, some bodies of the Council of Europe express their concern because stereotypes lead to presenting the migrant population as a danger to co-existence and well-being in Europe. These preconceived ideas have meant an increase in racism and xenophobia which should be countered by a review of standards and practices which could include discrimination on the basis of nationality, by means, inter alia, of the response to racism, xenophobia, hate speech and violence, through the adequate collection of information on the prevalence of these phenomena, with the efforts of national equality mechanisms, and by organising information campaigns so that people who are discriminated against know their rights²⁵.

Hate speech and hate crime are phenomena which are a well-known cause of concern to European bodies, particularly when the means of dissemination is the Internet and when they occur in the context of political messages. In addition to repressive measures, it has been stressed that there is a need to collect data on the impact of these phenomena and to act through the adoption of instruments, such as communication media or education, with a view to eliminating racial prejudices that give rise to hate speech and hate crimes.

The instruments on violence against women draw attention to gender-specific discrimination against women, which particularly affects migrant women. This is also the case of migrants belonging to vulnerable groups such as people with disabilities or religious minorities in the host country (especially Muslim²⁶ and Jewish women²⁷).

Finally, it is possible to affirm that there is, in the case law of the ECHR, a growing concern about discrimination that has extended to discrimination on the grounds of racial and ethnic origin, an area in which

25 Council of Europe (2016). *Time for Europe to get migrant integration right*. Retrieved from: <https://book.coe.int/en/commissioner-for-human-rights/6999-pdf-time-for-europe-to-get-migrant-integration-right.html> (Last accessed 15 May 2019).

26 Council of Europe (2012). *Multiple discrimination against Muslim women in Europe: for equal opportunities*. <http://www.assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=18921&lang=en> (Last accessed 24 May 2019) and OSCE (2018). *Hate crimes against Muslims*. <https://www.osce.org/es/odhr/414479> (Last accessed 24 May 2019).

27 OSCE (2004). *Combating anti-Semitism*. <https://www.osce.org/es/pc/30985?download=true> (Last accessed 25 May 2019); OSCE (2017) *Understanding antisemitic hate crime: do the experiences, perceptions and behaviours of Jews vary by gender, age and religiosity?* <https://www.osce.org/odhr/320021> (Last accessed 26 May 2019); ECRI (2004). *Recommendation No. 9 Preventing and combating anti-Semitism*. <https://rm.coe.int/ecri-general-policy-recommendation-no-9-on-the-fight-against-antisemit/16808b5ac9> (Last accessed 25 May 2019).



some categories of anti-discrimination law are incorporated. Thus, the ECHR is understood to prohibit direct discrimination, indirect discrimination and also discrimination by association. In addition, it is useful to note that the ECtHR introduced the rule that, in cases where there are indications of racial discrimination, the burden of proof rests with the authorities.

3.2. THE INTER-AMERICAN SYSTEM

The protection of human rights in the inter-American system is assumed by the Organisation of American States (OAS). In this context, the American Convention on Human Rights (1969) recognises the right to equality before the law and the prohibition of discrimination “for reasons of race, colour, sex, language, religion, political or other opinion, national or social origin, economic status, birth or any other social condition” (Articles 1 and 24)²⁸.

Long before that, the OAS Charter (1951) already contained an express condemnation of racism, discrimination and intolerance against people of African descent²⁹. Concern about discrimination has led to the approval of two conventions on the subject: the Inter-American Convention against Racism, Racial Discrimination and Related Forms of Intolerance on the one hand, and the Inter-American Convention against All forms of Discrimination and Intolerance on the other. Some states have expressed reluctance with regard to the latter convention because they maintain discriminatory standards regarding sexual orientation and gender identity³⁰.

The Inter-American Convention against Racism, Racial Discrimination and Related Forms of Intolerance points out that discriminatory attitudes deny universal values such as the inalienable and inviolable rights of the human person. In the text, it is considered that it is the duty of the State to adopt special measures in favour of the rights of persons or groups of persons who are victims of racial discrimination, in any field of activity, public or private, in order to promote fair conditions and equality of opportunity and to combat racial discrimination in all its individual, structural and institutional manifestations. In addition, it is established that it is necessary to take into account the individual and collective experience of discrimination to combat exclusion and marginalisation for reasons of race, ethnic group or nationality, as well as to protect the life plan of people and communities at risk of being segregated and marginalised. In this context, it also underlines the growth of hate crimes committed for reasons of race, colour, descent or national or ethnic origin and the fundamental role of education in the phenomenon of respect for human rights, equality, non-discrimination and tolerance³¹.

