

## **Contribution to the CERD-CMW Joint General Comment/Recommendation on the Obligations of States Parties to Comprehensive Public Policies to Combat and Eradicate Xenophobia and its Impact on the Rights of Migrants and Other Non-Citizens Affected by Racial Discrimination.**

The European Network Against Racism (ENAR) welcomes the opportunity to provide our input to the Committee on the Elimination of Racial Discrimination (CERD) and Committee on the Protection of the Rights of All Migrant Workers and Members of their Families (CEW) on the Obligations of States Parties to Comprehensive Public Policies to Combat and Eradicate Xenophobia and its Impact on the Rights of Migrants and Other Non-Citizens Affected by Racial Discrimination.

ENAR is a network-led organisation representing 170+ NGOs across Europe working to put an end to structural racism and discrimination, and a real difference in the lives of racial, ethnic and religious minorities in Europe.

Our submission focuses on highlighting the need to centre racism, decoloniality and intersectionality at the centre of migration policies in Europe, and globally. It provides a nuanced understanding of xenophobia drawing attention to the need for a systemic analysis of race as it pertains to mobility and mobile bodies.

## Introduction

To understand mobility and the attitudes and policy responses toward mobility, we must first understand borders and the meanings and consequences of borders. Borders are not abstract or race neutral technologies that simply include and exclude in-groups and out-groups – often referred to as citizens and non-citizens. They are mirrors that reflect and represent exclusionary attitudes and racialised anxieties. Borders confer certain rights and benefits to in-groups, and exclude those considered as not belonging to this in-group from certain rights and benefits. They allow people possess (or not) legal documents or legal identities which *do things* to people and *to situations*.<sup>1</sup> They are also technologies of race-making that reflect anti-immigrant discourses and attitudes often targeting groups and mobile bodies (migrants) defined in and through racial lenses. As Tendayi Achiume has argued, contemporary borders in the global minority (also referred to as the Global North) are structured by ‘imperial inequity’, are ‘inherently racial’ and ‘privilege whiteness’, with race operating as a means of enforcing these neocolonial borders.<sup>2</sup> To put it simply, borders have served to reinforce the deeply-embedded racially-based hierarchies within colonial systems and structures. As such, to understand migration governance particularly in Europe, one must adopt a decolonial and an anti-racist lens.

To assess the obligations of States Parties, in this case the public policies adopted by European states and the European Union with regards to migrants and non-citizens and the impact of xenophobia and racial discrimination toward these groups, it is necessary to acknowledge not only the current state of affairs in EU law and policy but also the historical background, and the assumptions underpinning political priorities and agendas. This allows for a critical understanding of how priorities and agenda-setting frame certain forms of mobility as regular or irregular leading to an approach which in the Von Der Leyen (VDL) Commission prioritises a law enforcement and criminalisation approach to cross-border mobility.<sup>3</sup> An approach which is at loggerheads with other policy approaches that could prioritise human dignity, social inclusion, employment, fundamental rights, non-discrimination, and anti-racism which are more in line with the promise of the EU Anti-racism Action Plan (EU ARAP).<sup>4</sup>

This explains the prioritisation of policies that criminalise migrants and mobility such as the Migration Pact and the Schengen Border Code Reform. The former racialises migration to Europe and betrays the spirit of the EU ARAP<sup>5</sup>, and the latter creates a dangerous system of ‘managing migration’ within Europe, legitimising racial profiling.<sup>6</sup> This approach further places “strict conditions for stay in the EU” where people are put in “situations where they are dependent on an employer or spouse” increasing vulnerability to exploitation and abuse, limiting access to social services and compounding “risk of poverty, destitution, homelessness and violence”.<sup>7</sup> In this regard, the VDL Commission and EU Member States are not fulfilling their roles as guardians of the Treaties of the European Union, their

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<sup>1</sup> Achiri, Emmanuel, and Bart Klem. "Navigating the legal liminalities of a de facto state: Migrant precarity and placeholder identity papers in Northern Cyprus." *Migration Studies* 12, no. 2 (2024): mnae015,

<sup>2</sup> E. Tendayi Achiume, "Racial Borders," *Georgetown Law Journal* 110, no. 3 (March 2022): 445-508.

