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Item 3 of the provisional agenda **Requests addressed to the Advisory Committee stemming from Human Rights resolutions:  
A global call for concrete action for the total elimination of racism, racial discrimination, xenophobia and related intolerance and the comprehensive implementation of and follow up to the Durban Declaration and Programme of Action**

A global call for concrete action for the total elimination of racism, racial discrimination, xenophobia and related intolerance and the comprehensive implementation of and follow up to the Durban Declaration and Programme of Action

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Report of the Human Rights Council Advisory Committee on A global call for concrete action for the total elimination of racism, racial discrimination, xenophobia and related intolerance and the comprehensive implementation of and follow up to the Durban Declaration and Programme of Action

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I. Introduction

A. Mandate

1. Despite the efforts of the international community over the past decades, racism continues to plague our societies, leading to systematic human rights violations. Thus, with a view to eradicating this scourge of humanity through concrete actions, the General Assembly, in its resolution 52/111 of 12 December 1997, convened the Durban Conference. This was concluded with the adoption of the Durban Declaration and Programme of Action in 2001. Twenty years later, the General Assembly, in its resolution 72/157 of 19 December 2017, established a mandate focused on the implementation of the measures taken during the 2001 Declaration.

2. At its seventy-second session in December 2017, the General Assembly adopted its resolution 72/157, entitled “A global call for concrete action for the total elimination of racism, racial discrimination, xenophobia and related intolerance and the comprehensive implementation of and follow-up to the Durban Declaration and Programme of Action”, and requested the Human Rights Council to continue to pay attention to the situation regarding racial equality in the world, and in this regard requested the Council, through its Advisory Committee, to prepare a study on appropriate ways and means of assessing the situation, while identifying possible gaps and overlaps. The Secretary-General, through resolution 72/157, is requested to submit to the General Assembly at its seventy-third session a report on the implementation of that resolution. A drafting group will be established in August 2018, at the twenty-first session of the Advisory Committee.

3. In its resolution, the General Assembly states that it is “alarmed at the spread in many parts of the world of various racist extremist movements based on ideologies that seek to promote populist, nationalist, right-wing agendas and racial superiority, and stressing that these practices fuel racism, racial discrimination, xenophobia and related intolerance” and deplored “the ongoing and resurgent scourges of racism, racial discrimination, xenophobia and related intolerance in many regions of the world, particularly targeting migrants and refugees, as well as people of African descent, expressing concern that political leaders and parties have supported such an environment, and in this context expressing its support for migrants and refugees in the context of the severe discrimination that they may face”.

B. Normative Framework

4. The Durban Conference’s Declaration clearly identifies slavery, poverty, underdevelopment, marginalisation, social exclusion or economic disparities as sources and manifestations of racism ["Declaration", Durban World Conference against Racism, Racial Discrimination, Xenophobia and Intolerance, 2001, §18]. In this way, it demonstrates that this phenomenon is not only linked to history, but can also affect new groups such as migrants, refugees, but also women and children belonging to certain minorities [§§30 and 38]. The Declaration states that no country can claim to be free from racism, which must therefore be a global concern. As such, it proposes the implementation of measures in the field of prevention, education and protection against racism [§34]. In addition, the text of the Declaration also states that racist, discriminatory, xenophobic or intolerant behaviour generates violence. For the record, the main objective of the United Nations is to guarantee peace and collective security [UN Charter, art. 1§1], and the elimination of racism is therefore a necessary condition for maintaining peace by reducing the phenomena of violence.

5. In 2009, a Durban Review Conference was convened to take a first look at the Declaration and Programme of Action adopted in South Africa. It emphasises the urgent need to prevent, combat and completely eliminate such behaviour in contemporary society and notes that the programmes of action and objectives previously set have not been achieved in many areas. To overcome this inefficiency, on 19 December 2017, United Nations General Assembly Resolution 72/157 was adopted with a view to launching a "Global Call for Concrete Action for the Total Elimination of Racism and Racial Discrimination, Xenophobia and Related Intolerance and the Comprehensive Implementation of and Follow-up to the Durban Declaration and Programme of Action”. The Resolution recalls that the 2001 Durban Declaration and Programme of Action is a solid basis for action and prescribes, inter alia, comprehensive measures to combat acts related to racism and to fill the gaps in the 1965 International Convention on the Elimination of All Forms of Racial Discrimination ["Global Call for Concrete Action for the Total Elimination of Racism, Racial Discrimination, Xenophobia and Related Intolerance and the Comprehensive Implementation of and Follow-up to the Durban Declaration and Programme of Action", Resolution adopted by the United Nations General Assembly, A/RES/72/157, 19/12/2017, Preamble paragraph 4, §§3-5]. The General Assembly also stresses the need for the full and effective implementation of these principles in view of the resurgence of racist and extremist movements promoting racial superiority in contemporary societies ["Global Call for Concrete Action for the Total Elimination of Racism, Racial Discrimination, Xenophobia and Related Intolerance and the Comprehensive Implementation of and Follow-up to the Durban Declaration and Programme of Action", Resolution adopted by the United Nations General Assembly, A/RES/72/157, 19/12/2017, Preamble paragraphs 1, 6 and 78].

6. To implement this global appeal, the UN Secretary General adopted a Report on 7 September 2018, entitled "Global Call to Action for the Total Elimination of Racism, Racial Discrimination, Xenophobia and Related Intolerance and for the Comprehensive Implementation of and Follow-up to the Durban Declaration and Programme of Action", [UN Secretary-General's Report, A/73/371, 07/09/2018]. It brings together various measures taken by States in the implementation of the Durban Programme of Action. It also provides recommendations and identifies several key areas in which action to combat racial discrimination is important. Through an inventory of possible initiatives, it draws up a non-exhaustive list of different functional measures in certain States so that they can strengthen their national systems.

7. In addition, on 16 June 2003, the Secretary General appointed five independent experts, whose mandate is to monitor the implementation of the provisions of the Durban Declaration and Programme of Action and to prepare all the necessary recommendations for this task. In addition, within the framework of the Human Rights Council, a Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance of the Human Rights Council has also been appointed.

II. Concepts and Definitions

A. From the concept of race to racism

8. There is no international definition of the concept of "race". It is extremely dependent on the historical contexts in which it is formulated, but also on the languages and semantics in which these terms are used. The concepts of race and ethnicity are fluctuant: what is referred to as "race" in one country is referred to as "nation", "nationality", "ethnicity", "ethnic group" in others [MORNING Ann, “Ethnic Classification in Global Perspective : A Cross-National Survey of the 2000 Census Round”, Population Research Policy Review, 27/2, 2008, pp. 239-272] .

9. The idea of race stems from a visible observation: there are physical differences between members of the same species. Applied to human beings, the concept was first used in the 17th century by François Bernier who, based on geographical and physical criteria, distinguished "four or five species or races of humans whose difference is so significant that it can serve as the right basis for a new division of the Earth” [BANCEL et al, L'invention de la race, des représentations scientifiques aux expositions de populations, La découverte, 2014, p. 28]. In this sense, the concept of race is then only used to describe and classify individuals according to their physical characteristics, and in particular the colour of their skin. Race becomes an organisational idea: it is thought to differentiate human beings from distinctive combinations of physical traits transmitted in a lineage. The idea of race has a double dimension, both biological, physiological (the race is written in the bodies) and filial (the race is transmitted). At that time, the concept of race was not yet an analytical concept to explain the differences between men, it was only used to describe them.

10. Racism is constructed in the opposite direction of exchange with the other. On the contrary, it is based on the negation of the value of the other, solely because of his physical and biological characteristics. He denies the individuality of the human being by postulating that individuals of the same race possess the same character traits, psychological inclinations, qualities and defects. But evolving with the times,"[t]he racism escapes any objective grasp[...] because it is constantly recomposed under new faces and forms (...)"[H. Bentouhami, M. Möschel (dir.), Critical Race Theory - An Introduction to the Great Founding Texts, Paris, Dalloz, 2017, p. 2.]