For its part, the Convention against all forms of Discrimination and Intolerance takes the victims of discrimination and intolerance in the Americas together with migrant, refugee and displaced persons, as well as with other groups and sexual, cultural, religious and linguistic minorities affected by such manifestations. Some people are subject, in multiple or aggravated forms, to discrimination and intolerance motivated by a combination of factors such as gender, age, sexual orientation, language, religion, political

28 OAS (1969). *American Convention on Human Rights*. https://www.oas.org/dil/esp/tratados_B-32_Convencion_Americana_sobre_Derechos_Humanos.htm (Last accessed 29 April 2019). Article 24. All persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law.

29 *Charter of the Organisation of American States* (1951). Retrieved from: http://www.oas.org/es/sla/ddi/tratados_multilaterales_interamericanos_A-41_carta_OEA.asp (Last accessed 28 April 2019).

30 OAS (2013). *Inter-American Convention against All Forms of Discrimination and Intolerance*. Retrieved from: http://www.oas.org/es/sla/ddi/tratados_multilaterales_interamericanos_A-69_discriminacion_intolerancia.asp (Last accessed 13 May 2019).

31 OAS (2013). *Inter-American Convention against Racism, Racial Discrimination and Related Forms of Intolerance*. Retrieved from: http://www.oas.org/es/sla/ddi/tratados_multilaterales_interamericanos_A-68_racismo.asp (Last accessed 13 May 2019).



or other opinion, social origin, economic status, migrant, refugee or displaced status, birth, living with stigmatising infectious/contagious conditions, genetic characteristics, disability, incapacitating physical suffering or any other social condition. OAS States have an obligation to prevent and combat all forms of discrimination within the scope of these two Conventions, to adopt extraordinary measures and real action to guarantee the enjoyment of rights by persons likely to be victims of racism, racial discrimination or related forms of intolerance.

In the inter-American system, an increase in racism, xenophobia and discrimination against migrants and their families has been observed. It is therefore envisaged that the States approve specific strategies to prevent and respond to the phenomenon with legal, political, administrative and educational and cultural measures. The Inter-American Commission on Human Rights (IACHR) is particularly concerned about the impact of violence against migrant women³². This concern also appears in the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women³³. In the region, the protection of the rights of indigenous women, who are simultaneously exposed to racism, sexism and poverty, requires the inclusion of an appropriate approach on the part of States³⁴.

The Inter-American Commission of Human Rights (IACHR) considers the principle of equality and non-discrimination as a peremptory norm. It has incorporated into its case law, in addition to the categories of direct or indirect discrimination, the concepts of multiple, intersectional and structural discrimination and applies, in cases where racial or ethnic origin is present, the obligation of States to demonstrate that differential treatment does not contain racial prejudice. Regarding the non-national population, it accepts differential treatment that is reasonable, objective and proportional and does not violate human rights.

Finally, the IACHR considers that the prohibition of discrimination against persons belonging to indigenous communities is included in the prohibition of discrimination on the basis of ethnic origin and in the open clause of article 1 of the American Convention on Human Rights (*“any other social condition”*).

3.3. THE AFRICAN SYSTEM

In the African system, the organisation for the protection of rights is the African Union (AU). In this context, the reference is the African Charter on Human and Peoples' Rights (1981), Article 2 of which stipulates that *“every individual shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political any other opinion, national and social origin, fortune, birth or other status”*. Furthermore, section 3 of the Charter stipulates that all individuals shall be equal before the law and shall be entitled to equal protection³⁵.

In addition to the AU, it is interesting to consider the coordination work carried out by the Network of African National Human Rights Institutions (NANHRI), founded in 2007. The 44 African national human

32 IACHR (2015). *Norms and Standards of the Inter-American System on the Human Rights of Migrants, Refugees, Stateless Persons, Victims of Human Trafficking and Internally Displaced Persons*. <http://www.oas.org/es/cidh/informes/pdfs/MovilidadHumana.pdf> (Last accessed 15 May 2019).

33 OAS (1999). *Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women*. <https://www.oas.org/juridico/spanish/tratados/a-65.html> (Last accessed 3 June 2019).

34 IACHR (2017). *Indigenous women and their human rights in the Americas*. <http://www.oas.org/es/cidh/informes/pdfs/mujeresindigenas.pdf> (Last accessed 20 May 2019).

