**SUBMISSION ON THE CONCEPT NOTE FOR THE CERD-CMW JOINT GENERAL COMMENT/RECOMMENDATION ON XENOPHOBIA**

This submission addresses two issues raised in the call for inputs for the CERD and the CMW outline of the Joint General Comment on Obligations of State Parties on public policies for addressing and eradicating xenophobia and its impact on the rights of migrants, their families, and other non-citizens affected by racial discrimination –

1. How should xenophobia be defined?
2. What is the relationship between xenophobia and intersectionality?

The submission argues that: first, xenophobia should be defined through the harm it entails—of disbelongingness—rather than any set of exhaustive grounds or groups affected because grounds and groups are diverse and constantly evolving; and second, that xenophobic discrimination should be understood as a sui generis case of intersectional discrimination which is often based on a combination of multiple grounds rather than a single ground such as race or foreignness.

*by*

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1. **Defining Xenophobia[[1]](#footnote-1)**

*Beyond groups and grounds*

1. The concept note’s title indicates an interest in developing a General Comment/Recommendation on ‘State Parties Obligations on Public Policies for Addressing and Eradicating Xenophobia and its impact on the rights of *migrants*, *their families*, and *other non-citizens* affected by *racial discrimination*.’
2. This formulation delineates three groups: *migrants*, *their families*, and *other non-citizens*, and one ground: *race*, in defining the scope of the proposed General Comment/Recommendation on xenophobia. Both the groups and the ground identified in the title however unduly delimit the scope of protection against xenophobia.
3. While migrants, their families and non-citizens are often subjected to xenophobia, they may not be the only groups impacted by xenophobia. Xenophobia can be directed against second or third generation citizens, citizens who hold several nationalities, as well as non-migrants. Limiting xenophobia to migrants, their families and non-citizens also gives the impression that xenophobia has to do with nationality or citizenship necessarily. But xenophobia can be targeted at religious groups and linguistic minorities. There is good reason to think that discrimination against these groups may or may not always be based on religion or language and could instead be targeted at the outsider-status from a political community when political communities are defined in terms of religion or language, say, in an ethno-nationalist or religious-fundamentalist state.
4. It is thus ill-advised to take a group-based approach to xenophobia in the title of the General Comment/Recommendation itself, such as was taken in the CERD General Recommendation No. 30 on Discrimination Against Non-Citizens, which then limited the General Recommendation to ‘non-citizens’ specifically. A broader approach should be preferred instead. It is worthwhile considering how an authoritative statement against xenophobia in international law can be framed in the widest terms possible to include a whole range of discriminatory experiences of actual or perceived outsiders in civic society.

1. Likewise, xenophobia can be based on a host of grounds and not only racial grounds. It may be imprudent to link xenophobia with racial discrimination alone as it gives the impression that xenophobia is indeed racial discrimination or addressed in international law only when it coincides with racial discrimination.
2. The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) too does *not* delineate groups subjected to racial discrimination (Black people, indigenous people, Dalits, Romas, Irish travellers etc). Instead, it adopts a definition of racial discrimination which is anchored in effects.[[2]](#footnote-2)
3. In a similar vein, it would be useful to define xenophobia through its effects or the specific harm it entails, which has hitherto remained unrecognised in international law.

*Towards a harm-based approach*

1. The concept note states that: ‘xenophobia involves discrimination based on the *perception* of the other as being foreign or not from one’s own community or nation.’ This is a helpful start – xenophobia may be directly against *actual or perceived foreigners*, i.e. those considered to not belong to a particular civic community (often a nation-state).
2. But the reason why xenophobia is discriminatory or leads to a violation of human rights is not because it targets a specific group (actual or perceived outsiders) but because it leads to a *particular* *harm or disadvantage* to that group.
3. Xenophobia entails the harm of disbelongingness or civic ostracisation which excludes people from participating in the social, political, economic and cultural life of the communities they find themselves in. The harm of disbelongingness is broader than the definition of harm proposed by the UN Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance as *political exclusion from a nation-state*. It is broader because it extends to civic and not simply political lives of individuals where individuals come in touch with other individuals in local, institutional, governmental and other settings. Thus, the harm is not always located at the level of nation-state either but may extend to participation in civic and community life of a village, town, city etc.
4. A harm-based account of xenophobia can orientate international law towards a structural conception of equality and non-discrimination rather than an emphasis on certain formal characteristics or grounds; as if greater attention to grounds like ‘race’ or ‘foreignness’ can itself be sufficient in addressing structures of oppression aka racism and xenophobia. In other words, this approach has the benefit of putting structures of oppression before categories or identities.