B. From the principle of equality to non-discrimination

11. The principle of equality is one of the very foundations of the idea of democracy. It postulates that things, situations or individuals must be treated equally [C. Perelman, Egalité et valeurs, in H. Buch et al (DIR), L'égalité, Bruxelles : Bruylant, Vol. I, 1971, p.320]. It is the matrix of the various human rights instruments, all of which refer to it. In this sense, the preamble to the Universal Declaration of Human Rights emphasizes that all members of the human family are born free and equal in law.

12. However, it may seem difficult to grasp the true scope of this principle in law. Is equality a value, a principle, a right? A distinction is often made by international instruments in terms of equality "before the law" ("equality before the law") and equality "in the rule of law" ("equality in the law”). For H. Kelsen, this latter expression refers to the idea that there should be no difference in treatment under the law on certain specific distinctions. Equality before the law refers to the fact that protection bodies can only take into account distinctions made in the law itself. It would be possible to attribute to the legislator a breach in the equal protection of the law since it must purge the legal rules it adopts of any discrimination, while a breach in equality before the law would be attributable to the executive and judicial powers in charge of applying the law equally for all without creating discrimination according to persons [H. Kelsen, Théorie pure du droit, [1962], Paris : LGDJ, 1999, 2nd edition, p.190.].

13. As a negative formulation of equality in many international law texts, non-discrimination is a subjective right of the private person. According to P. Meyer-Bisch, the right to non-discrimination is a multidimensional, transversal and unclassifiable right. Legally, discrimination is defined as "any distinction, exclusion, restriction or preference... which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by all, on an equal footing, of all human rights and fundamental freedoms". In short, the law does not prohibit distinctions, but it prohibits discriminatory distinctions that deny the principle of equality. Discrimination, unlike simple distinction, is based on a criterion considered illegitimate and therefore prohibited [M. Borgetto, "Égalité, différenciation et discrimination : ce que dit le droit", Informations sociales, vol. 148, no. 4, 2008, pp. 8-17.]. Among these many criteria, race, origin, sex, religion, to name only the main ones.

14. In addition, discrimination has an impact at different levels: access to education (including higher education), employment, housing, health (...). It is also observed that often, the criteria for distinction are cumulative and produce as a result of situations of cascading discrimination.

15. A distinction is also made between direct and indirect discrimination. It is direct "when it is expressly based on a prohibited criterion", indirect when it "is based on a criterion that appears neutral, but leads to the same result as discrimination based on an expressly prohibited criterion"[E. Ellis and P. Watson, EU Anti-Discrimination Law, 2nd ed., Oxford, Oxford, Oxford University Press, 2012, pp. 143-155]

16. The right to non-discrimination implies a double obligation for States: negative and positive. The negative obligation implies that the State must not discriminate against persons under its jurisdiction. The positive obligation presupposes that it takes effective measures to protect persons who may be victims of discrimination.

17. Moreover, the concept of discrimination is changing in its use. Positive discrimination is now referred to as positive discrimination to designate certain differences of treatment not prohibited by law [M. Borgetto, Ibid.] The purpose of so-called positive discrimination practices is to correct "negative" discrimination by favouring categories of people who usually suffer such discrimination (the concept was initially conceived in the United States, in order to correct discrimination against people of black colour; it was then applied to women, people with disabilities, people from a disadvantaged social background...).

C. Racial discrimination: breach of the principle of equality

18. The principle of equality, applied to the racial issue, postulates that each individual, regardless of race, has the same rights as any other, and is not discriminated against on the basis of race. However, there is a considerable gap between the principle of equality and the implementation of public policies in favour of racial equality.

19. Racial discrimination, a direct consequence of racism, was born at the same time as racism. The International Convention on the Elimination of All Forms of Racial Discrimination defines racial discrimination as “any distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin 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 and cultural fields or in any other field of public life.” It should be stressed that racial discrimination does not only apply to people of "colour". It targets any disadvantaged person who is treated as genetically inferior (e.g. anti-Jewish, anti-Gypsy racism, to mention only these two examples).

20. Racism and racial discrimination are practices that are largely part of a social construction. In this respect, they are deeply rooted in the collective unconscious. There is indeed an intrinsic collective dimension to racial prejudice and racial equality policies. A participant in this idea, it is noted that "[t]he belief in equal opportunity is deeply rooted among white middle-class Americans. Minority students who fail at school are supposed to reject American norms and values. (...) it is easier to blame parents than to question structural inequality. " [A. Osler, "School: Can Racial Equality be Inspected? "(translated from English by F. Lorcerie), Migrations Société, 2010/5, No. 131, pp. 185-200). This kind of attitude reveals the perception of racial discrimination by individuals belonging to the ruling class; its importance is reduced or even (consciously or unconsciously) ignored. Regardless of the adoption of laws or decisions, the latter do not necessarily or immediately guarantee formal equality, as the implementation of laws can take years. Even when formal equality is achieved, individuals and groups may have to struggle to assert their rights [A. Osler, Ibid.

III. Normative foundations

A. The standards

21. All international human rights law instruments aim to establish equality between individuals regardless of their race, as this principle is so closely linked to human dignity. Equality has been enshrined in particular in Article 1 of the Universal Declaration of Human Rights, which states that "all human beings are born free and equal in dignity and rights". This principle implies, in international human rights law instruments, the equal enjoyment of rights, a declination of the principle of equality before the law within the major human rights instruments.

22. In an attempt to eradicate racist and discriminatory abuses, various specific legal instruments have been adopted by States and international institutions. The obligation of non-discrimination in the enjoyment and exercise of internationally protected rights is found in the main UN instruments, but also in certain specific conventions.

23. In 1965, the international community drafted the International Convention on the Elimination of All Forms of Racial Discrimination. It is the first major conventional tool to combat racism. This convention establishes a committee, which is a body composed of independent experts to monitor the implementation of the Convention. Other conventions and conferences testify to the commitment of States to combat policies that prioritize races and undermine equality between individuals. These include the International Convention on the Suppression and Punishment of the Crime of Apartheid or the World Conference against Racism and Racial Discrimination.

24. In 2001, the Durban Declaration was adopted. It identifies slavery, poverty, underdevelopment, marginalization, social exclusion and economic disparities as sources and manifestations of racism. It also states that racist, discriminatory, xenophobic or intolerant behaviour generates violence. In order to ensure the follow-up to the Durban Declaration, three mechanisms have been established by the Declaration: a group of independent eminent experts on the implementation of the Durban Declaration and Programme of Action, an intergovernmental working group on the effective implementation of the Durban Declaration and Programme of Action and a United Nations working group of experts to study the problems of racial discrimination of people of African descent.

25. In addition, all regional instruments of general application provide for the obligation to respect the principle of equality and non-discrimination, with the exception of the Charter of Fundamental Rights of the European Union, which contains no substantive limitation on the prohibition of discrimination.

26. As for the autonomous right to non-discrimination, it is also enshrined in the majority of human rights treaties. In addition to general texts, it is also found in sources protecting specific rights.

27. However, the proclamation and legal recognition of equality and non-discrimination are not enough. It must be noted that the mere legal or financial sanction is not enough to ensure that States respect the principle of equality and non-discrimination.

B. The case law

1. The concepts of racial equality and discrimination in international jurisprudence

28. Even before the entry into force of the International Convention on the Elimination of All Forms of Racial Discrimination, the International Court of Justice addressed the issue of respect for the principles of racial equality and non-discrimination. In the South West African case, the judges thus established that the South African regime was an apartheid regime which discriminated within society on the grounds of race, colour, national or tribal origin and thus violates the principle of equality (South West African Affairs, second phase, judgment, ICJ, Reports 1966).