35 Organisation of African Unity (1981). *African Charter on Human and Peoples' Rights*. <https://www.acnur.org/fileadmin/Documentos/BDL/2002/1297.pdf> (Last accessed 01/05/2019).



rights institutions that make up NANHRI have recommended to Member States to safeguard the human rights of migrants through the development of national and regional mechanisms for the promotion and monitoring of the Global Compact on Migration. This network has also developed initiatives aimed at promoting and protecting the rights of people with disabilities.

Combating racial discrimination is an urgent matter for the people of Africa and therefore it is not surprising that in the Solemn Declaration on the occasion of the 50th anniversary of the African Union, States committed themselves to continue the global struggle against all forms of racism and discrimination, xenophobia and related forms³⁶ or that Agenda 2063 establishes that, by the year 2020, “*African peoples will be free from colonial oppression and that all types of oppression will be opposed, including forms of discrimination for reasons of gender, race or any other type*”³⁷.

The Convention for the Promotion and Assistance of Internally Displaced Persons in Africa (2000)³⁸ may be relevant for identifying safeguards against racism, xenophobia and discrimination against the migrant population insofar as it establishes the obligation of States to “Respect and ensure respect and protection of the human rights of internally displaced persons, including humane treatment, non-discrimination, equality and equal protection of law” (Article 3.1d) and to protect and assist, in the event of internal displacement, displaced persons within their territory or jurisdiction (Article 5.1); as well as the right of persons “*to be protected against arbitrary displacement such as, for example, displacement based on policies of racial discrimination or other similar practices aimed at/or resulting in altering the ethnic, religious or racial composition of the population*” (Article 4. 4a).

Regarding the interaction with other factors, the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Persons with Disabilities in Africa³⁹ establishes the obligation of States to ensure that persons with disabilities are not discriminated against on any grounds, including race or ethnic origin, language, religion, colour and nationality”.

The African Court on Human and Peoples’ Rights (ACtHPR), given its recent creation, has not developed notable case law on equality and against racism, xenophobia and discrimination against the migrant population.

36 AU (2013). *50th Anniversary Solemn Declaration*. <https://au.int/en/documents/20130613/50th-anniversary-solemn-declaration-2013> (Last accessed 1 May 2019).

37 AU Commission (2015). *Agenda 2063: The Africa We Want*. https://au.int/en/Agenda2063/popular_version (Last accessed 2 May 2019).

38 AU (2009). *Convention for the Protection and Assistance of Internally Displaced Persons in Africa*. <https://www.acnur.org/5c7408004.pdf> (Last accessed 15 May 2019).

39 AU (2018) *Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Persons with Disabilities in Africa*. <https://au.int/en/treaties/protocol-african-charter-human-and-peoples-rights-rights-persons-disabilities-africa> (Last accessed 3 June 2019).



4. ANALYSIS OF REGULATIONS ON EQUALITY AND RACIAL OR ETHNIC NON-DISCRIMINATION FOR IMMIGRANTS INTO THE EUROPEAN UNION

The prohibition of discrimination is one of the fundamental principles of the European Union (EU), in the context of which the racial question assumes special importance. Indeed, the EU's commitment to the principle of respecting and guaranteeing fundamental rights, which was established in Article 6.3 of the Treaty on European Union (TEU), constitutes an essential pillar of relations between the EU, the Member States and the citizenry. This principle relating to respect for human rights has been reinforced and given concrete form through the approval of the Charter of Fundamental Rights⁴⁰ (CFREU) in Nice; and has been further reinforced following the 2007 reform, by means of the Lisbon Treaty, under which it was stipulated, in article 6.1 TEU, that the CFREU is part of the applicable law, with the same legal validity as the Treaties. Article 21 of the Charter echoes the principle of the prohibition of discrimination, including in its application the Member States, but only when they apply Union law. In any event, the prohibition of discrimination is one of the fundamental principles of the EU that has led to a significant production of standards that are binding on the Member States.

The concept of discrimination within the framework of the Union does not have a homogeneous and constant definition and terminological concretisation. In this sense, it is possible to identify two important milestones: Directive 2000/43/EC on Racial Equality⁴¹ (applying the principle of equal treatment of persons regardless of their racial or ethnic origin) and the Employment Equality Directive 2000/78/EC⁴² (laying down the establishment of a general framework for equal treatment in employment and occupation), which extends the prohibition of discrimination in the field of employment to sexual orientation, religious beliefs, age and disability. The fact that the first directive specifically addresses discrimination on racial grounds provides a significant indication of its importance for the European institutions. Furthermore, under Directive 2000/43, unlike Directive 2000/78/EC, the prohibition of discrimination extends beyond employment in the strict sense and encompasses vocational training, participation in organisations of working and business and professional persons, social protection, social benefits, education and access to goods and services, including housing (Article 3.1).

