

Protection of Migrants Against Racist, Discriminatory and Xenophobia Practices An International Human Rights Approach: Limitations and Possibilities

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Outline

- I. The Problem: Setting Some Parameters**
- II. ICERD: Possibilities and Limitations**
- III. Current Trajectory Within The ICERD Framework**
- IV. Recommendations for the Elaboration of Global Anti-Xenophobia Norms**

I. THE PROBLEM: SETTING SOME PARAMETERS

Where international migrants and xenophobia are concerned, it is vital to distinguish between the concerns and vulnerabilities of two categories:

- **Voluntary Migrants**
- **Involuntary Migrants** (heightened vulnerability)

Refugee v. Migrant?

- Legally Distinct:
 - Refugees Internationally Protected (1951 Refugee Convention and 1967 Protocol)
- Shared Empirical Reality:
 - Refugees and involuntary migrants share the same chaotic, dangerous migratory routes
 - Many perpetrators of xenophobic discrimination and violence do not distinguish between refugees and other migrants

This cautions against too siloed an approach to protection of these two groups.

Conceptualizing Migrant Vulnerability: The Problem of Xenophobia

Xenophobia:

Illegitimate anti-foreigner acts or
attitudes

Foreignness

Foreignness: the status of being an actual or perceived outsider to a given political community, and where international migrants are concerned, this is typically the nation state.

- Intersectional social category: Migrants are designated foreign and rendered vulnerable on account of their nationality **OR** national origin **AND**
 - Race
 - Ethnicity
 - Religion
 - Class
 - Gender

Racism and Xenophobia

- Overlapping:
 - Race is often an explicit or implicit basis for xenophobic discrimination and anxiety.
- Distinct:
 - Race is not always salient in the construction of foreignness where migrants are concerned
 - Non-citizenship status can amplify the negative impact of racism, such that addressing racism alone may not appropriately address the circumstances of non-citizens experiencing racial discrimination

Acts or Attitudes

- **Xenophobic Discrimination:** acts, conducts or omissions that have the purpose or effect of human rights violations on account of foreigner status
- **Xenophobic Anxiety:** anti-foreigner attitudes/sentiments that function to legitimate foreignness discrimination:
 - Explicit Prejudice
 - Alternative Pretextual Registers
- Private Actors and State Authorities

Legitimate v. Illegitimate

When do anti-foreigner attitudes and actions cross the threshold and become xenophobic?

- Absence of clear answer in international human rights law
- What's at stake in the international legal response to this question:
 - Expressive Function
 - Instrumental Function

II. THE INTERNATIONAL CONVENTION FOR THE ELIMINATION OF RACIAL DISCRIMINATION: POSSIBILITIES AND LIMITATIONS

ICERD provides an important framework for addressing xenophobic discrimination and xenophobic anxiety but also has a number of significant shortcomings that limit its capacity fully to protect migrants (especially involuntary migrants) from xenophobic harm.

ICERD Art. 1

1. In this Convention, the term "racial discrimination" shall mean 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, cultural or any other field of public life.
2. **This Convention shall not apply to distinctions, exclusions, restrictions or preferences made by a State Party to this Convention between citizens and non-citizens.**
3. Nothing in this Convention may be interpreted as affecting in any way the legal provisions of States Parties concerning nationality, citizenship or naturalization, provided that such provisions do not discriminate against any particular nationality.

ICERD Art. 1

Built into Article 1 is ambiguity about the *extent and scope* of its prohibition of xenophobic discrimination.

Beneficial Guidance of the CERD

- An Intersectional Approach to discrimination
 - CERD General Recommendation No. 25
 - **But** see *Kamal Quereshi v. Denmark*, Communication No. 33/2003 (“a general reference to ‘foreigners’ is not at present considered to single out a group of persons on the basis of a specific race, ethnicity, colour, descent or national origin within the meaning of Article 1.”)

Beneficial Guidance of the CERD

- Citizenship Discrimination
 - General Comment 30: (“[D]ifferential treatment based on citizenship or immigration status will constitute discrimination if the criteria for such differentiation, judged in the light of the objectives and purposes of the Convention, are not applied pursuant to a legitimate aim, and are not proportional to the achievement of this aim.”)

Strengths and Weaknesses of the ICERD Regime

- **Strengths:** broad definition of racial discrimination (direct and indirect) that has been interpreted to address:
 - Intersectional discrimination
 - Certain forms of citizenship based discrimination
- **Weaknesses:**
 - Facial Tension in text of Article 1 results in an ambiguous, equivocal global anti-xenophobia norm
 - Contested Legal Status of CERD General Recommendations
 - What is the status of religious discrimination against migrants?

III. Current Trajectory Within the ICERD Framework

Anti-xenophobia initiatives within the United Nations framework have taken what can be described as a personal prejudice approach to combatting xenophobic anxiety and discrimination, advocating:

- Punishment of individual, prejudice-motivated perpetrators guilty of xenophobic discrimination
- Tolerance promotion between migrants and receiving state citizens via direct and indirect human rights education and other initiatives to diminish anti-foreigner prejudice

CONSIDERING CRIMINALIZATION

- A protocol “criminalizing acts of a racist and xenophobic nature”
- Existing international examples:
 - Additional Protocol to the Convention on Cybercrime Concerning the Criminalisation of Acts of a Racist and Xenophobic Nature Committed Through Computer Systems

Critiques of Criminalization

- Implementation/Enforcement Concerns:
 - Crimes targeting migrants as low enforcement priority
 - Difficulty of proving xenophobic **intent**
 - Barriers to migrant access to judicial and administrative processes
 - Anti-migrant backlash
- “Crowding Out” Effect

Critiques of Criminalization

- Structural Blindness and the Criminal Law Frame:
 - Myopic focus on punishing individual perpetrators leaves intact larger structures that are just as harmful to migrants or just as responsible for:
 - **xenophobic discrimination** (e.g. facially alienage neutral laws and practices with discriminatory effect)
 - **xenophobic anxiety** (e.g. fraught social tensions rooted in actual or perceived socio-economic competition, or political contestation)

IV. RECOMMENDATIONS FOR THE ELABORATION OF GLOBAL ANTI-XENOPHOBIA NORMS

- Clarify the bounds of prohibited manifestations of xenophobia, and do so to account for non-criminal intervention
- Pursue a human rights-based approach that views social cohesion and integration as vital for combatting xenophobia
 - E.g. Approach taken by cities
- Pursue a coordinated approach that situates ICERD elaboration within broader reform efforts tied to the international regulation of migration
 - E.g. Global Compacts on Migrants and Refugees