29. The Inter-American Court of Human Rights has incorporated the principles of equality and non-discrimination in its case law and considers the right to racial equality as a norm of jus cogens. In particular, it is the weight of racial discrimination on the intrinsic dignity of the human person that makes the principle of equality one of the cardinal principles for the Court. This approach reinforces the legal value of the right to racial equality and non-discrimination. The judges also consider that domestic and international public orders must take these principles into account when establishing their legal systems. In this perspective, the Court concludes, in Norin Catriman and Others v. Chile, that racial discrimination is a distinction, exclusion, restriction or preference which has the purpose or effect of destroying or impairing the recognition, enjoyment or exercise of human rights and fundamental freedoms in the political, economic, social, cultural or other fields [CIADH, Norín Catrimán y otros (dirigentes, miembros y activista del pueblo indigena mapuche) vs. Chile, Sentencia de 29 de Mayo de 2014, §§197 and following]. The Court has ruled on cases relating to indigenous peoples in particular in matters of racial equality. In addition, the right to cultural identity is guaranteed by the Court's case-law, which links it to the principles of equality and non-discrimination. It thus considers that this right is an essential element in the fight against racial discrimination and that guaranteeing the right to cultural identity is an important means of promoting equality between indigenous peoples and other components of societies in Latin America [CIADH, Pueblo Indigena Kichwa de Sarayaku vs. Ecuador, Sentencia de 27 de Junio de 2012, §213]. This therefore brings these principles of racial equality and non-discrimination within the scope of collective human rights and therefore confers essential legal value on them.

30. The African Court on Human and Peoples' Rights is in line with the case law of the Inter-American Court. It thus considers that the right to non-discrimination is linked to the right to equality before the law [ACHPR, Tanganyika Law Society and the Legal and Human Rights Centre v. United Republic of Tanzania, Judgment of 14 June 2013, §119]. The breach of the principle of equality therefore leads to a discriminatory measure, which the Court does not hesitate to sanction, particularly when the applications concern indigenous ethnic minorities [ACHPR, African Commission on Human and Peoples' Rights v. Republic of Kenya, Judgment of 26 May 2017, §142].

31. The European Court of Human Rights, in its settled case-law, defines discrimination as the different treatment, without objective and reasonable justification, of persons placed in comparable situations [ECHR, Willis v. the United Kingdom, Judgment of 11 June 2002, §48]. It states, inter alia, that discrimination based on a person's ethnic origin is a form of racial discrimination [ECHR, D.H. and others v. Czech Republic, Judgment of 13 November 2007, §176]. Moreover, the Court points out that discrimination on grounds of race may even in itself constitute degrading treatment within the meaning of Article 3 of the European Convention on Human Rights [ECHR, Moldovan and Others v. Romania, Judgment of 12 July 2015, §§111-113]. However, the European Court of Human Rights shows a certain flexibility in terms of differential treatment on the basis of race by stating that Article 14 of the Convention does not prohibit contracting parties from treating groups in a differentiated manner to correct "factual inequalities" between them [ECHR, Sejdic and Finci v. Bosnia and Herzegovina, judgment of 22 December 2009, §44].

32. Overall, in the light of the general regime of the principle of equality and non-discrimination, in cases where a difference of treatment is established, treatment is discriminatory if it lacks "objective and reasonable justification", i.e. if it "does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim pursued" (ECHR, Burden v. United Kingdom, Judgment of 29 April 2008, §60; Human Rights Committee, Muller v. Namibia, Views of 26 March 2002]. However, as regards differences of treatment based on race, colour or ethnic origin, the notion of objective and reasonable justification must be interpreted as strictly as possible [ECHR, Orsus and Others v. Croatia, Judgment of 16 March 2010, §156]. The Inter-American Court goes further by considering that the American Convention prohibits any discriminatory norm, act or practice based on the ethnic origin of the person and that, consequently, no rule, decision or practice of domestic law, whether on the part of State authorities or individuals, may diminish or restrict the rights of a person on the basis of his or her ethnic origin[CIADH, Norin Norín Catrimán y otros (dirigentes, miembros y activista del pueblo indigena mapuche) v. Chile, op. cit. §206].

33. In addition, international jurisprudence imposes a number of positive obligations on States in terms of racial equality and non-discrimination. These obligations are substantial and procedural in nature.

34 The Inter-American Court of Human Rights first of all enshrines the obligation to respect and ensure the full and free exercise of the rights and freedoms recognized in the Convention without any discrimination. Failure to comply with this obligation even entails the international responsibility of the State [CIADH, Nadege Dorzema y otros vs. Republica Dominicana, Sentencia de 24 de Octubre de 2012, §224]. The Court had already established the obligation of States to take positive measures to combat discrimination against a specific group of persons [IACtHR, Atala Riffo y niñas v. Chile, Sentencia de 24 de Febrero de 2012, §80].

35. On the other hand, the enjoyment of the right to non-discrimination, in particular in the context of the elimination of all forms of racial discrimination, depends on the procedural measures that accompany it. Thus, international bodies have affirmed the existence of positive procedural obligations binding on States parties. These procedural measures include those deduced from article 6 of the 1969 International Convention on the Elimination of All Forms of Racial Discrimination: access to effective remedies and the duty of national authorities to investigate promptly and diligently allegations of acts of discrimination [CERD, Zaad Ben Ahmed Habassi v. Denmark, 17 March 1999].

36. The principle of reversal of the burden of proof has also been elevated to the level of a positive procedural obligation in order to improve judicial proceedings open to victims of racial discrimination. This measure, recommended by the Committee on the Elimination of Racial Discrimination [CERD, Laurent Gabre Gabaroum v. France, 10 May 2016, §9], has been endorsed by the case law of several protection bodies[IACtHR, Nadege Dorzema y otros vs. Republica Dominicana, op. cit., §229; ECHR, Timichev v. Russia, Decision of 13 December 2005, §57].

37. Despite recent developments in international case law on combating racial discrimination, which seem to indicate a strong desire to exclude differential treatment on such a discriminatory ground, international human rights bodies are still confronted with the conceptual limits of racial equality because of its uncertain nature.

2. The concepts of racial equality and discrimination in national case law

38. In addition to international case law, decisions of national courts are also very interesting in the field of racial equality. Some States have in the past had a particular relationship with racial equality and produce a rich jurisprudence in the field of non-discrimination.

39. First of all, it is worth mentioning the judgments handed down by the American courts on the subject of racial equality. The Supreme Court's Brown v. Board of Education decision is essential in this area. The Court thus declares that segregation in education is contrary to the provisions of the Constitution and that it must be ended [Supreme Court of the United States, Brown v. Board of Education of Topeka, Judgement of the May 17, 1954]. This decision is made in a legal system where the separation between blacks and whites did not constitute racial discrimination [Supreme Court of the United States, Plessy v. Ferguson, Judgement of the May 18, 1896] under the doctrine of "separate but equal".

40. A few years later, in 1964, the Supreme Court declared the prohibition of segregation or discrimination in public or commercial places to be in conformity with the Constitution [Supreme Court of the United States, Heart of Atlanta Motel v. United States, Judgement of the December 14, 1964]. More generally, since the 1960s, there has been a particularly rich development of case law in the United States on the promotion of racial equality and the fight against discrimination, in a context of abolition of segregation[Supreme Court of the United States, Loving v. Virginia, Judgement of the June 12, 1967; Supreme Court of the United States, Regents of the University of California v. Bakke, Judgement of the June 28, 1978 ; Supreme Court of the United States, Grutter v. Bollinger, Judgement of the June 23, 2003].

41. South African case law has also been provided on racial equality decisions since the end of the apartheid regime. In the T. Makwanyane and M. Mchunu v. South Africa, the Court recalls that the country's Constitution provides for the principle of non-discrimination on the basis of colour, race, class, creed or sex [Constitutional Court of the Republic of South Africa, T. Makwanyane and M. Mchunu v. The State, Judgment of the June 6, 1995, §7]. It also specifies that race still too often plays a role in the aggravation or mitigation of a criminal sentence and that this situation cannot be perpetuated [Ibid. §54]. Finally, the judges made a strong plea promoting full equality between South African citizens and the abolition of all forms of discrimination based on colour or race [Ibid. §262]. This position was confirmed in 1996 by the Azapo v. The President of the Republic of South Africa [The Azanian peoples organization (AZAPO) and others vs. The President of the Republic of South Africa, Judgement of the July 25, 1996].

3. The particular contributions of case law

42. The case law of the various international bodies as well as national courts is of particular interest for the study of racial equality. The following paragraphs present in detail the most relevant elements in this regard.