The Racial Equality Directive 2000/43/EC considers that “*direct discrimination occurs where one person is treated less favourably than another is, has been or would be treated in a comparable situation on grounds of racial or ethnic origin [and] indirect discrimination occurs where an apparently neutral provision, criterion or practice is likely to put persons of a given racial or ethnic origin at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary*” (Article 2). This concept of discrimination can be extended to the scope of Directive 2000/78/EC (Article 2).

40 EU, CFREU, C 364. Official Bulletin of the European Communities, 18 December 2000. Retrieved from: http://www.europarl.europa.eu/charter/pdf/text_fr.pdf (Last accessed 09/06/2019).

41 EU. Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin. Official Bulletin of the European Communities, 29 July 2000. Retrieved from: <http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2000:180:0022:0026:es:PDF> (Last accessed 09/06/2019).

42 EU. Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation. Official Bulletin of the European Communities, 2 December 2000. Retrieved from: <https://eur-lex.europa.eu/legal-content/ES/TXT/PDF/?uri=CELEX:32000L0078&from=EN> (Last accessed 09/06/2019).



In addition, the concept of discrimination has gradually extended to new aspects, such as the case of sexual harassment, which is understood as conduct of sexual discrimination against women by Directive 2004/113/EC⁴³ and Directive 2006/54/EC⁴⁴, which also discusses in its Article 2 the concepts mentioned above, as well as other concepts. In addition to the direct and indirect modalities, these two directives include harassment in the concept of discrimination.

European awareness of the problem of racial and ethnic discrimination has found a response in various instruments among which the aforementioned Directive 2000/43/EC on Racial Equality stands out, from which the Member States have had to adopt regulations. Directive 2000/43/EC applies in the fields of employment, social security and access to goods and services and opens the way for victims to file complaints of racial discrimination and to be assisted by NGOs and other entities. It determines penalties for those who practise this type of discrimination. Another relevant innovation resulting from this Directive is the requirement imposed on Member States to set up a body to monitor and promote equality at national level. For its part, Framework Decision 2008/913/JHA of 28 November 2008 concerns combating discrimination through criminal law and encompasses certain forms and expressions of racism and xenophobia. However, it is rare that people exposed to discrimination because of their racial origin receive specific treatment by EU law. This is the case, for example, of the Roma community, which has given rise to certain standards on a European scale. The same is true, more recently, for people of African descent.

Furthermore, it should be mentioned that in response to a growing demand, the EU legislation has gradually come to the view that people subjected to racial discrimination may also be victims of more complex discrimination, since racial discrimination goes hand in hand with gender, sexual orientation, etc. Thus, Directive 2000/43/EC and Directive 2000/78/EC expressly refer to multiple discrimination which occurs through the interaction of gender with other factors of discrimination. In its Communication SEC (2005) 689⁴⁵ to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, the European Commission stresses the need to apply an *“integrated approach to combating discrimination and promoting equality between men and women, which would take into account the fact that some may experience multiple discrimination on several grounds”*.

With regard to nationality, at Community level, a citizen of a Member State may not be discriminated against when exercising their rights, neither by the security forces and public authorities, nor by other specific persons in any Member State. Moreover, the citizens of the Union are protected by the Court of Justice of the European Union (CJEU), which guarantees the application of this principle among the citizens of the Member States. The CJEU has declared that both discrimination on grounds of nationality and any other veiled form of discrimination are prohibited.

Although the right to free movement within the Union is recognised for citizens of the Member States, in the case of non-EU persons, the treatment of these persons is based on their categorisation according to their qualification and the reason for which they are on the territory of the Union, making a distinction,

43 EU. Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services. Official Bulletin of the European Union, 21 December 2004. Retrieved from: <https://eur-lex.europa.eu/legal-content/FR/TXT/PDF/?uri=CELEX:32004L0113&from=ES> (Last accessed 09/06/2019).

44 EU. Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast). Official Bulletin of the European Union, 26 July 2006. Retrieved from: <https://eur-lex.europa.eu/legal-content/FR/TXT/PDF/?uri=CELEX:32006L0054&from=es> (Last accessed 09/06/2019).