<sup>3</sup> This approach is examined in a report led by Sergio Carrera & Davide Colombi as part of the ICLAIM (<https://i-claim.eu/>) consortium (including ENAR) study investigating the living and working conditions of migrant households with precarious legal status in Europe. Final report to be published in the second half of 2024.

<sup>4</sup> [EU Anti-racism Action Plan 2020-2025 - European Commission \(europa.eu\)](https://european-council.europa.eu/media/e300042c-327d-4761-991d-6f3e0943223c/attachment_data/data/13222_en.pdf)

<sup>5</sup> <https://www.enar-eu.org/wp-content/uploads/Migration-Pact-Policy-Brief-2112-2.pdf>

<sup>6</sup> <https://www.enar-eu.org/joint-statement-85-organisations-call-on-meps-to-reject-the-harmful-schengen-borders-code-reform/>

<sup>7</sup> <https://www.ohchr.org/sites/default/files/documents/issues/racism/cfis/cerd-cmw-jointqc/subm-concept-paper-cerd-cso-picum.pdf>

obligations under the European Convention on Human Rights and the European Social Charter<sup>8</sup>, as well as other international instruments such as the Convention on the Elimination of All Forms of Racial Discrimination<sup>9</sup> and the Recommendations of the CMW on Principles and Guidelines on Human Rights at International Borders<sup>10</sup>.

### **An Analytic Systemic Dimension to Xenophobia**

Xenophobia as defined in this call and as mostly applied in migration studies and policy making ignores the systemic dimension/analysis of racism. It is oblivious to the hierarchisation of differences and characteristics and applies a purely legalistic approach to racial discrimination. Whereas, it is important to understand xenophobia as including a process of racialization, at least, within the scope of this General Comment as it pertains to mobile bodies and other non-citizens.

Racial discrimination could be a consequence of either racism and or xenophobia or both. Going by the interpretation of the ICERD provided by Dr. Ion Diaconu of CERD<sup>11</sup>, the Convention specifically prohibits racial discrimination and not racism or xenophobia. Racial discrimination could be a consequence of racism and or xenophobia or both. He elucidates that today, “racist theories and attitudes are not placing the emphasis on biological features, but on cultural differences between groups and persons, proclaiming the superiority of some cultures over the others and considering differences between cultures as absolute and irreducible and the respective human groups as antagonistic. Biological racism, although not completely eliminated, is replaced by the cultural racism, but trying similarly to justify discrimination and exclusion.” The European Commission against Racism and Intolerance (ECRI) also observes that the concept of racialisation – a social and ideological process that develops the simplistic stereotyping of diverse human identities in racial terms based on ascribed cultural or phenotype identifiers helps to better understand the conditions under which racist thinking is developed and spread. Concluding in its opinion that this concept is important to understand “the processes underpinning racism and racial discrimination”.<sup>12</sup>

Xenophobia understood as fear of the foreign also denotes cultural differences as reasons for this ‘othering’. While racism and xenophobia should not be mistaken to mean the same thing, when xenophobic attitudes are expressed by groups which have a history of engaging in structural and institutional racism, it would be unwise to simply classify such acts and utterances as xenophobic without taking into consideration the racist historical social processes that have led to this dehumanisation or fear of the group considered as an ‘other’.

When then Bulgarian Prime Minister, Kiril Petkov, following the invocation of the Temporary Protection Directive (TPD) in response to displacement from Ukraine is quoted as saying; “these are not the types of refugees we are used to...these people are Europeans. These people are intelligent, they are educated,” and represent a different kind of movement compared to those from the Middle East and

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<sup>8</sup> Ktistakis, Yannis. "Protecting Migrants under the European convention on human rights and the European social charter." A handbook for legal practitioners (2013).