43. In Norin Catriman and Others v. Chile, the Court defined the concept of racial discrimination as follows:

§197 : "On the principle of equality before the law and non-discrimination, the Court has pointed out that the notion of equality is directly derived from the unity of the nature of the human race and is inseparable from the essential dignity of the person, in the face of which it is incompatible any situation which, by considering it superior to a particular group, leads to it being treated with privilege; or which, conversely, by considering it inferior, treats it with hostility or in any way discriminates against it from the enjoyment of rights which are recognized to those who do not consider themselves to be in such a situation. The jurisprudence of the Court has also indicated that at the present stage of the evolution of international law, the fundamental principle of equality and non-discrimination has entered the domain of jus cogens. On it rests the juridical scaffolding of the national and international public order and permeate all the juridical order. »

§200 : "The Court has determined that a difference in treatment is discriminatory when it does not have an objective and reasonable justification, that is, when it does not pursue a legitimate aim and there is no reasonable relationship of proportionality between the means used and the aim pursued. "IACHR, Norin Catriman and others (leaders, members and activist of the Mapuche indigenous people) v. Chile, op. cit. ]

44. In the case of Pueblo indigena Kichwa de Sarayaku v. Ecuador, the Court stated that the right to equality is a collective right that applies in particular to indigenous peoples. It also states that the right to cultural identity is an essential corollary of the right to equality and non-discrimination:

§213: « Under the principle of non-discrimination established in Article 1(1) of the Convention, recognition of the right to cultural identity is an ingredient and a crosscutting means of interpretation to understand, respect and guarantee the enjoyment and exercise of the human rights of indigenous peoples and communities protected by the Convention and, pursuant to Article 29(b) thereof, also by domestic law. » [CIADH, Pueblo indigena Kichwa de Sarayaku vs. Ecuador, op. cit.]

45. In the African Commission on Human and Peoples' Rights v. Republic of Kenya decision, the Court ruled on the scope of the right to non-discrimination and ruled in favour of the Ogiek indigenous community in Kenya. This decision considerably strengthens the case law on the right to equality of indigenous peoples:

§138: "The right not to be discriminated against is linked to the right to equality before the law and to equal protection of the law, which is guaranteed in Article 3 of the Charter. The scope of the right to non-discrimination extends beyond the right to equal treatment by law. It also has a practical dimension in that individuals should, in fact, be able to enjoy the rights enshrined in the Charter without distinction of any kind as to race, colour, sex, religion, political opinion, national or social origin or any other status. The term "any other situation" includes cases of discrimination that could not have been foreseen at the time of the adoption of the Charter. In determining whether any time falls within this category, the Court takes into account the general spirit of the Charter. "ACHPR, African Commission on Human and Peoples' Rights v. Republic of Kenya, op. cit.

46. In Natchova and Others v. Bulgaria, the Court in turn defined racial discrimination and urged states to fight for the promotion of the principle of equality:

§145: "Discrimination consists in treating persons in comparable situations differently, unless there is an objective and reasonable justification, (Willis v. the United Kingdom, no. 36042/97, § 48, ECHR 2002-IV). Racial violence constitutes a particular violation of human dignity and, given its dangerous consequences, requires special vigilance and a strong response from the authorities. Therefore, they must use all the means at their disposal to combat racism and racist violence, thus strengthening democracy's conception of society, perceiving diversity not as a threat but as a source of wealth. "ECHR, Natchova and others v. Bulgaria, Judgment of 26 February 2004

47. In the Timichev v. Russia judgment, the Court ruled on procedural measures relating to the invocation of the principle of non-discrimination before its jurisdiction. It also produces interesting reasoning on the concepts of racial equality and discrimination:

§53: "The Court recalls that Article 14 does not exist autonomously, but plays an important role as a complement to the other provisions of the Convention and the Protocols since it protects individuals in similar situations from any discrimination in the enjoyment of the rights set out in these other provisions. Where the Court has found a separate violation of a normative clause of the Convention or its Protocols, invoked before it both as such and in conjunction with Article 14, it generally does not need to examine the case also under that Article, but the situation is different if a clear inequality of treatment in the enjoyment of the right in question constitutes a fundamental aspect of the dispute. »

§55: "Ethnic origin and race are related and overlapping concepts. While the notion of race originates in the idea of a biological classification of human beings into subspecies according to their morphological characteristics (skin colour, facial features), ethnic origin is based on the idea of social groups sharing a common nationality, tribal affiliation, religion, language, origins and cultural and traditional background. »

§56: "The fact of treating persons in comparable situations differently, unless there is an objective and reasonable justification, constitutes discrimination.... Discrimination based on real or perceived ethnic origin constitutes a form of racial discrimination.... Racial discrimination is a particularly heinous form of discrimination and, given its dangerous consequences, it requires special vigilance and a strong response from the authorities. Therefore, they must use all the means at their disposal to combat racism, thus strengthening democracy's conception of society, perceiving diversity not as a threat but as a source of wealth. "ECHR, Timichev v. Russia, op. cit.

48. In general communication No. 29 of the Committee on the Elimination of Racial Discrimination, the members of the Committee:

"Confirm the Committee's consistent view that the term "descent" in article 1, paragraph 1, of the Convention does not refer only to "race" and has a meaning and application that complement the other grounds on which discrimination is prohibited,

Strongly reaffirm that discrimination based on "descent" includes discrimination against members of communities based on forms of social stratification such as caste and similar systems of hereditary status that prevent or impede their equal enjoyment of human rights"[CERD, General Recommendation No. 29,"Discrimination based on descent", 2002]

49. In the communication concerning L.R. et al v. Slovak Republic, the Committee on the Elimination of Racial Discrimination recalls its conception of discrimination and elaborates a reasoning on indirect discrimination on the grounds of race:

§10.4: "The Committee recalls that the definition of racial discrimination in article 1 includes not only measures that are explicitly discriminatory, but also measures that are not discriminatory at first sight but are discriminatory in fact and in their effects, i.e. measures that represent indirect discrimination. In assessing the existence of indirect discrimination, the Committee must take full account of the particular circumstances and context surrounding the request, since, by definition, indirect discrimination can only be demonstrated by indirect evidence. »

§10.7: "In the Committee's view, it would be contrary to the purpose of the Convention and excessively formalistic to consider that the last stage of the practical application of a right or freedom must take place in a non-discriminatory manner, while the preliminary and necessary elements (decision-making) directly related to its application would be dissociated from it and would escape any scrutiny. "CERD/C/66/D/31/2003, L.R. et al. v. Slovak Republic, 7 March 2005

50. Finally, in Brown v. Board of Education, the Supreme Court developed a historical opinion on racial segregation and concluded that the principle of "separate but equal" was unconstitutional:

«We come then to the question presented: Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other "tangible" factors may be equal, deprive the children of the minority group of equal educational opportunities? We believe that it does. »

«We conclude that in the field of public education the doctrine of "separate but equal" has no place. Separate educational facilities are inherently unequal."' Therefore, we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment. This disposition makes unnecessary any discussion whether such segregation also violates the Due Process Clause of the Fourteenth Amendment. »

«Because these are class actions, because of the wide applicability of this decision, and because of the great variety of local conditions, the formulation of decrees in these cases presents problems of considerable complexity. On reargument, the consideration of appropriate relief was necessarily subordinated to the primary question of the constitutionality of segregation in public education. We have now announced that such segregation is a denial of the equal protection of the laws. » [Supreme Court of the United States, Brown v. Board of Education of Topeka, op. cit.]

IV. Practices of racial discrimination and inequality

51. Some practices of racial discrimination have, in some countries, been legally institutionalized (apartheid practices in South Africa, segregation of blacks in the United States in particular). However, their formal abolition has not resulted in the abolition of social practices of racial discrimination. Indeed, they remain, whether individual racism or incidental institutional racism [Commission des droits de la personne et des droits de la jeunesse, "Profilage racial et discrimination systémique des jeunes racisés, rapport de la consultation sur le profilage racial et ses conséquences", 2011, 126 p.]. Moreover, they have not been abolished everywhere either, as some States remain fundamentally racist, classifying individuals according to their racial affiliation, and locking them into defined categories with unequal rights, thereby denying the principle of racial equality.