45 EU. Communication SEC (2005) 689 from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions. Framework strategy against discrimination and for equal opportunities for all. Commission of the European Communities, 1 June 2005. Retrieved from: <https://eumr-lex.europa.eu/legal-content/FR/TXT/PDF/?uri=CELEX:52005DC0224&from=ES> (Last accessed 09/06/2019).



in the latter case, between people travelling for professional reasons and those seeking international protection. Several Directives regulate the conditions of the migrant population by trying to link the possibility of regularisation with the absorption of these people on the labour market, in particular Directive 2009/50/EC on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment⁴⁶, Directive 2011/98/EU on applications for permits to reside and work in the Union by immigrants from third countries⁴⁷, Directive 2014/36/EU regulating the rights and conditions of entry and stay of third-country nationals with regard to temporary employment in the Union for a period between five and nine months⁴⁸, Directive 2014/66/EU on the conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer⁴⁹ – which aims to encourage the mobility of workers between companies with headquarters and branches in the EU, and Directive 2016/801 on the conditions of entry and residence of third-country nationals for the purposes of research, studies, training, voluntary service, pupil exchange schemes or educational projects and au pairing⁵⁰. In this context, Directive 2003/109/EC⁵¹ deals with the status of third-country migrants who are long-term residents, and recognises certain employment rights relating to social security, as well as simpler mechanisms for obtaining the nationality of the Member State of residence. Beyond the minimum, the situation depends on the State of residence. Hate language in discriminatory processes based on hatred towards minorities for various reasons, particularly on the internet, is a key issue in recent attempts by the EU to combat processes of discrimination against groups in vulnerable situations. Although this concern can be derived from several Community standards, it is worth mentioning, because of its relevance, Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia through criminal law⁵², which gave concrete form to a common and unified penal approach for certain forms of racism and xenophobia, and specifically for hate speech for racist and xenophobic reasons and for hate crimes. In this context, Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010, on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audio-visual media services⁵³, also addresses the issue of hate speech.

46 EU. Council Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment. Official Bulletin of the European Union, 18 June 2009. Retrieved from: <https://eur-lex.europa.eu/legal-content/FR/TXT/PDF/?uri=CELEX:32009L0050&from=ES> (Last accessed 09/06/2019).

47 EU. Directive 2011/98/EU of the European Parliament and of the Council of 13 December 2011, on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State. Official Bulletin of the European Union, 23 December 2011. Retrieved from: <https://eur-lex.europa.eu/legal-content/FR/TXT/PDF/?uri=CELEX:32011L0098&from=ES> (Last accessed 09/06/2019).

48 EU. Directive 2014/36/EU of the European Parliament and of the Council of 26 February 2014 on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers. Official Bulletin of the European Union, 28 March 2014 Retrieved from: <https://eur-lex.europa.eu/legal-content/FR/TXT/PDF/?uri=CELEX:32014L0036&from=es> (Last accessed 09/06/2019).

49 EU. Directive 2014/66/EU of the European Parliament and of the Council of 15 May 2014, on the conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer. Official Bulletin of the European Union, 27 May 2014. Retrieved from: <https://eur-lex.europa.eu/legal-content/FR/TXT/PDF/?uri=CELEX:32014L0066&from=ES> (Last accessed 09/06/2019).

50 EU. Directive 2016/801 of the European Parliament and of the Council of 11 May 2016 on the conditions of entry and residence of third-country nationals for the purposes of research, studies, training, voluntary service, pupil exchange schemes or educational projects and au pairing. Official Bulletin of the European Union, 21 May 2016. Retrieved from: <https://eur-lex.europa.eu/legal-content/FR/TXT/PDF/?uri=CELEX:32016L0801&from=es> (Last accessed 09/06/2019).

51 EU. Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents. Official Bulletin of the European Union, 23 January 2004. Retrieved from: <https://eur-lex.europa.eu/legal-content/FR/TXT/PDF/?uri=CELEX:32003L0109&from=ES> (Last accessed 09/06/2019).

52 As above.

53 EU. Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audio-visual media services. Official Bulletin of the European Union, 15 April 2010. Retrieved from: <https://eur-lex.europa.eu/legal-content/FR/TXT/PDF/?uri=CELEX:32010L0013&from=ES> (Last accessed 09/06/2019).



In addition to the definition of hate crimes, Union law encourages States to regulate racism and xenophobia as an aggravating element of crimes and suggests the organisation of specialised units in police forces and in public authorities, as well as specific training for legal operators⁵⁴.