**Recommendation**

Xenophobia should be centrally defined through the harm it entails, i.e. the harm of disbelongingness or civic ostracization which restricts people from forming social, political, economic and cultural bonds and relationships within local, regional, national or other civic communities.

1. **Xenophobia and Intersectionality[[3]](#footnote-3)**
2. What is the basis of xenophobic discrimination? That is, on what basis are people othered as actual or perceived outsiders or foreigners? Is it to do with clothing, appearance, language, accent, nationality, citizenship, employment-status, colour, race, ethnicity, religion, gender, class etc? The simple answer is that any of these grounds can be deployed to make someone appear as a foreigner or as an outsider to the civic community.
3. That makes xenophobic discrimination quite unusual. A group with cameras and a guide may be seen as tourists. Someone who asks for directions in a different accent or a different language from the majority in a country, may be considered an outsider. Someone with a nationality or citizenship from a country which is at war may be considered a refugee. Someone in a job which is normally occupied by those from outside the country because of labour shortage in the industry, may be considered a migrant worker. Someone with a different colour or ethnicity than the majority may be perceived as an outsider because of their race in a country where ethnonationalism is rife. Irrespective of whether these people are in a particular country legally or illegally, or actually hold the statuses they are seen to inhabit, stereotypes based on clothing, appearance, language, accent, nationality, citizenship, employment-status, colour, race, ethnicity, religion, gender and class, can, in their own way and in combination, dictate how individuals and groups come to be perceived as the ‘other’ or ‘foreign’. It is in this sense that foreignness is often called ‘intersectional’ or co-constituted by a whole range of both enumerated grounds (race, colour, descent, national or ethnic origin, sex, disability, age, religion, language etc) and unenumerated grounds (accent, appearance, citizenship, class, social origin etc).
4. Causally speaking, because xenophobia is co-constituted by these many grounds at once, it is difficult (if not impossible) in a specific case to determine the basis of xenophobia as embedded necessarily or mainly in one or more racial grounds; just as, for example, it is difficult to exactly ascertain the basis of ethnonationalism or right-wing populism which fuels Islamophobia or antisemitism for the purposes of racial discrimination (as opposed to discrimination based on religion).
5. Victims of xenophobia may thus be defined by a whole range of grounds and group characteristics—cutting across indigenous peoples, naturalised persons, second- or third-generation citizens, non-citizens, migrant workers, undocumented persons, religious minorities, refugees and asylum seekers, linguistic minorities, and more, as well as racial (ethnicity, colour, descent, or national origin) and non-racial (religion, language, class, or culture) grounds of discrimination.
6. Instead of isolating *the* ground on which xenophobia or xenophobic discrimination occurs, international law may be better served by recognising the *sui generis* nature of xenophobic discrimination as a fundamentally intersectional category of discrimination which can be based on a whole range of grounds but which leads to the specific harm of disbelongingness from civic communities.

**Recommendation**

Xenophobic discrimination should be recognised as a sui generis category of discrimination which is fundamentally intersectional in nature in that actual or perceived outsiders or foreigners may be impacted on the basis of a whole range of enumerated and non-enumerated grounds in international law, grounds which cannot be causally disentangled to reveal a single ground of xenophobic discrimination.

1. See for a harm-based account of xenophobic discrimination: Shreya Atrey, ‘Xenophobic Discrimination’ (2024) 87 Modern Law Review 80. [↑](#footnote-ref-1)
2. Article 1(1) of ICERD 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, cultural or any other field of public life.*’). [↑](#footnote-ref-2)
3. See this argument developed in detail in Shreya Atrey, ‘Understanding Xenophobia as Intersectional Discrimination’ (2022) 79(3) Washington and Lee Law Review 1007–1019. [↑](#footnote-ref-3)