52. It seems essential to recall that racial discrimination results from the perception by individuals belonging to the dominant category of other individuals considered different. Also, Fabian Georgi to note: “the racist essentialisation and hierarchisation of socially constructed differences is not always or primarily the result of explicit discourses, thought-out ideologies or conscious intentions. Instead, the essentialisation is (also) produced by effectively treating certain differences as inherited, unchangeable and inferior in order to reap the associated advantages of doing so. It is a product of praxis. Historically, ‘racial ideology did not precede racist practices’ (Camfield 2016: 43). […] as explained by Adam Kotsko (2017): ‘[B]eing a member of a certain race is not something inherent, it is something that is done to you. And it is done to you in order to mark you out as something that needs to be tamed, controlled, and subdued. It is a way of naturalizing an order of domination.”

53. Therefore, it will be necessary here to identify the main practices of racial discrimination. In the analysis, two main types of discrimination can be distinguished: those in access to certain rights, and those in the treatment of individuals within the framework of these rights.

A. Racial discrimination in access to certain rights and services

1. Racial discrimination in access to Nationality and citizenship

54. Access to nationality is the first level of racial discrimination [Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance "Racial discrimination in the context of laws, policies and practices concerning citizenship, nationality and immigration", A/HRC/38/52, 23p, 25 April 2018.] The ability to enjoy certain rights is first and foremost conditioned by citizenship or nationality and access to that nationality is de facto a discriminatory instrument. Access to nationality and citizenship is a theme that concentrates many tensions in political discourse, particularly with regard to certain racial considerations. According to German and Austrian racist speeches, for example, nationality is intimately linked to the concept of "Volk" (people), itself imbued with the idea of a "Blutsgemeinschaft" (blood community), which foreigners could never really integrate. These political discourses on nationality increase the vulnerability of people perceived as different to racial discrimination and contribute to conveying ideas that generate racism [Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, Ibid. ... In Europe, they are now permeating public debate, particularly since the "migration crisis" of 2015-2016.

55. However, some racist speeches are translated into legislative terms and racial discrimination is made in access to nationality and state citizenship. The Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance expressed particular concern about laws and policies relating to nationality, citizenship and immigration that discriminate specifically on the basis of race, ethnicity or religion. Such laws exist, for example, in Myanmar against the Rohingya ethnic minority. The 1982 Citizenship Act thus deprives individuals belonging to the Rohingya ethnic group of citizenship, on the basis of their ethnic origin [Amnesty International Report "Openly locked up" The State of Arakan, Myanmar, is in a situation of apartheid ", 21 Nov. 2017, : ASA 16/7484/2017].

2. Racial discrimination in access to Health care

56. The issue of racial discrimination in access to health care is complicated because there are fundamentally different public and private health systems in different countries. In any case, racial discrimination can be found in a large majority of them [see. not. Healing a divided Britain: the need for a comprehensive race equality strategy, Equality and Human Rights Commission, 2016, 74 p.]. In particular, what is quite widely observable is a reluctance or even reluctance on the part of some health professionals to welcome and treat new patients from racial minorities. Indeed, the argument often opposed to patients whose racial otherness is directly visible (because of their skin colour, clothing, accent or name) is that of: "sorry, we don't take any more [new] patients." This leads to refusals of care, in violation of the principle of equality. In the United States, statistical studies have been conducted showing that the mortality rate due to cancer, heart disease and diabetes was significantly higher among black people than among white people.

57. A survey conducted in France also established a significant statistical association between having experienced discrimination in the last five years (regardless of the ground and field) and poor health. Thus, discrimination is both a cause and a consequence of an impaired state of health[COGNET M., HAMEL C., MOISY M., Santé des migrants en France: l'effet des discriminations liées à l'origine et au sexe, Revue européenne des migrations internationales, vol. 28, No. 2, 2012, pp. 11-34.].

3. Racial discrimination in access to Education

58. Racial discrimination in education is likely to take several forms. First and foremost, in the opportunities to have access to institutions providing quality education [ECHR (Grand Chamber), Judgment, "DH and Others v. Czech Republic", 13 Nov. 2007, Application No. 57325/00]. Whether the educational system is predominantly public or private, in other words, free or paid, has significant consequences on discrimination in access to education. Indeed, in many States, private institutions will be reputed to offer a superior quality of education to its students, and de facto, to train for better degrees. However, such establishments are mainly attended by pupils and students from the favoured social classes, generally corresponding to the dominant racial category, while pupils and students from ethnic minorities attend public establishments, which statistically offer them fewer opportunities. Ultimately, it is necessary to "take into account the impact of poverty on children's ability to benefit from schooling and to recognize that the most disadvantaged students attend schools with fewer resources. For the majority of black and other minority pupils over-represented in these schools [in the United Kingdom], they are the only accessible schools. »

59. In France, since the Republic is "blind to colour", there is a real reluctance to make distinctions based on skin colour or origin. However, racist patterns in access to primary but also secondary education can be observed. Indeed, the Human Rights Defender pointed out that discrimination based on origin and nationality appears to be an obstacle to effective schooling. It has noted that it regularly receives cases concerning denials of enrolment in kindergarten and primary school for foreign children (in particular children belonging to the Roma ethnic group, which suffers from numerous racial discriminations in Europe [CCPR/C/111/D/1926/2010, S.I.D. et al. v. Bulgaria, 29 September 2004]). He recalled that "these situations constitute a violation of the right to education and the best interests of children and testify to discrimination in access to education based on the criterion of origin [in particular]". Intervention by the Human Rights Defender at the end of the conference "Racism and racial discrimination, from school to university" (Université Paris Diderot 27-29 September 2018).

4. Racial discrimination in access to work

60. Equality of opportunity in access to the labour market, far from being a reality, appears in many States to be only a utopian principle. Access to the labour market seems to be the catalyst for both speeches and practices of racial discrimination ["Racism and discrimination in the context of Migration in Europe", ENAR shadow report, 2015 - 2016, 54 p.] According to racist discourse, "foreigners" (perceived as such because of their supposed belonging to a different race) should not be entitled to access the labour market under the same conditions as nationals, as they would "steal" opportunities and jobs from nationals. It should be noted that racial discrimination in access to the labour market is particularly prevalent in so-called developed countries with relatively high unemployment rates (this is the case in a majority of European countries). However, Patrick Simon and Mohamed Madoui observe that discrimination "results less from a "racist ideology" than from the functioning of a system whose rules, apparently neutral, effectively disadvantage people because of their membership, real or supposed, in stigmatised groups, thus making it difficult for them to access the labour market (...)". SIMON Patrick, MADOUI Mohamed, "Le marché du travail à l'épreuve des discriminations", Sociologies pratiques, 2011/2 (n° 23), p. 1-7]

5. Racial discrimination in access to housing

61. Racial discrimination practices in access to housing reflect a kind of continuity of racial segregation. Residential segregation remains very common in the United States. Real estate agents' practices continue to reproduce this type of segregation in access to the housing market (particularly in large cities such as New York). Studies have shown that real estate agents are much more present in Asian and white neighborhoods than in black and Latino neighborhoods. This reduced presence results in a narrower choice for these populations. In addition, in access to housing, racism is sometimes explicit: "I see racism in the market. The Hasids in Williamsburg and the Russians in Brighton Beach and even little old Italian women in Cobble Hill, they don't want to sell to them[blacks] (...)." Nathan Tempey," "I see racism in the market": Brokers get candid on race in a new study", Brick Underground, 16 Oct. 2017: https://www.brickunderground.com/live/nyc-real-estate-agents-segregation, URL consulted on May 22, 2019]. In addition, these same studies have shown that real estate agents share less information when they face potential black property buyers. These practices reflect a desire to keep people trapped in racially predominant neighborhoods.

62. In addition, in the case of Qatar, for example, the Rapporteur of the Committee on the Elimination of Racial Discrimination expressed concern about the creation of an isolated city to house up to 53,000 migrant workers. It noted that this could further alienate these workers from Qatari society and thus lead to a risk of social segregation[Committee on the Elimination of Racial Discrimination, Consideration of the report of Qatar, 28 Nov. 2018].