The Roma group, for its part, has received specific treatment by Community anti-discrimination regulations, also in relation to hate speech and hate crimes, as expressed in the Council Recommendation of 9 December 2013 effective Roma integration measures in the Member States⁵⁵.

In terms of case law, in addition to the incorporation, in large part, of the categories of the ECtHR, the CJEU considers that there is direct discrimination in recruitment when the employer publicly declares that he will not recruit workers of a given ethnic or racial origin or foreign persons⁵⁶. EU legislation has gradually come to the view that people subjected to racial discrimination may also be victims of more complex discrimination, since racial discrimination can go hand in hand with gender and sexual orientation. Notwithstanding, it should be emphasized that the CJEU excluded nationality from the scope of protection of Racial Equality Directive 2000/43/EC.

As is the case with the legislative and regulatory context of discrimination at other levels, in EU law the grounds of discrimination were considered as isolated factors at the outset of the protection against discrimination. However, in recent years, the multiple consideration of discriminatory phenomena and, more recently, its intersectional conception⁵⁷ have gradually gained ground. The EU has developed the concept of '*special vulnerability*', which refers to people to whom several cumulative grounds of discrimination apply. The term "*especially vulnerable victim*" has had a significant development in minors, especially in human trafficking legislation⁵⁸, for which special attention to particularly vulnerable or disadvantaged people is fully justified. With regard to gender, age, disability and vulnerability generated by migratory processes, it is worth mentioning Directive 2011/36/EU on preventing and combating trafficking in human beings⁵⁹. Another factor that operates in racism, xenophobia and discrimination against the migrant population is religion, which has received attention from various EU instruments, such as Council Directive 2000/78/EC on discrimination in employment.

54 EU. Report SWD (2014) 27 final from the Commission to the European Parliament and the Council on the implementation of Council Framework Decision 2008/913/JHA on combating certain forms and expressions of racism and xenophobia through criminal law. European Commission, 27 January 2014. Retrieved from: <https://eur-lex.europa.eu/legal-content/ES/TXT/PDF/?uri=CELEX:52014DC0027&from=EN> (Last accessed 09/06/2019).

55 EU. Council Recommendation 2013/C378/01 of 9 December 2013 on effective Roma integration measures in the Member States. Official Bulletin of the European Union, 24 December 2013. Retrieved from: [https://eur-lex.europa.eu/legal-content/FR/TXT/PDF/?uri=CELEX:32013H1224\(01\)&from=ES](https://eur-lex.europa.eu/legal-content/FR/TXT/PDF/?uri=CELEX:32013H1224(01)&from=ES) (Last accessed 09/06/2019).

56 CJEU judgement of 10 July 2008, C-54/07, Cas Centrum voor gelijkheid van kansen en voor racismebestrijding v. Firma Feryn NV. Retrieved from: <http://curia.europa.eu/juris/document/document.jsf?text=&docid=67586&pageIndex=0&doclang=ES&mode=lst&dir=&occ=first&part=1&cid=2932677> (Last accessed 09/06/2019).

57 EU. Resolution 2017/2038(INI) of the European Parliament of 25 October 2017, on fundamental rights aspects in Roma integration in the EU: fighting anti-gypsyism. Official Bulletin of the European Union, 27 September 2018. Retrieved from: <https://eur-lex.europa.eu/legal-content/FR/TXT/PDF/?uri=CELEX:52017IP0413&from=ES> (Last accessed 09/06/2019).

58 In fact, Council Framework Decision 2002/629/JHA of 19 July 2002 on combating trafficking in human beings specifically states "(5) Children are more vulnerable and therefore run a greater risk of becoming victims".

59 EU Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA. Official Bulletin of the European Union, 15 April 2011. Retrieved from: <https://eur-lex.europa.eu/legal-content/FR/TXT/PDF/?uri=CELEX:32011L0098&from=ES> (Last accessed 09/06/2019) Recital (12) of this Directive states: "*In the context of this Directive, 'particularly vulnerable persons' should include at least all children. Other factors that could be taken into account when assessing the vulnerability of a victim include, for example, gender, pregnancy, state of health and disability*".



5. CONCLUSIONS

Racial discrimination, racism, xenophobia and related intolerance are a disease present in almost every human structure in the world. These phenomena therefore affect a large number of people. This is a reality that can happen anywhere on the planet. The widespread acceptance of this phenomenon as irremediable, inevitable or even non-existent leads to institutional passivity or resignation which appears to be one of the greatest risks to the protection of human rights. For this reason, the process of eliminating discrimination is so complex and requires action and cooperation between international institutions, national governments, the civilian population, public bodies and private companies. This phenomenon affects all social spheres, both in community life and in private and family life, and the struggle to put an end to it inevitably involves express recognition of its prohibition.