<sup>9</sup> <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-convention-elimination-all-forms-racial>

<sup>10</sup> [https://www.ohchr.org/sites/default/files/2021-12/OHCHR\\_Recommended\\_Principles\\_Guidelines.pdf](https://www.ohchr.org/sites/default/files/2021-12/OHCHR_Recommended_Principles_Guidelines.pdf)

<sup>11</sup> Racial discrimination-Definition, approaches and trends –

<https://view.officeapps.live.com/op/view.aspx?src=https%3A%2F%2Fwww.ohchr.org%2Fsites%2Fdefault%2Ffiles%2FDocuments%2FIssues%2FRacism%2FIWG%2FSession8%2FonDiaconu.doc&wdOrigin=BROWSELINK>

<sup>12</sup> <https://rm.coe.int/ecri-opinion-on-the-concept-of-racialisation/1680a4dcc2>

Africa with unclear pasts, “who could have been terrorists...in other words, there is not a single European country which is afraid of the current ‘wave’ of refugees”<sup>13</sup>, it is quite evident the use of stereotypes of some cultures as being ‘superior’, more ‘civilised’, and more ‘intelligent’ than others. This is not just xenophobia or fear of the ‘other’, this is social and racial hierarchisation, what Dr. Diaconu refers to as ‘cultural racism’. One, based on distorted and debunked race science, racist dehumanisation of black and brown people as unintelligent, uneducated, lazy and dangerous, and the hierarchisation of groups based on their physical and cultural characteristics. These are some of the thinkings that were used to justify enslavement and colonialism as ways of educating the ‘beasts’ of the global majority (often referred to as the Global South) . Petrov’s words are also reflective of the general rise in Islamophobia [classified as a form of racism by the UN whereby Islamic religion, tradition and culture are seen as a ‘threat’ to Western values]<sup>14</sup> in Europe as well as globally.

As documented with the response to Ukraine, and in line with PM Petrov’s statements, black and brown asylum seekers and migrants fleeing the war in Ukraine faced discrimination and many unable to enjoy the benefits of the TPD. Here, we see what one could casually refer to as xenophobic attitudes or fear of others/foreigners, in reality stemming from cultural racism and leading to policy responses which impact the lives of certain groups of migrants and their families.

As such, when this call specifically encourages addressing the impact of xenophobia on the rights of mobile bodies and others affected by racial discrimination, albeit with an intersectional approach that includes racism, but without drawing attention to racism and the processes of racialisation and hierarchisation as distinct factors in and of themselves, it as a consequence fails to center racism as a critical factor in responses to mobility. ENAR has highlighted a widespread reluctance to face the significance of race and the reality of racism<sup>15</sup>. We suggest to not approach analysis and responses to mobility solely using the lens of xenophobia or by simply including racism as one of the other interests as is the case in this call, but for the necessity to intentionally use race, hierarchisation, and racialisation as lenses through which to assess the impact of migration-related policies on the lives of mobile bodies, their families and other non-citizens.

### **Recommendations for a Comprehensive and Holistic Public Policy Addressing Racism in Migration-related Policies.**

A holistic preventative approach must consider colonialism, race and structural racism in immigration policies. This implies intentionally centering colonialism, empire, and racism as “discursive objects of study” by re-situating “these phenomena as key shaping forces of the contemporary world, in a context where their role has been systematically effaced from view” to borrow from Bhabra, Gebrial and Nisancioglu<sup>16</sup>. This means decolonising our contemporary understandings of human mobility and the factors that (co)produce and frame certain forms of mobility by particular groups, particularly minoritised and racialised groups as a problem(or not). Without first addressing these problematic

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<sup>13</sup> <https://apnews.com/article/russia-ukraine-war-refugees-diversity-230b0cc790820b9bf8883f918fc8e313>

<sup>14</sup> <https://www.un.org/en/observances/anti-islamophobia-day>

<sup>15</sup> <https://www.enar-eu.org/intersectionalityreport/>

<sup>16</sup> Bhabra, Gurinder K., Kerem Nişancıoğlu, and Dalia Gebrial. "Decolonising the university in 2020." *Identities* 27, no. 4 (2020): 509-516.

socio-historical meanings attached to the mobility of certain groups, policy recommendations will always fall short of preventing and eradicating xenophobia and racism in migrant-receiving societies because the policies implemented to *address* mobility would rather reinforce existing social inequalities.