A. Racial discrimination in treatment

1. Immigration

63. As has been observed with regard to discrimination in access to nationality, it should be noted that discrimination in immigration is largely based, in Europe at least, on racist discourse against foreigners, considered as "invaders", particularly when they have a skin colour, culture, religion or language that visibly differentiates them from individuals belonging to the dominant racial class. This is reflected in the numerous anti-immigration demonstrations throughout Europe following the 2015-16 migration crisis, highlighting the rise of populism across the continent [Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, A/73/305, 2018, 24 p.]. In recent years, a phenomenon of immigration restrictions has been widely observed in Europe but also in the United States, with the adoption of anti-immigration decrees by US President Trump. In this respect: “(…) the policies, institutions and state apparatuses of border regimes result from social and political struggles that are fundamentally shaped by a set of migration-related structural contradictions within a capitalist and racist world system.” [GEORGI Fabian, op. cit., p. 100.]

2. The work

64. Racial discrimination is not only limited to access to the labour market, but also manifests itself in the treatment of discriminated persons. In the countries of the Arabian Peninsula, practices of racial discrimination against migrant workers are common. The Rapporteur of the Committee on the Elimination of Racial Discrimination notes in her report for Qatar the persistent delays in the payment of wages, the continued and widespread practice of passport confiscation by employers, and other violations of the rights of migrant workers [Committee on the Elimination of Racial Discrimination, 28 Nov. 2018, consideration of the report of Qatar]. In addition, the principle of equal pay for equal work is also not respected in Qatar, as migrant workers' wages are negotiated directly with States of origin.

3. Before the courts

65. In some States (notably the United States), racial discrimination is quite significant in the treatment of individuals before the courts [CERD, General Recommendation No. 31/2005 on the prevention of racial discrimination in the administration and functioning of criminal justice, 2015]. This is reflected in the conviction of racialized individuals. The percentages are quite telling. Since 1976, in the United States, 34% of executed prisoners have been black, while blacks represent only 14% of the country's population; moreover, more than one in two prisoners awaiting execution is of African-American or Hispanic origin. Thus, the percentage of black death row inmates is much higher than the percentage of white death row inmates for the same type of offences, which shows a discriminatory difference in treatment based on racial criteria. Especially since, although half of the murder victims in this country are black, 77% of death row inmates have been executed for killing a white person [Amnesty International, Report 2017/2018 "The State of the World's Human Rights", POL 10/6700/2018].

4. By the police

66. Racial and ethnic profiling can be defined as a set of methods that consists, for law enforcement, security services and border police, of subjecting individuals to thorough searches, identity checks and investigations, or determining their involvement in criminal activity, taking into account their race, skin colour, ancestry or national or ethnic origin[Commission des droits de la personne et des droits de la jeunesse, "Profilage racial et discrimination systémique des jeunes racisés. Report of the consultation on racial profiling and its consequences", 2011]. Racial profiling is thus a chronic and widespread problem in the field of policing. The use of this practice is often linked to national security and immigration policies. This technique often accentuates discrimination and remains a serious obstacle to the enjoyment of the rights of different racial, ethnic and religious groups [Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, "Racism, racial discrimination, xenophobia and related intolerance: follow-up to and implementation of the Durban Declaration and Programme of Action", A/HRC/29/46, 20 April 2015, 22 p.].

67. In all and for all, racial discrimination follows one another, one by one, leading to another, which produces a cascade of discrimination. In addition, discrimination is often interconnected: racial, religious, cultural, gender, sexual orientation, etc.

V. Measures to assess racial equality

A. Special rapporteurs and committees

68. First, special rapporteurs and committees on equality and anti-discrimination play an important role in the assessment of racial equality. In particular, there are four special rapporteurs or expert groups that have a crucial role in the assessment of racial equality. These are the working group on persons of African descent, the Special Rapporteur on extreme poverty and human rights, the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, and the Special Rapporteur on contemporary forms of slavery. These experts assess racial equality through, inter alia, regular reports, but also through visits to countries where allegations of particularly high levels of discrimination are raised. In addition, the experts also send notes to governments.

69. In addition, special committees also work to assess racial equality. Three main committees have this role: the Human Rights Committee, the Committee on the Elimination of Racial Discrimination and the Committee on Economic, Social and Cultural Rights. It is possible to add to this the Intergovernmental Working Group on the Effective Implementation of the Durban Declaration and Programme of Action. Like the Special Rapporteurs, these committees produce reports based on information provided by States. They also observe, monitor and propose measures to combat racial discrimination.

B. Theoretical approach to the evaluation of racial equality through indicators

70. To successfully combat racism and racial discrimination, indicators and statistics seem to be useful means. According to a report prepared by the Université du Québec in February 2005, indicators can be defined as "observable measures that make it possible to assess an aspect of a complex situation by dividing it into components that are easier to understand"[Indicators for the evaluation of municipal policies to combat racism and discrimination, CRIEC Report, Université de Québec à Montréal, February 2005, p. 44]. These indicators are of two kinds, first of all, there are qualitative indicators, then there are also quantitative indicators. Indicators of any kind can demonstrate the compliance of a standard, law or programme with a treaty promoting racial equality, but also assess the performance of development programmes (Human Rights indicators, Guide to measuring and implementing, Office of the United Nations High Commissioner for Human Rights, HR/PUB/12/5, pp.111-148).

71. In general, indicators are used in many disciplines, including the social sciences. They can also be adopted in the field of human rights. Non-governmental organisations, but also international or academic institutions, see them as an effective means of assessing racial equality. They are also used to measure the impact of measures promoting racial equality on target populations. In this perspective, they are of great help when it comes, for example, to deciding on the priority objectives to be implemented.

72. With regard to non-discrimination standards, the indicators include an assessment of accessibility to the principles of non-discrimination: thus, the law must not only prohibit certain discriminatory behaviour but also affirm equal access for the entire population to the same services.

73. Different data can be collected to create indicators such as factual data on human rights violations, socio-economic statistics or surveys based on expert reports. Thus, indicators are used for multiple purposes: measuring and quantifying inequalities, comparing data between different states, informing citizens, advocating for the defence of human rights. The monitoring and promotion of human rights is also based on these means of evaluation. Therefore, indicators for measuring racial equality allow for a rigorous improvement of programmes to combat racial discrimination.

C. The different indicators for assessing racial equality

74. The measurement of discrimination appears to be fundamental since it subsequently makes it possible to adopt legislation and combat racial inequality. Not all laws are intended to combat inequality and some are even sources of discrimination, as demonstrated by a report of the Special Rapporteur on contemporary forms of racism and racial discrimination ["Racial discrimination in the context of laws, policies and practices concerning citizenship, nationality and immigration", Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, A/HRC/38/52, 25 April 2018, 23p.]

75. In the light of the practice of States, international organizations and non-governmental organizations, there is a general tendency to use indicators both in the field of human rights and in the more specific field of racial discrimination. In the United Kingdom, for example, following the murder of a black London teenager in 1997 [The report of the Commission of Inquiry set up to shed light on the case highlighted that institutional racism was a key cause of social exclusion in Britain. Voy. not. MACPHERSON of CLUNY, William, The Stephen Lawrence inquiry: report of an inquiry, London: The Stationery Office, 1999, 2 vol., 340 p. + 300 p. (appendices)], the government introduced various measures to assess racial discrimination in the British education system. Thus, academic inspectors (among others) are now required to record racist incidents and school exclusions taking into account the criterion of ethnic origin.

76. The use of indicators has thus permeated the specific theme of racial discrimination. The Committee on the Elimination of Racial Discrimination thus suggests "including in its next periodic report disaggregated data on ethnic minorities" in Cambodia. In addition, as part of the Universal Periodic Review of the Human Rights Council, Brazil assessed in its final report racial inequalities between white people and people of African descent using disaggregated socio-economic statistics and highlighted the high homicide rate in the country for people of African descent, particularly among children.