Although the causes of discrimination are heterogeneous, in the international legislative and regulatory framework, some of them are the object of particular attention: (i) racial or ethnic origin, (ii) skin colour, (iii) nationality, (iv) citizenship, e.g. the status of non-national which includes refugees, asylum seekers, migrant workers and victims of trafficking, (v) national or social origin, (vi) birth, (vii) ancestry, (viii) conditions affecting legal capacity, (ix) sex and gender, gender identity or sexual orientation, (x) language, especially minority languages, (xi) religion and belief, (xii) political or other opinions, (xiii) any type of disability, (xiv) age, particularly the young and the elderly, (xv) marital status and family situation, (xvi) state of health, (xvii) place of residence or (xviii) economic or social status.

The diversity of this reality requires special monitoring of the groups concerned, since the recognition of their existence is the first step towards their protection. The most important measure is the signing of all multilateral instruments, as well as their ratification and the national transposition by States of all international conventions and treaties on equality and non-discrimination, since they establish the essential courses of action to ensure full access to and enjoyment of human rights.

International human rights law contains peremptory norms such as the prohibition of racial discrimination. However, international treaties are voluntary membership agreements. In addition, the coercive power necessary to enforce them is relatively limited. The most important thing is therefore that States adhere to and ratify all international human rights conventions, and that they lift all the reservations they have made to them.

Moreover, the definition of certain phenomena and realities at the root of discrimination, racism and xenophobia is a very controversial issue at international level. Therefore, another essential element in establishing safeguards against discrimination would be to recognise internationally accepted definitions as valid and to include the prohibition of discrimination in the terms provided by international treaties in regional, national and local systems. It is therefore necessary for national legislation to make explicit reference to groups in a situation of vulnerability, for these groups to benefit from a special protection regime and for their full participation in society to be ensured.

A recurrent measure in the general comments of the International Committees is to remind States of the obligation to ensure that differential treatment pursues a legitimate and necessary objective and respects proportionality. In addition, measures are envisaged such as the provision of adequate human rights training to civil servants in order to avoid any institutionalised discrimination such as profiling, in addition to the promotion of diversity awareness campaigns for society as a whole. (Finally, it is found that the effectiveness of measures against discrimination requires financial and human resources in the plans for



the prevention of discrimination and the promotion of human rights. Hate speech is a quite common public manifestation of racism, xenophobia and intolerance. It must therefore be particularly monitored and controlled without disproportionate restriction of freedom of expression. In addition to advocating a criminal law route, international human rights committees suggest developing positive measures as part of comprehensive anti-racism plans to allow minorities to express themselves and thus encourage their presence in society). In this sense, criminalising the situations of irregularity in which migrants, refugees or asylum seekers can be found needs to be avoided if we want to put an end to their stigmatisation. In the case of non-nationals, situations of statelessness must be prevented in order to guarantee the full enjoyment of rights under conditions of equality. These are the groups that encounter the most difficulties in accessing basic goods such as health, education or justice. When national anti-discrimination plans are being drawn up, the committees remind States that racism, xenophobia and intolerance overlap or add to other grounds for exclusion. These aspects should be taken into consideration when developing any regulations that particularly affect any of the above categories.

Hate speech is a very widespread public manifestation of racism, xenophobia and intolerance. It must therefore be especially monitored and controlled without disproportionate restriction of the right to freedom of expression. Instead of advocating a criminal law route, international human rights committees suggest developing positive measures as part of comprehensive anti-racism plans to give a voice to minorities and thus encourage their presence in society. In this sense, criminalising the situations of irregularity in which migrants, refugees or asylum seekers may find themselves needs to be avoided in order to put an end to their stigmatisation. In the case of non-nationals, situations of statelessness must be prevented to guarantee their full enjoyment of rights under conditions of equality. These are the groups that encounter the most difficulties in accessing basic goods such as health, education or justice. When national anti-discrimination plans are being drawn up, the committees remind States that racism, xenophobia and intolerance interact or add to other grounds for exclusion. These aspects must be taken into account when developing any type of regulation that particularly affects the aforementioned groups.