Further, adopting an intersectional framework – where social categories such as gender, class, race, sexuality, disability, religion and other identity axes are interwoven on multiple and simultaneous levels to exacerbate discrimination, systemic injustice and social inequality – can help policy makers and actors to approach discrimination and social inequalities from a systemic and structural perspective and capture those discriminatory patterns which tend to be invisibilised or overlooked in the current legal and policy frameworks for anti-discrimination.

The following steps could serve as guidelines:

- Mobile bodies and non-citizens need to be included in the design of migration-related policies. This includes discouraging *tokenisation* and encouraging meaningful participation where their input is central to policy-making.
- It is important to move away from the *silos-tic* approach to migration policies where it remains within the purview of the ministries of interior or home affairs as this prioritises addressing mobility as an issue of security, law enforcement, and policing rather than as a question of human dignity, fundamental rights, social inclusion, and non-discrimination. Public actors responsible for implementing fundamental rights, non-discrimination and anti-racism, and employment and social inclusion at the local, municipal, national, regional and international level could be better empowered to this end.
- A fundamental rights impact assessment prior to the design and implementation of policies to proactively identify potential risks and ensure alignment with human rights standards and the recommendations in the EU Anti-Racism Action Plan.
- To ensure, this approach is mainstreamed at national levels, we encourage the National Action Plans approach proposed in the EU Anti-racism Action Plan, albeit including the recommendations proposed by ENAR<sup>17</sup>.
- Encourage Member States to provide regular reports, either annually or semi-annually, on the implementation of policies. These reports should be CSO-led and co-signed by various stakeholders, including public bodies, and representatives from migrant communities. This collaborative approach promotes transparency, accountability, and the inclusion of diverse perspectives in the policymaking and monitoring processes.
- The specific roles and formats for the involvement of different stakeholders in the monitoring process should be outlined to ensure the mainstreaming of fundamental rights and enhance the political impact of policies in terms of democratic legitimacy. This could involve

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<sup>17</sup> [https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13797-EU-anti-racism-action-plan-implementation-/F3423999\\_en](https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13797-EU-anti-racism-action-plan-implementation-/F3423999_en)

establishing clear guidelines for stakeholder participation, defining their responsibilities, and facilitating meaningful engagement centred in racial equality, reparatory justice, systemic justice and decoloniality throughout the policy cycle.

- Enhance the measurement of policy impact through prioritising the collection of data in a disaggregated manner, coupled with an intersectional analysis breaking down data into specific demographic categories, not limited to race, ethnicity, gender, age, disability status, and socioeconomic background. This would help to understand how different intersecting identities intersect and experience policy outcomes differently. By collecting and analysing data in this way, policymakers can gain deeper insights into the unique challenges and barriers faced by different groups of mobile bodies and tailor interventions accordingly.
- The implementation of rigorous data protection guidelines which guarantee that such data will not be shared with law enforcement authorities, national or European third parties, and third countries.
- Allocate adequate financial resources to support comprehensive studies (including on decolonising migration), surveys, and evaluations that assess the effectiveness of policies in addressing racial discrimination and promoting racial equity. Investing in research not only generates evidence-based insights but also fosters collaboration between policymakers, researchers, and communities, leading to more informed decision-making and meaningful policy interventions.
- Funds should be reallocated from the areas of border security, surveillance, externalisation and punitive migration management toward meeting the safety and protection needs of people on the move<sup>18</sup>, upholding human dignity, combatting racism and xenophobia, and encouraging social inclusion and employment.

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<sup>18</sup> <https://www.equinox-eu.com/wp-content/uploads/2021/03/WEB-EQUINOX-Towards-racial-justice-EU-institutions.pdf>