77. In addition, UNESCO developed an Action Plan in Nuremberg in December 2004 to encourage the development of municipal anti-discrimination policies and created the European Coalition of United Cities against Racism. The proposed action plan is based on ten objectives, including the desire to "initiate or further develop data collection on racism and discrimination, set achievable objectives and set up common indicators to assess the impact of public policies" (Objective 2), as well as the establishment of a "network for monitoring, vigilance and solidarity against racism at the municipal level" (Objective 1). Each signatory city must therefore submit a biannual report presenting the anti-discrimination policies put in place with regard to indicators determined by the cities themselves.

78. In addition, according to Barbara Reskin, it is necessary to recognize the interdependencies between different types of discrimination. This professor of sociology at the University of Washington thus theorizes the concept of "uber discrimination" which would be a global phenomenon exacerbating inequalities between people of different origins. The system of discrimination would thus be produced by inequalities based on race and a belief system that would perpetuate them. In this sense, the most effective solution would be, first of all, to recognize that racial inequalities are a system of discrimination. In the absence of such recognition, the total elimination of racial discrimination would be impossible and would therefore make it more difficult to build a more just society[Barbara Reskin, "The race discrimination system", Annual Review of Sociology, 2012, pp.17-35].

79. Racial or ethnic profiling can benefit from racially-based indicators and measures of assessment. However, the collection of such data may be essential to combat discrimination as it is part of equality access programmes.

80. There are two complementary logics that can guide and trivialize the use of ethnic statistics[Rachad Antonius, "Measuring Diversity in Canada: The Link between Measurement and Action", in Frédéric Guiomard & Sophie Robin-Olivier, Diversité et discriminatoires raciales: une perspective transatlantique, Dalloz, 2009, pp.51-62...]: a logic of diversity management representing a more inclusive and consensual policy and a logic of combating discrimination, necessarily and explicitly conflictual since carried by individuals and groups excluded from power. The fight here becomes a tool to demonstrate the extent of inequalities.

D. The challenges

81. However, several conceptual and methodological challenges may arise in the use of indicators for measuring and evaluating racial equality. These difficulties are linked in particular to the very subject of racial discrimination.

82. The main limitation to the use of indicators can thus be explained: these evaluation measures are inadequate in the fight against racial discrimination because the collection of data on race is difficult. This is problematic when it comes to combating racial discrimination. Indeed, the data generated by a State make it possible to measure the level of discrimination present there. As a result, it seems difficult, in countries where reliable statistics on race and racial equality cannot be produced, to answer certain questions relating, for example, to the impact of imputed race on living standards. This is detrimental to the promotion of equality as racial inequalities are sometimes very high depending on where people live (e.g. suburbs).

83. On the other hand, indicators make it possible to statistically measure results in terms of socio-economic data, but not their causes: however, the resulting gaps are generally linked to historical processes, economic structures and global policies that go beyond the local context. Similarly, human rights are multi-faceted and this makes it difficult to analyse in isolation when comparing the performance of States in implementing and monitoring respect for human rights.

VI. The limitations of the measures to combat racial discrimination

A. Gaps in normative instruments

84. There are gaps and imperfections in the measures for assessing racial equality. In this respect, the development of concrete measuring instruments seems insufficient, even though it would be very useful. Indeed, an effective fight against racism and the behaviours associated with it requires a good knowledge of these phenomena and greater visibility on how they occur. Measurement indicators therefore seem to be the most appropriate instruments to gain a deep understanding of racial inequalities. However, statistical studies in particular are still too often neglected. While the fields of education, health or work are relatively well covered, all the fields where racial discrimination is expressed are still relatively little analysed. In addition, the instruments for measuring racial equality are manifold and differ from one State to another. However, the measurement tools should be common to all countries in order to allow for analogies and a comparative study of public policies in favour of racial equality.

85. In a similar perspective, the promotion of statistical studies disaggregated by race also appears to be a desirable measure that is only too rarely used. Controversial because of the painful memories associated with ethnic filing, these data would nevertheless make racism visible by making it visible to everyone. This would promote a certain transparency on these phenomena, and it seems that discernment in the field of racism is one of the best bulwarks against discrimination and racial inequalities.

86. Moreover, and in the perspective described above of improving knowledge of racial discrimination practices, ethnic statistics are not sufficiently generalised. However, they seem to be a useful indicator for promoting racial equality. Nevertheless, these statistics have some limitations. Indeed, the identification of an ethnic group appears to be a complex task and it is not easy to identify who would have the task of distinguishing the different affiliations of individuals. If the State takes charge of identifying ethnic groups, then the risk of authoritarian or racist abuses is high. As for the individuals themselves, can they really assume such a role? In addition, the question of multi-ethnicity and interbreeding arises.

87. Finally, the issue of positive discrimination is widely debated. Indeed, this tool is controversial in the fight against discrimination. Some States practice it and make these measures a spearhead for the promotion of equality. In India, for example, quotas are put in place to promote access to education and employment for untouchables; in Brazil, some universities have set up a system to promote access for students based on their ethnicity; and in the United States, already since the 1960s but especially in the 1970s, ethnic quotas have been introduced at universities and in the world of work[Gérard Mathilde, "India, Brazil, United States: they have experienced positive discrimination", Le Monde, 19/01/2019]. However, some people see these policies as generating new inequalities. Indeed, affirmative action policies are potentially elitist policies. Thus, as the Observatory of Inequalities explains: "The strategy adopted consists in bringing about the emergence, among those who are being sought to integrate into the global society, of social, economic or political elites, which we bet will then play a leading role in the group's general progress. The effort therefore focuses on the middle and upper strata that we want to help reach the social positions they would have "normally" held in the absence of discrimination"[Calvès Gwénaële, "What is positive discrimination? ", Alternatives économiques, n°232, June 2005].

88. Thus, if measurement instruments are insufficiently developed and used, they remain promising. Closing the gaps in them would make it possible to work effectively towards racial equality and the elimination of racism.

B. Other deficiencies

89. Moreover, State practices are also insufficient to promote racial equality.These gaps are of different kinds but relate mainly to confusion about the concept of race. Indeed, as we have already explained, there is no international definition of the concept of race.This gives rise to various interpretations, which are not unified by a human rights instrument with a certain authority.

90. In addition, there are major gaps in the study on the notion of race and this is expressed in two ways. First, there is a lack of recent major studies on the notion of race and racial equality. While the end of the 20th century was quite successful in this area; notably because of significant historical events such as the fall of the Nazi regime, the end of segregation in the United States or the abolition of apartheid - all three of which made racial inequality the origin and purpose of all public policies - the beginning of the 21st century, and especially the years 2010, are quite poor in doctrine relating to racial equality.

91. In parallel, there are also gaps in terms of studies on the notion of race in European or Arab societies. While countries such as Brazil, the United States and South Africa are the subject of many analyses, countries in Europe, North Africa and the Middle East remain relatively neglected. This may be explained by a certain reluctance to talk about this phenomenon, which leads to a tendency to overlook the problems related to racism, even if latent racism remains very much present because it is rooted in the mores and habits of these different societies.

92. Finally, national legal corpuses remain weak and it is striking to note a lack of integration of anti-discrimination laws into national corpora but also into human rights discourse. However, strengthening national legal corpuses would prove to be an efficient means of promoting racial equality. The legitimization of inequalities must under no circumstances be tolerated in legal corpuses and an effort should be made in this direction. In addition, some attempts to combat racial discrimination encounter relative legal uncertainty about certain behaviours that border on legality. From this perspective, greater precision on the content of racist, discriminatory, xenophobic or intolerant behaviour should be considered, without however giving way to restrictive definitions that would not take into account the constant evolution of reprehensible phenomena. Thus, there are many gaps and much remains to be done in order to develop effective and efficient policies to combat racial discrimination.

VII. Normative overlaps

93. An in-depth study of the instruments relating to the fight against racial discrimination and the promotion of racial equality leads to the following observation: there are normative overlaps between these instruments. Some of them carry redundancies that should be corrected. Nevertheless, other of these overlaps appear constructive, reflecting a mutual enrichment of instruments relating to racial discrimination.

A. Redundant normative overlaps

1. Conceptual overlaps

94. First, the existence of a significant diversity of meanings of the notion of race is likely to lead to differences in its interpretation. This poses a threat to the legal clarity that should prevail in this area. In this sense, in its attempt to define race, the[Report of the High Commissioner for Human Rights containing a draft core document on the development of a racial equality index, E/CN.4/2006/14, 2006, 21 p.] refers to a list of commonly used criteria (ethnic origin, race/skin colour, caste, tribe, immigrant status, nationality, religion and aboriginal/indigenous status), without however proposing a comprehensive definition of this concept. At most, it recommends referring to the concept of "racialized groups". However, this instrument appears to be one of the few that has made an effort to define the concept of race. Indeed, there is a common reference to this concept without prior definition. Ultimately, the lack of adoption of a uniform definition of this concept by all UN bodies involved in the fight against racial discrimination means that an effective joint fight against the phenomenon of racism and other related phenomena is not possible.

2. Constant reaffirmations: ineffectiveness of the fight against racial discrimination?

95. Secondly, it should be noted that the normative instruments relating to the fight against racial discrimination contain constant references to previous work that has already been presented.

96. In this sense, the General Assembly: "Recalling all its previous resolutions on the systematic follow-up to the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance and on the effective implementation of the Durban Declaration and Programme of Action adopted by the World Conference and emphasizing in this regard that it is imperative that they be fully and effectively implemented"[Resolution A/RES/72/157 "Global Call for Practical Action for the Total Elimination of Racism, Racial Discrimination, Xenophobia and Related Intolerance and the Comprehensive Implementation of and Follow-up to the Durban Declaration and Programme of Action", 19 December 2017.] This observation is not in itself indicative of a gap. On the contrary, it is customary in United Nations instruments to make such references.

97. On the other hand, what seems to indicate potential inefficiency is the fact that in reminders and reaffirmations of principle, little changes occur because practices of inequality and racial discrimination remain. Many of the same recommendations are aimed at improving the fight against racism (including its prevention)[Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, A/CHR/35/41, 2017, 20 p. Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance,"Racism, racial discrimination, xenophobia and related intolerance: follow-up to and implementation of the Durban Declaration and Programme of Action", A/HRC/23/56, 2 April 2013, 17 p.] Therefore, the question can legitimately arise as to the effectiveness of these recommendations. In Resolution 72/157, the General Assembly "regrets that the programmes of action drawn up on these occasions have not been fully implemented and that the objectives set have not yet been achieved". Do such normative overlaps not lead to a normative clutter, also threatening the legal clarity of these instruments? The question may arise.

3. Potential contradictions in instruments to combat racial discrimination and other measures

98. Finally, there is concern that normative overlaps between several branches of law may have negative effects on the fight against racial discrimination. For example, CERD[CERD General Recommendation No. 31/2005 on the prevention of racial discrimination in the administration and functioning of criminal justice] or the Special Rapporteur on contemporary forms of racism[Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, A/CHR/35/41, 2017, 20 p.... express concern about the adoption of anti-terrorist legislation, highlighting that the overly broad scope of anti-terrorist legislation leads to abuses: extreme limitations on freedom of expression, increased surveillance of targeted migrants, stigmatization of certain minorities; in short, the resurgence of racist acts.

B. Constructive normative overlaps

1. Complementary approaches to combating discriminatory practices

99. It should be noted that reports on the fight against racial discrimination, issued by the various competent bodies, often have a particular focus. This ensures that the reports are as accurate and analytical as possible. The adoption of different study angles ensures a welcome complementarity between these different reports. For example, it may be noted that the Special Rapporteur on contemporary forms of racism[Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, A/CHR/35/41, 2017, 20 p.] focuses mainly on policies to combat terrorism that give rise to racist practices. In addition, the impact of nationalist and populist speeches and parties on the fight against racial discrimination is often adopted as a focus[Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, A/73/305, 2018, 24 p.]. Finally, the use of the Internet in the spread of racist speech is also addressed[Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, A/67/326, 21 August 2012, 24 p.].

100. In doing so, the bodies devoted to the fight against racial discrimination and related practices are mutually enriching. The diversity of these study angles is truly reflected in terms of complementarity and precision. Moreover, cross-references are made between these different reports by these bodies.

2. Inter-organizational cooperation welcome

101. On another level, the inter-organisational cooperation that is being developed is also a positive overlap. In this regard, CERD is planning cooperation with the International Labour Organization (ILO) and the United Nations Educational, Scientific and Cultural Organization (UNESCO), both of which have been invited to be represented at the Committee's sessions, as well as the Office of the United Nations High Commissioner for Refugees and the United Nations Children's Fund (UNICEF) (CERD report, A/73/18, Ninety-fifth session, 23 April-11 May 2018, 31 pp. ]. Such cooperation brings with it an enrichment of the dialogue and reflection necessary in the fight against racial discrimination.

102. In this sense, it can also be noted that thematic debates are occasionally organised, bringing together a diversity of actors in the fight against racial discrimination. For example, CERD organized a half-day discussion on the theme of "Racial discrimination in today's world: racial profiling, ethnic cleansing and current global problems and challenges". It allowed for an "open and frank exchange on these major current global issues, with a view to identifying solutions and best practices, focusing on the Convention, with a view to countering, inter alia, the profound negative effects of racial profiling in several countries and regions"[CERD Report, A/73/18, Ibid., para. 59].

VIII. Recommendations for action

103. .Regarding the points that should be improved, first, agreement on a common understanding of concepts at the international level, and in particular on the concept of race, appears more than necessary. As stated above, this lack of a common understanding is one of the main weaknesses in the fight against racial discrimination, racism and intolerance. Consequently, the first recommendation concerning the promotion of racial equality consists in a work of reflection and pooling of the different meanings of the concepts in order to be able to precisely define their scope. It would seem that the Committee on the Elimination of Racial Discrimination could assume this role, in partnership with other international and regional actors, and thus define the notion of race.

104. Secondly, the development of common indicators, used by all and everywhere, is desirable and would provide a more representative overview of the state of discrimination or racial equality. The development of concrete measurement tools appears necessary, as well as the promotion of statistical studies broken down by race. In addition, the strengthening of national legal corpuses would be useful, if not necessary. Thus, the second recommendation we can make is to address the shortcomings of the study of racial discrimination, racism and related intolerance in order to address these shortcomings and thus promote the promotion of racial equality.

105. Finally, at the present time, it is striking to note the spread of racist ideas and ideologies on the Internet and in nationalist and populist discourse. The fight against this phenomenon, particularly online, is delicate because it involves different fields, straddling between freedom of expression and incitement to hatred. The defenders of the position of "everything can be said"[see in this sense for example Vaneigem Raoul, Nothing is sacred, everything can be said: reflections on freedom of expression, La Découverte, 2003] thus consider that the fight against the spread of racist words and ideologies on the Internet, a fortiori through the criminalization of these remarks, would abolish "the distinction between opinion and assault, by precisely making opinion an assault"[Gardères Nicolas, Voyages d'un avocat au pays des infréquentables, L'observatoire, 2018, p.94. thus endangering the right to free speech. Yet for others, these words and racism in general do not constitute an opinion as such but rather an attack directed at harming a group by stigmatizing it. Therefore, the exercise of definition and delimitation is important in order to preserve the principle of equality and the fundamental rights and freedoms of everyone. In this sense, making clear recommendations on this subject seems difficult, yet it seems increasingly necessary to qualify these behaviours and the conduct to be adopted in their presence. If the legislative and judicial effort is complex, then perhaps it is appropriate to act upstream of the problem.

106. Thus, the most important focus should be on education. Racism, racial discrimination, inequalities or xenophobia are often the result of widespread over-simplification, ignorance and fear. Only education can intervene in depth in these areas and make it possible to truly eliminate racial inequalities. An awareness of human rights and the principle of equality can be considered according to the target audience, but more generally, the openness towards a better perception of difference must be promoted. A better understanding of differences would thus help to combat inequalities and racism. National education systems appear to be bastions of equality, both in the perspective of collective education and in that of individual self-presence taught to children from an early age. More than normative proposals, it is really on the aspect of pedagogy and respect that achievements must be concentrated, because it is through this stage that all societies must pass to affirm together the eradication of racial inequalities.

1. The present report was submitted after the deadline in order to reflect the most recent developments. [↑](#footnote-ref-2)