Ultimately, States cannot simply refrain from taking a stand and remain passive towards forms of discrimination, regardless of its grounds. They must play an active role in the process of eliminating discrimination. It is therefore imperative that they adopt legislation expressly prohibiting discrimination based on what is imposed by the international instruments. It is therefore not enough to adopt new laws; it is essential to review them periodically and amend them when necessary to ensure their conformity with international human rights law. National, regional and local policies, plans and action strategies must specifically target all social groups that are vulnerable due to the processes of discrimination to which they may be subjected. State budgets, resource allocation and all measures aimed at stimulating economic growth must aim to guarantee the effective exercise of rights within the framework of an effective accountability mechanism.

Human development is possible only to the extent that all people can participate on an equal footing and fully enjoy social, political, cultural and economic life without discrimination, racism, xenophobia or any other form of intolerance due to their identification or perception as part of a particular group. Finally, the elimination of discrimination is the *sine qua non* of a fairer and more egalitarian society.

The highest level of safeguards in protection against discrimination affecting the migrant population is related to racial discrimination. The European and Inter-American regional systems are more developed than the African system, which has geared its protection measures towards the internally displaced population in African states.



In the European region, the rise of hate speech against migrants, Muslims, Jews and Roma in the political sphere and on the Internet is seen as a serious problem. Because of this problem, a protocol has been developed. Several decisions have been signed and several recommendations have been made regarding hate speech.

At this level, it is also difficult for victims of discrimination to lodge a complaint. Difficulties may be due, among other things, to lack of information from victims, so support for equality bodies can help to improve the situation. Other tools such as the reversal of the burden of proof aim to facilitate the viability of legal claims based on discrimination.

On the other hand, one of the possible explanations for the rise of racism may lie in the fact that the migration policies implemented are not human rights-oriented but rather aim to criminalise irregular migration, and that integration policies are inadequate.

In the inter-American system, there are two anti-discrimination conventions which take into account the individual and collective experience of discrimination in order to combat exclusion and marginalisation because of race or ethnic group. It is in this context that the concept of intersectional discrimination was introduced.

In the inter-American system, racial and/or ethnic discrimination is considered to stem from stereotypes and prejudice against people of African descent. In the European system, this is especially the case with Roma. In both systems, this discrimination based on race and/or ethnicity stems primarily from stereotypes and prejudices.

The EU is a supranational organisation competent to dictate rules which become part of the internal law of the Member States. Various binding and non-binding Community standards have laid the foundations for combating discrimination within the Union and have generated a series of common obligations for the States, as well as certain obligations for the citizens of these States. In addition, the case law of the CJEU has also shaped state obligations, as we have seen, increasingly guaranteeing protection against discrimination.

An obstacle to the implementation of European objectives which crystallises in the various European standards is that these have not been adopted and adapted in a homogeneous manner in all the Member States, with sometimes notable differences.

On the other hand, in many cases, the lack of data concerning the real scope of racist attacks, the impact of discrimination on certain groups and the recording of hate crimes represents an issue in its own right at European level. The shortcomings regarding the specialisation, training and awareness of public authorities and law enforcement agencies persist even after the approval of the Lisbon Treaty, by which the Union strengthened its competences in the field of the struggle against discrimination. There is still considerable room for improvement.

Current trends such as the growing influence of the Internet affect hate speech and discriminatory acts. For this reason, the most recent regulations give a lot of importance to this issue, strengthening the protection of victims of such acts, by implementing more prevention and training measures. In today's highly deregulated environment, community efforts focus on addressing hate crimes and their particular impact on minorities. However, the terminological inaccuracies in this area prevent a homogeneous concept throughout the Union. Such a concept would, however, provide more legal certainty.



Anti-Romani sentiment, growing Islamophobia and rejection of people of African descent still persist within the Union. In this context, characterised by constant migratory flows and movements, this line of discrimination is combined with others such as gender, sexual orientation or disability, all of which require a commitment that, especially in the case of the latter, needs to be developed. An intersectional approach is still expressed to a very small extent – sometimes not at all – in the various national regulations, although international bodies, including the case law of supranational courts, have taken steps in this direction. This is why it is up to the Member States, in tackling discrimination, to be aware of it as a multidimensional problem that is more complex than has hitherto been thought.

It can be said that although international human rights law provides a series of values, regulations and protection mechanisms to combat racism and xenophobia directed at migrants, diversity management is a challenge for the different communities. Human rights, the ideal of human dignity and the principle of equality and non-discrimination inherent in this ideal, must guide the various regulations, policies and initiatives at the national level.



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Partners:

